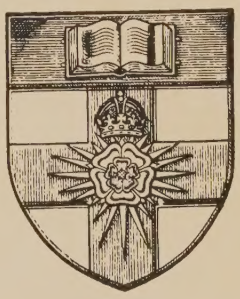
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Dr. N. Gall.



UNIVERSITY OF LONDON
LIBRARY

13 MAY 1991

THE
ALL ENGLAND
LAW REPORTS

Incorporating the

LAW TIMES REPORTS

LAW JOURNAL REPORTS

1960

VOLUME 3

Consulting Editor
for Chancery Cases

HAROLD CHRISTIE, Q.C.
Bencher of Lincoln's Inn

Consulting Editor
for Taxation Cases

CYRIL KING, Q.C.
Bencher of the Middle Temple

Editor

J. T. EDGERLEY
of the Inner Temple and Lincoln's Inn, Barrister-at-Law

LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.

©
Butterworth & Co. (Publishers) Ltd.
1960

Printed in Great Britain by R. J. ACFORD LTD., Industrial Estate, Chichester, Sussex.

HOUSE OF LORDS

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN: THE RT. HON. VISCOUNT KILMUIR

LORDS OF APPEAL IN ORDINARY

THE RT. HON. VISCOUNT SIMONDS
THE RT. HON. LORD REID
THE RT. HON. LORD RADCLIFFE
THE RT. HON. LORD TUCKER
THE RT. HON. LORD COHEN
(resigned Sept. 30, 1960)
THE RT. HON. LORD KEITH OF AVONHOLM
THE RT. HON. LORD DENNING
THE RT. HON. LORD JENKINS
THE RT. HON. LORD MORRIS OF BORTH-Y-GEST

THE RT. HON. LORD HODSON OF ROTHERFIELD GREYS (appointed Oct. 1, 1960)

COURT OF APPEAL

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN

LORD CHIEF JUSTICE OF ENGLAND: THE RT. HON. LORD PARKER

MASTER OF THE ROLLS: THE RT. HON. LORD EVERSHED

PRESIDENT OF THE PROBATE, DIVORCE AND ADMIRALTY DIVISION: THE RT. HON. LORD MERRIMAN

THE RT. HON. LORD JUSTICE HODSON
(appointed Lord of Appeal in Ordinary, Oct. 1, 1960)
THE RT. HON. LORD JUSTICE SELLERS
THE RT. HON. LORD JUSTICE ORMEROD
THE RT. HON. LORD JUSTICE PEARCE
THE RT. HON. LORD JUSTICE WILLMER
THE RT. HON. LORD JUSTICE HARMAN
THE RT. HON. LORD JUSTICE DEVLIN
THE RT. HON. LORD JUSTICE UPJOHN
THE RT. HON. LORD JUSTICE DONOVAN
(appointed Oct. 1, 1960)

CHANCERY DIVISION

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE HON. MR. JUSTICE DANCKWERTS
THE HON. MR. JUSTICE LLOYD-JACOB
THE HON. MR. JUSTICE RUSSELL
THE HON. MR. JUSTICE CROSS
THE HON. MR. JUSTICE BUCKLEY
THE HON. MR. JUSTICE PENNYCUICK

QUEEN'S BENCH DIVISION

LORD CHIEF JUSTICE OF ENGLAND: THE RT. HON. LORD PARKER

THE HON. MR. JUSTICE HILBERY
THE HON. MR. JUSTICE STABLE
THE HON. MR. JUSTICE CASSELS
THE HON. MR. JUSTICE PILCHER
THE HON. MR. JUSTICE JONES
THE HON. MR. JUSTICE BYRNE
(retired Nov. 16, 1960)
THE HON. MR. JUSTICE FINNEMORE
THE HON. MR. JUSTICE STREATFEILD
THE HON. MR. JUSTICE SLADE
THE HON. MR. JUSTICE GORMAN
THE HON. MR. JUSTICE BARRY
THE HON. MR. JUSTICE DONOVAN
(appointed Lord Justice of Appeal, Oct. 1, 1960)
THE HON. MR. JUSTICE MCNAIR
THE HON. MR. JUSTICE HAVERS
THE HON. MR. JUSTICE PEARSON
THE HON. MR. JUSTICE DAVIES
THE HON. MR. JUSTICE GLYN-JONES
THE HON. MR. JUSTICE SACHS
THE HON. MR. JUSTICE ASHWORTH
THE HON. MR. JUSTICE DIPLOCK
THE HON. MR. JUSTICE HINCHCLIFFE
THE HON. MR. JUSTICE PAULL
THE HON. MR. JUSTICE SALMON
THE HON. MR. JUSTICE EDMUND DAVIES
THE HON. MR. JUSTICE ELWES
THE HON. MR. JUSTICE THESIGER
THE HON. MR. JUSTICE WINN
THE HON. MR. JUSTICE FENTON ATKINSON
(appointed Oct. 3, 1960)
THE HON. MR. JUSTICE NIELD
(appointed Nov. 21, 1960)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

PRESIDENT: THE RT. HON. LORD MERRIMAN

THE HON. MR. JUSTICE WALLINGTON
(retired Sept. 30, 1960)
THE HON. MR. JUSTICE COLLINGWOOD
THE HON. MR. JUSTICE KARMINSKI
THE HON. MR. JUSTICE STEVENSON
THE HON. MR. JUSTICE WRANGHAM
THE HON. MR. JUSTICE HEWSON
THE HON. MR. JUSTICE MARSHALL
THE HON. MR. JUSTICE PHILLIMORE
THE HON. MR. JUSTICE LLOYD-JONES
THE HON. MR. JUSTICE CAIRNS
(appointed Oct. 1, 1960)

REPORTERS

HOUSE OF LORDS	G. A. KIDNER, ESQ.	Barrister-at-Law
PRIVY COUNCIL	G. A. KIDNER, ESQ.	Barrister-at-Law
COURT OF APPEAL, No. 1	F. GUTTMAN, ESQ.	Barrister-at-Law
COURT OF APPEAL, No. 2	HENRY SUMMERFIELD, ESQ.	Barrister-at-Law
COURT OF APPEAL, No. 3	F. A. AMIES, ESQ.	Barrister-at-Law
COURT OF APPEAL, No. 4	F. GUTTMAN, ESQ.	Barrister-at-Law
COURT OF CRIMINAL APPEAL	N. P. METCALFE, ESQ. KEVIN WINSTAIN, ESQ.	Barristers-at-Law
COURTS-MARTIAL APPEALS	KEVIN WINSTAIN, ESQ.	Barrister-at-Law
CHANCERY DIVISION	R. D. H. OSBORNE, ESQ. JENIFER SANDELL	Barristers-at-Law
QUEEN'S BENCH DIVISION and COURTS OF ASSIZE	M. DENISE CHORLTON K. B. EDWARDS, ESQ. F. GUTTMAN, ESQ. D. M. HUGHES, ESQ. G. A. KIDNER, ESQ. GWYNEDD LEWIS DEIRDRE MCKINNEY JENIFER SANDELL WENDY SHOCKETT G. M. SMAILES, ESQ. HENRY SUMMERFIELD, ESQ.	Barristers-at-Law
REVENUE CASES	F. A. AMIES, ESQ.	Barrister-at-Law
PROBATE, DIVORCE AND ADMIRALTY	A. T. HOOLAHAN, ESQ. N. P. METCALFE, ESQ.	Barristers-at-Law
RESTRICTIVE PRACTICES COURT	G. A. KIDNER, ESQ.	Barrister-at-Law
ECCLESIASTICAL CASES	A. T. HOOLAHAN, ESQ.	Barrister-at-Law

CITATION

These reports are cited thus:

[1960] 3 All E.R.

REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

Halsbury's Laws of England, Simonds Edition

The reference 2 Halsbury's Laws (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

Halsbury's Laws of England, Hailsham Edition

The reference 34 Halsbury's Laws (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

Halsbury's Statutes of England, Second Edition

The reference 26 Halsbury's Statutes (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

English and Empire Digest

The reference 24 Digest 602, *6028*, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 Digest (Repl.) 244, *3794*, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

A reference to a volume as " 1st Re-issue " refers to the first re-issue of the appropriate volume of Halsbury's Statutory Instruments.

Encyclopaedia of Forms and Precedents, Third Edition

The reference 15 Ency. Forms & Precedents (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

Encyclopaedia of Court Forms and Precedents

The reference 5 Court Forms 268, Form 164, refers to Form 164 on page 268 of Volume 5 of the Encyclopaedia of Court Forms and Precedents in Civil Proceedings, first edition.

CASES REPORTED IN VOLUME 3

PAGE

ACKLAND & PRATTEN, LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS. [CH.D.] 367
ADDISON *v.* ADDISON AND HOLDEN [C.A.] .. 187
ADMINISTRATOR OF ROUMANIAN PROPERTY, FISCHLER *v.* [H.L.] 433
ALMOND (VALUATION OFFICER) *v.* HEATHFIELD LAUNDRY (BIRMINGHAM), LTD. [C.A.] .. 700
ANGLO OVERSEAS AGENCIES, LTD. *v.* GREEN [Q.B.D.] 244
ANGUS'S WILL TRUSTS, Re [CH.D.] 835
ASHMAN, OLIVER *v.* [Q.B.D.] 677
ATTORNEY-GENERAL (ON THE RELATION OF MANCHESTER CORPN.) *v.* HARRIS [C.A.] .. 207
ATTORNEY-GENERAL, KATIKIRO OF BUGANDA *v.* [P.C.] 849
ATTORNEY-GENERAL *v.* VERNAZZA [H.L.] .. 97
B.A.L., LTD. FIFTH PARTY, INDUSTRIAL GUARDING EQUIPMENTS, LTD. THIRD PARTY, BALDWIN INSTRUMENT CO. LTD., FOURTH PARTY. PIDDOCK *v.* CLIFFORD PRODUCTS, LTD. [C.A.] 805
BAKER, SMITH *v.* [Q.B.D. DIVL. CT.] 653
BALDWIN INSTRUMENT CO., LTD. FOURTH PARTY, INDUSTRIAL GUARDING EQUIPMENTS, LTD. THIRD PARTY, B.A.L., LTD. FIFTH PARTY. PIDDOCK *v.* CLIFFORD PRODUCTS, LTD. [C.A.] 805
BARCLAYS BANK, LTD. *v.* NAYLOR (INSPECTOR OF TAXES) [CH.D.] 173
BATES, PIDDINGTON *v.* [Q.B.D. DIVL. CT.] .. 660
BATH HOUSE SYNDICATE, LTD., WINE SHIPPERS (LONDON), LTD. *v.* [C.A.] 283
BEAVERFORD, THE [ADM.] 612
BEDFORD (DUKE) (*decd.*), Re [CH.D.] 756
BELL, FISHER *v.* [Q.B.D. DIVL. CT.] 731
BERRY *v.* BRITISH TRANSPORT COMMISSION [Q.B.D.] 322
BEST *v.* GLENVILLE [C.A.] 478
BIRD *v.* O'NEAL [P.C.] 254
BLACK BOLT AND NUT ASSOCIATION OF GREAT BRITAIN'S AGREEMENT, Re [R.P.C.] 122
BOARD OF CONTROL, WHITEHOUSE *v.* [H.L.] .. 182
BOWER *v.* GLADSTONE [C.A.] 353
BOWRING, COMMISSIONER OF ESTATE AND SUCCESSION DUTIES *v.* [P.C.] 188
BRAITHWAITE *v.* WINWOOD [CH.D.] 642
BRITISH TRANSPORT COMMISSION, BERRY *v.* [Q.B.D.] 322
BROWN, *Ex parte*. R. *v.* NOTTINGHAM JUSTICES [Q.B.D. DIVL. CT.] 625
BROWN *v.* NATIONAL COAL BOARD [C.A.] .. 594
BROWN, KELLY AND KELLY *v.* [DIV.] 232
BUCKINGHAM COUNTY COUNCIL, FAWCETT PROPERTIES, LTD. *v.* [H.L.] 503
BUGLE PRESS, LTD., Re [C.A.] 791
BURDETT-COUTTS *v.* INLAND REVENUE COMRS. [CH.D.] 153
BUXTON *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [Q.B.D.] 408
BYRNE, R. *v.* [C.C.A.] 1
CANE (VALUATION OFFICER), INSTITUTION OF MECHANICAL ENGINEERS *v.* [H.L.] 715
CARL-ZEISS-STIFTUNG *v.* RAYNER & KEELER, LTD. [CH.D.] 289
CEMENTATION CO., LTD., DIXON *v.* [C.A.] .. 417
CENLON FINANCE CO., LTD. *v.* ELLWOOD (INSPECTOR OF TAXES) [CH.D.] 390
CEYLON (GOVERNMENT OF) *v.* SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS [Q.B.D.] .. 797
CHANEY, MORTON *v.* [Q.B.D. DIVL. CT.] .. 632
CHERRY *v.* INTERNATIONAL ALLOYS, LTD. [C.A.] 264
CHING GARAGE, LTD. *v.* CHINGFORD CORPN. [C.A.] 79
CHINGFORD CORPN, CHING GARAGE, LTD. *v.* [C.A.] 79
CHRISTOPHER, MORTON *v.* [Q.B.D. DIVL. CT.] .. 632
CHUNG KWOK HOTEL CO., LTD. *v.* FIELD [C.A.] 143
CLAYTON (VALUATION OFFICER) *v.* KINGSTON-UPON-HULL CORPN. [C.A.] 840

PAGE

CLIFFORD PRODUCTS LTD., PIDDOCK *v.* (INDUSTRIAL GUARDING EQUIPMENTS, LTD. THIRD PARTY, BALDWIN INSTRUMENT CO., LTD. FOURTH PARTY, B.A.L., LTD. FIFTH PARTY) [C.A.] 805
COASTAL TRANSPORT, LTD. FOURTH PARTY, S. HUGHES (HIRERS), LTD. THIRD PARTY, HENRY LONG (MANNINGHAM), LTD. FIFTH PARTY. WILLIAM MALLINSON & SONS (MFG.), LTD. *v.* KEY TRANSPORT CO., LTD. [C.A.] .. 735
COMMERCIAL BANKING COMPANY OF SYDNEY, LTD. *v.* MANN [P.C.] 482
COMMISSIONER OF ESTATE AND SUCCESSION DUTIES *v.* BOWRING [P.C.] 188
COOKE *v.* COOKE [DIV.] 39
COTTERELL *v.* PRICE [CH.D.] 315
COTTON YARN DOUBLERS' ASSOCIATION'S AGREEMENT (NO. 2), Re [R.P.C.] 809
CRACKNELL *v.* SMITH [Q.B.D. DIVL. CT.] .. 569
CUSHING (TRADING AS FAKENHAM STEAM LAUNDRY) *v.* WEBBER (VALUATION OFFICER) [C.A.] 700
DANIELS, LINCOLN *v.* [Q.B.D.] 205
DAVEY, R. *v.* [C.C.A.] 533
DAVIES *v.* DAVIES [C.A.] 248
DAVIES *v.* ELSBY BROTHERS, LTD. [C.A.] .. 672
DAWNIER MOTORS, LTD., *Ex parte*, R. *v.* EPSOM JUSTICES [Q.B.D. DIVL. CT.] 635
DAWRANT *v.* NUTT [STAFFORD ASSIZES] .. 681
DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH [H.L.] 161
DIXON *v.* CEMENTATION CO., LTD. [C.A.] .. 417
DONCASTER CO-OPERATIVE SOCIETY, LTD.'S AND RETFORD CO-OPERATIVE SOCIETY, LTD.'S AGREEMENT, Re [R.P.C.] 541
DREWERY *v.* WARE-LANE [C.A.] 529
DUNNING (H.) & CO. (1946), LTD., INLAND REVENUE COMRS. *v.* [CH.D.] 75
EAKETTS *v.* EAKETTS [DIV.] 581
EAVES *v.* MORRIS MOTORS, LTD. [BIRMINGHAM ASSIZES] 656
ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO. LTD. [CH.D.] 390
ELSBY BROTHERS, LTD., DAVIES *v.* [C.A.] .. 672
EPSOM JUSTICES, R. *v.*, *Ex parte* DAWNIER MOTORS, LTD. [Q.B.D. DIVL. CT.] 635
FARR (A. E.), LTD. *v.* MINISTRY OF TRANSPORT [CH.D.] 88
FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL [H.L.] 503
FIELD, CHUNG KWOK HOTEL CO., LTD. *v.* [C.A.] 143
FISCHLER *v.* ADMINISTRATOR OF ROUMANIAN PROPERTY [H.L.] 433
FISHER *v.* BELL [Q.B.D. DIVL. CT.] 731
FOX *v.* GENERAL MEDICAL COUNCIL [P.C.] .. 225
G. *v.* G. (OTHERWISE H.) [DIV.] 56
GAGE *v.* KING [Q.B.D.] 62
GAUNT, WARE URBAN DISTRICT COUNCIL *v.* [Q.B.D. DIVL. CT.] 778
GENERAL MEDICAL COUNCIL, FOX *v.* [P.C.] .. 225
GLADSTONE *v.* BOWER [C.A.] 353
GLENVILLE, BEST *v.* [C.A.] 478
GOLDER, R. *v.* [C.C.A.] 457
GOLLAN *v.* RANDWICK MUNICIPAL COUNCIL [P.C.] 449
GOODERHAM, MOORE *v.* [Q.B.D. DIVL. CT.] .. 575
GREEN, ANGLO OVERSEAS AGENCIES, LTD. *v.* [Q.B.D.] 244
GREENALL, NATIONAL PIG PROGENY TESTING BOARD *v.* [C.A.] 556
GRUNWALD, R. *v.* [C.C.C.] 380
GUILDFORD GODALMING AND DISTRICT WATER BOARD, LONGHURST *v.* [C.A.] 664
HALES, WEG MOTORS LTD. *v.* [CH.D.] 762
HALL LINE, LTD., ULLAH *v.* [Q.B.D.] 488
HARPUR'S WILL TRUSTS, Re [CH.D.] 237
HARRIS, ATTORNEY-GENERAL (ON THE RELATION OF MANCHESTER CORPN.) *v.* [C.A.] 207
HARTON COAL CO., LTD. (IN LIQUIDATION), INLAND REVENUE COMRS. *v.* [CH.D.] .. 48

	PAGE
Heathfield Laundry (Birmingham), Ltd., Almond (Valuation Officer) *v.* [C.A.]	700
Hogan, R. *v.* [C.C.A.]	149
Horton *v.* Horton [C.A.]	649
Houses and Estates, Ltd., Re [C.A.]	791
Hughes (S.) (Hirers), Ltd. Third Party, Coastal Transport, Ltd. Fourth Party, Henry Long (Manningham), Ltd. Fifth Party. William Mallinson & Sons (Mfg.), Ltd. *v.* Key Transport Co., Ltd. [C.A.]	735
Industrial Guarding Equipments, Ltd. Third Party, Baldwin Instrument Co., Ltd. Fourth Party, B.A.L., Ltd. Fifth Party. Piddock *v.* Clifford Products, Ltd. [C.A.]	805
Ingram *v.* Little [C.A.]	332
Inland Revenue Comrs., Ackland & Pratten, Ltd. *v.* [Ch.D.]	367
Inland Revenue Comrs., Burdett-Coutts *v.* [Ch.D.]	153
Inland Revenue Comrs. *v.* Dunning (H.) & Co. (1946), Ltd. [Ch.D.]	75
Inland Revenue Comrs. *v.* Harton Coal Co., Ltd. (In Liquidation) [Ch.D.]	48
Inland Revenue Comrs. *v.* Jackson [C.A.]	31
Inland Revenue Comrs., Philipson-Stow *v.* [H.L.]	814
Inland Revenue Comrs., Rorke (H. J.), Ltd. *v.* [Ch.D.]	359
Institution of Mechanical Engineers *v.* Cane (Valuation Officer) [H.L.]	715
International Alloys, Ltd., Cherry *v.* [C.A.]	264
Jackson, Inland Revenue Comrs. *v.* [C.A.]	31
Jackson *v.* Jackson and Pavan [Div.]	621
Jacobs *v.* Jacobs [Div.]	578
James's Will Trusts, Re [Ch.D.]	744
Jones, Morgan *v.* [C.A.]	583
Jones, R. *v.* [C.C.A.]	457
Judd, Parish *v.* [Q.B.D.]	33
Katikiro of Buganda *v.* Attorney-General [P.C.]	849
Kelly *v.* Kelly and Brown [Div.]	232
Kew, Longmuir *v.* [Ch.D.]	26
Key Transport Co., Ltd., Mallinson (William) & Sons (Mfg.), Ltd. *v.* (S. Hughes (Hirers), Ltd. Third Party, Coastal Transport, Ltd. Fourth Party, Henry Long (Manningham), Ltd. Fifth Party) [C.A.]	735
King, Gage *v.* [Q.B.D.]	62
Kingston-upon-Hull Corpn., Clayton (Valuation Officer) *v.* [C.A.]	840
Leach *v.* Litchfield [Q.B.D. Divl. Ct.]	739
Lee *v.* Lee's Air Farming, Ltd. [P.C.]	420
Lee's Air Farming, Ltd., Lee *v.* [P.C.]	420
Lincoln *v.* Daniels [Q.B.D.]	205
Lindblom (Inspector of Taxes), Shiner *v.* [Ch.D.]	832
Litchfield, Leach *v.* [Q.B.D. Divl. Ct.]	739
Little, Ingram *v.* [C.A.]	332
Liverpool, The, (No. 2) [C.A.]	307
London County Council, Pearl *v.* [C.A.]	588
Long (Henry) (Manningham), Ltd. Fifth Party, S. Hughes (Hirers), Ltd. Third Party, Coastal Transport, Ltd. Fourth Party. William Mallinson & Sons (Mfg.), Ltd. *v.* Key Transport Co., Ltd. [C.A.]	735
Longhurst *v.* Guildford Godalming and District Water Board [C.A.]	664
Longmuir *v.* Kew [Ch.D.]	26
Mallinson (William) & Sons (Mfg.) Ltd. *v.* Key Transport Co., Ltd. (S. Hughes (Hirers), Ltd. Third Party, Coastal Transport, Ltd. Fourth Party, Henry Long (Manningham), Ltd. Fifth Party) [C.A.]	735
Mann, Commercial Banking Company of Sydney, Ltd. *v.* [P.C.]	482
Margate Corpn. *v.* Roach [Q.B.D. Divl. Ct.]	774
Miller *v.* Miller [Div.]	115
Minister of Housing and Local Government, Buxton *v.* [Q.B.D.]	408
Ministry of Transport, Farr (A. E.), Ltd. *v.* [Ch.D.]	88
Modiano (Isaac) Brother & Sons, Ltd., Wessenen's Koninklijke Fabrieken N.V. *v.* [Q.B.D.]	617
Moore *v.* Gooderham [Q.B.D. Divl. Ct.]	575
Morgan *v.* Jones [C.A.]	583
Morris Motors, Ltd., Eaves *v.* [Birmingham Assizes]	656
Morris's Will Trusts, Re [Ch.D.]	548
Morton *v.* Chaney [Q.B.D. Divl. Ct.]	632
Morton *v.* Christopher [Q.B.D. Divl. Ct.]	632
Moyse, Thomson (Inspector of Taxes) *v.* [H.L.]	684
National Coal Board, Brown *v.* [C.A.]	594
National Pig Progeny Testing Board *v.* Greenall [C.A.]	556
Naylor (Inspector of Taxes), Barclays Bank, Ltd. *v.* [Ch.D.]	173
Nottingham Justices, R. *v.*, *Ex parte* Brown [Q.B.D. Divl. Ct.]	625
Nutt, Dawrant *v.* [Stafford Assizes]	681
Oliver *v.* Ashman [Q.B.D.]	677
O'Neal, Bird *v.* [P.C.]	254
Orman *v.* Saville Sportswear, Ltd. [Q.B.D.]	105
Parish *v.* Judd [Q.B.D.]	33
Pavan, Jackson and, Jackson *v.* [Div.]	621
Pearce *v.* Pearce [C.A.]	21
Pearce, Duff & Co. Ltd., Re [Ch.D.]	222
Pearl *v.* London County Council [C.A.]	588
Philipson-Stow *v.* Inland Revenue Comrs. [H.L.]	814
Piddington *v.* Bates [Q.B.D. Divl. Ct.]	660
Piddock *v.* Clifford Products, Ltd. (Industrial Guarding Equipment, Ltd. Third Party, Baldwin Instrument Co., Ltd. Fourth Party, B.A.L., Ltd. Fifth Party) [C.A.]	805
Poole *v.* Reginam [P.C.]	398
Porritt, R. *v.* [C.C.A.]	457
Practice Direction (Mental Health Act, 1959)	447
Practice Direction (Minutes of order drawn by counsel) [Ch.D.]	416
Practice Direction (Patents and Registered Designs) [Ch.D.]	593
Practice Direction (Procedural orders made in chambers) [Ch.D.]	415
Practice Direction (Supreme Court Costs Rules, 1959, r. 35) [P.D.A.]	414
Practice Direction (Supreme Court Costs Rules, 1959, r. 35) [Q.B.D.]	448
Practice Direction (Supreme Court Costs Rules, 1959, r. 35) [Ch.D.]	499
Practice Note (Powers of Chancery Masters) [Ch.D.]	497
Prenn's Settlement, Re [Ch.D.]	564
Price, Cotterell *v.* [Ch.D.]	315
Price *v.* Romilly [Q.B.D.]	429
R. *v.* Byrne [C.C.A.]	1
R. *v.* Davey [C.C.A.]	533
R. *v.* Epsom Justices, *Ex parte* Dawnier Motors, Ltd. [Q.B.D. Divl. Ct.]	635
R. *v.* Golder [C.C.A.]	457
R. *v.* Grunwald [C.C.C.]	380
R. *v.* Hogan [C.C.A.]	149
R. *v.* Jones [C.C.A.]	457
R. *v.* Nottingham Justices, *Ex parte* Brown [Q.B.D. Divl. Ct.]	625
R. *v.* Porritt [C.C.A.]	457
R. *v.* Staincross Justices, *Ex parte* Teasdale [Q.B.D. Divl. Ct.]	572
R. *v.* Tompkins [C.C.A.]	149
Randwick Municipal Council, Gollan *v.* [P.C.]	449
Rayner & Keeler, Ltd., Carl-Zeiss-Stiftung *v.* [Ch.D.]	289
Reginam, Poole *v.* [P.C.]	398
Retford Co-operative Society, Ltd.'s and Doncaster Co-operative Society, Ltd.'s Agreement, Re [R.P.C.]	541
Ribton-Turner, Robson *v.* [Q.B.D. Divl. Ct.]	660
Riordan *v.* War Office [C.A.]	774*n*
Roach, Margate Corpn. *v.* [Q.B.D. Divl. Ct.]	774
Robertson's Will Trusts, Re [Ch.D.]	146
Robins *v.* Robins [Div.]	66
Robson *v.* Ribton-Turner [Q.B.D. Divl. Ct.]	660
Romilly, Price *v.* [Q.B.D.]	429
Rorke (H. J.), Ltd. *v.* Inland Revenue Comrs. [Ch.D.]	359
Ross Smith (otherwise Radford) *v.* Ross Smith [Div.]	70
Royal Mutual Benefit Building Society, Re [Ch.D.]	460
Rye *v.* Rye [C.A.]	810
St. George, Birmingham, Re Parish Church of [Consistory Court]	185
Saville Sportswear, Ltd., Orman *v.* [Q.B.D.]	105
Scremby Corn Rents, Re [C.A.]	462
Shiner *v.* Lindblom (Inspector of Taxes) [Ch.D.]	832
Short *v.* Short [C.A.]	6
Slater *v.* Slater [C.A.]	217
Smith *v.* Baker [Q.B.D. Divl. Ct.]	653
Smith, Cracknell *v.* [Q.B.D. Divl. Ct.]	569

PAGE

SMITH, DIRECTOR OF PUBLIC PROSECUTIONS *v.* [H.L.] 161
SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS, CEYLON (GOVERNMENT OF) *v.* [Q.B.D.] 797
SOFAER *v.* SOFAER (BY HER GUARDIAN) [DIV.] .. 468
SOWA *v.* SOWA [DIV.] 196
STAINCROSS JUSTICES, R. *v.*, *Ex parte* TEASDALE [Q.B.D. DIVL. CT.] 572
STIMPSON, THOMPSON *v.* [Q.B.D. DIVL. CT.] .. 500
STOREY *v.* STOREY [C.A.] 279
SUFFERT'S SETTLEMENT, Re [CH.D.] 561
SUTHERLAND (*decd.*), Re [C.A.] 270
TABLEAU HOLDINGS, LTD. *v.* WILLIAMS (INSPECTOR OF TAXES) [CH.D.] 390
THOMPSON *v.* STIMPSON [Q.B.D. DIVL. CT.] .. 500
THOMPSON'S WILL TRUSTS, Re [CH.D.] .. 378
THOMSON (INSPECTOR OF TAXES) *v.* MOYSE [H.L.] 684
TINKER'S SETTLEMENT, Re [CH.D.] 85
TOMKINS, R. *v.* [C.C.A.] 149
TREPCA MINES, LTD., Re [C.A.] 304

PAGE

ULLAH *v.* HALL LINE, LTD. [Q.B.D.] 488
VERNAZZA, ATTORNEY-GENERAL *v.* [H.L.] .. 97
VUMA, LTD., Re [C.A.] 629
WAR OFFICE, RIORDAN *v.* [C.A.] 774*n*
WARE URBAN DISTRICT COUNCIL *v.* GAUNT [Q.B.D. DIVL. CT.] 778
WARE-LANE, DREWERY *v.* [C.A.] 529
WEBBER (VALUATION OFFICER), CUSHING (TRADING AS FAKENHAM STEAM LAUNDRY) *v.* [C.A.] 700
WEG MOTORS, LTD. *v.* HALES [CH.D.] 762
WESSENEN'S KONINKLIJKE FABRIEKEN N.V. *v.* MODIANO (ISAAC) BROTHER & SONS, LTD. [Q.B.D.] 617
WHITEHOUSE *v.* BOARD OF CONTROL [H.L.] .. 182
WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS, LTD. [CH.D.] 390
WINE SHIPPERS (LONDON), LTD. *v.* BATH HOUSE SYNDICATE, LTD. [C.A.] 283
WINWOOD, BRAITHWAITE *v.* [CH.D.] 642
YARN SPINNERS' AGREEMENT (NO. 2), Re [R.P.C.] 809

INDEX

PAGE

ABATEMENT
Matrimonial cause. *See* DIVORCE (Costs—*Death of petitioner after decree nisi but before decree absolute*).

ACTION
Pending—*Contempt of court*. *See* CONTEMPT OF COURT (Publications concerning legal proceedings).

ADJOURNMENT
Proceedings, of. *See* PRACTICE.

ADMINISTRATION OF ESTATES
Jurisdiction of master. *See* PRACTICE (Chambers—*Chancery Division*).

ADMINISTRATOR OF ENEMY PROPERTY
See CURRENCY CONTROL (Debts clearing office).

ADMIRALTY
Costs—*Review of taxation—Procedure*. *See* COSTS (Taxation—*Review by court*).
Limitation of liability. *See* SHIPPING (Limitation of liability).
Practice—*Preliminary acts—Port authority allegedly engaged in directing movement of vessels—Whether port authority should file preliminary act—R.S.C., Ord.* 19, *r.* 28 (1) [THE BEAVERFORD] 612

ADULTERY
Confession. *See* DIVORCE (Practice—*Confession*).
See also DIVORCE.

ADVOCATE
Arbitrator as, before umpire. *See* ARBITRATION (Procedure—*Umpire*).

AFFILIATION
Evidence—*Corroboration—Evidence of opportunity not corroboration—Defendant's not giving evidence not corroboration—Affiliation Proceedings Act*, 1957 (*c.* 55), *s.* 4 [CRACKNELL *v.* SMITH] 569

AGENT
Estate agent. *See* ESTATE AGENT.

AGRICULTURAL HOLDING
See AGRICULTURE.

AGRICULTURE
Agricultural holding—*Agreement to let land for fixed period of eighteen months—Whether land let for an interest less than a "tenancy from year to year"—Whether tenant entitled to notice to quit—Agricultural Holdings Act*, 1948 (*c.* 63), *s.* 2 (1) [GLADSTONE *v.* BOWER] 353
Notice to quit—Consent of tribunal—Failure to comply with notice to remedy breaches of terms of tenancy—Several works required to be done by tenant—Failure of tenant to carry out one of the specified works by date of notice to quit—Whether partial failure in compliance sufficient to render tribunal's consent unnecessary under Agricultural Holdings Act, 1948 (*c.* 63), *s.* 24 (2) (*d*) [PRICE *v.* ROMILLY] 429
Rating. *See* RATES (Agricultural buildings).
Wheat—*Cereals* (*Deficiency Payments*)—*Ascertainment of corn rents*. *See* CORN RENTS (Assessment).

AIRGUN
Sale. *See* FIREARMS.

ALIMONY
See DIVORCE.

AMENDMENT
See PRACTICE (Parties).

ANIMAL
Dog—*Dangerous dog—Information—Whether proceedings were validly instituted or validated—Dogs Act*, 1871 (*c.* 36), *s.* 2—*Magistrates' Courts Act*, 1952 (*c.* 55), *s.* 42, *s.* 100 (1) [R. *v.* NOTTINGHAM JUSTICES, *Ex parte* BROWN] 625
Dog attacking boy—Complaint preferred by police officer investigating case against owner of dog—Whether valid—Dogs Act, 1871 (*c.* 56), *s.* 2 [SMITH *v.* BAKER] 653

APPEAL
Alteration of law pending appeal. *See* STATUTE (Retrospective operation—*Pending proceedings*).
County court, from *See* COUNTY COURT.
Court of Appeal, to. *See* COURT OF APPEAL.
Divorce proceedings, in. *See* DIVORCE.
House of Lords, to. *See* HOUSE OF LORDS.
Income tax. *See* INCOME TAX.
Quarter sessions, to. *See* QUARTER SESSIONS.

ARBITRATION
Arbitrator—*Advocate before umpire*. *See* Procedure—*Umpire—Status of arbitrators appearing at commercial arbitration before umpire, post.*
Procedure—*Umpire—Status of arbitrators appearing at commercial arbitration before umpire—London Cattle Food Trade Association—Arbitrators becoming advocates for parties who appointed them—Judicial notice of practice—Power of arbitrator, in capacity of advocate, to waive irregularity in procedure before umpire* [WESSANEN'S KONINKLIJKE FABRIEKEN N.V. *v.* ISAAC MODIANO BROTHER & SONS, LTD.] 617

ART GALLERY
Rateability. *See* RATES (Rateable occupation).

ASSIGNMENT
Judgment for possession. *See* JUDGMENT.

ATTORNEY-GENERAL
Information by. *See* CRIMINAL LAW (Indictment—*Second indictment or information not inherently bad by reason of the pendency of an earlier one for the same offence*).
Remedy—*Injunction—Relator action* [ATTORNEY-GENERAL (ON THE RELATION OF MANCHESTER CORPN.) *v.* HARRIS] 207

AUSTRALIA
See PRIVY COUNCIL.

AUTREFOIS CONVICT
See CRIMINAL LAW.

BANK
Cheque —*Conversion—Property in bank cheque—Cheque fraudulently drawn by one partner on partnership account—Partnership assets belonging to other partner—Bank cheque issued in exchange for cheque fraudulently drawn—Bank cheque cashed with another bank—Whether bank cheque was the property of the partner defrauded—Whether collecting bank liable in conversion* [COMMERCIAL BANKING CO. OF SYDNEY, LTD. *v.* MANN] 482

BANKRUPTCY
Limitation of action—*Time ceasing to run when receiving order made—Scope of doctrine—Remedies of secured creditor unaffected by receiving order—Remedies barred by subsequent expiry of period of limitation—Creditor ceasing to be "secured creditor"—Bankruptcy Act*, 1914 (*c.* 59), *Sch.* 2, *r.* 13 (*c*) [COTTERELL *v.* PRICE] 315
Secured creditor. *See* Limitation of action, *ante*.

BARBADOS
See PRIVY COUNCIL.

BASTARDY
See AFFILIATION.

BIRTH
Register—*Entry in—Evidence of adultery*. *See* DIVORCE (Adultery—*Evidence*).

BONUS
Commission—*Inclusion in employee's remuneration*. *See* MASTER AND SERVANT (Wages).

BREACH OF DUTY
Statutory. *See* COAL MINING (Statutory duty); FACTORY (Dangerous machinery).

BUGANDA
See PRIVY COUNCIL (Eastern Africa—*Uganda*).

BUILDING CONTRACT
Road construction—*Reference of dispute to arbitration—Refusal by engineer to certify for payment for particular excavation before completion of the works—Whether dispute was one as to the withholding by the engineer of any certificate—Institution of Civil Engineers' General Conditions of Contract* (*4th Edn.*), *cl.* 66 [A. E. FARR, LTD. *v.* MINISTRY OF TRANSPORT] 88

BUILDING SOCIETY
Misapplication of funds. *See* CRIMINAL LAW (Inducement to enter into agreement to dispose of shares).

BUSINESS PREMISES
New tenancy. *See* LANDLORD AND TENANT (New tenancy).

CAPITAL
Capital or income. *See* WILL (Capital or income).
Profits tax—*Capital or income*. *See* PROFITS TAX (Computation of profits).

CASE STATED
Lands Tribunal, by—*Rating*. *See* RATES (Lands Tribunal).

CERTIFICATE
Engineer's. *See* BUILDING CONTRACT (Road construction).
Firearms. *See* FIREARMS.

CHAMBERS
Chancery Division. *See* PRACTICE.

CHARITY
Uncertainty—*Gift to institution whose main object charitable but whose other objects might or might not be charitable—Charitable Trusts* (*Validation*) *Act*, 1954 (*c.* 58), *s.* 1 (1), *s.* 2 [Re HARPUR'S WILL TRUSTS] 237
Validation by Charitable Trusts (Validation) Act, 1954—*Imperfect trust provision—Gift to institution whose main object charitable but whose other objects might or might not be charitable Whether trust validated—Preservation of rights of adverse claimants—Unascertained class of next-of-kin—Date when rights accrue—Charitable Trusts* (*Validation*) *Act*, 1954 (*c.* 58), *s.* 1 (1), *s.* 3 (1), (2), (3) [Re HARPUR'S WILL TRUSTS] 237

CHEQUE
See BANK.

CHURCH
Demolition—*Faculty*. *See* ECCLESIASTICAL LAW (Faculty—*Jurisdiction*).

COAL MINING
Statutory duty—*Breach—Security of road and working place—Electrician removing electric light fitting from partly fallen girder before receiving actual instructions to do so and without knowledge of overman—Fall of stone from roof—Whether breach of statutory duty—Mines and Quarries Act*, 1954 (*c.* 70), *s.* 48 (1), (2) [BROWN *v.* NATIONAL COAL BOARD] 594

COMMISSION
Estate agent. *See* ESTATE AGENT.

COMPANY
Director—*Governing director—Contract of service—Dual capacities as director and servant—Governing director killed while piloting company's aircraft under alleged contract of service—Workman's compensation claim—Whether sole governing director and principal shareholder could also be working as servant of company under contract of service negotiated by him with company* [LEE *v.* LEE'S AIR FARMING, LTD.] 420

COMPANY—*continued.*

Estate duty—*Valuation of shares. See* ESTATE DUTY.

Foreign creditor—*Conduct of proceedings in person. See* PRACTICE (Conduct of proceedings).

Memorandum of association—*Object clauses—Construction—Numerous objects set out in separate paragraphs—Concluding words of clause providing that objects specified in any one paragraph not to be limited by reference to terms of any other paragraph or by name of company—Main object of company export and import of goods—Whether scope of subsequent object clauses limited so as to be ancillary to main object—Whether proposed acquisition of building lease for a venture in land development ultra vires* [ANGLO OVERSEAS AGENCIES, LTD. *v.* GREEN] 244

Private company—*Exempt private company—Loss of exemption—Person other than holder having interest in company's shares—Exception of shares held by trustees on the trusts of a family settlement disposing of the shares—Shares acquired by trustees by purchase after execution of settlement—Companies Act,* 1948 (*c.* 38), *s.* 129, *Sch.* 7, *para.* 3 (1) (*b*) [Re PRENN'S SETTLEMENT] 564

Reduction of capital—*Special resolutions—Less than twenty-one days' notice given—Consent of every shareholder to treatment of resolutions as valid—Petition prosecuted on basis of validity —Companies Act,* 1948 (*c.* 38), *s.* 141 [Re PEARCE, DUFF & CO., LTD.].. 222

Resolution—*Special resolution—Notice—Insufficient notice—Consent of shareholders—Validity of resolution for reduction of capital* [Re PEARCE, DUFF & CO., LTD.].. 222

Scheme of arrangement—*Transfer of shares to transferee company—Acquisition of shares of dissentients—Majority shareholders in transferor company holding all shares in transferee company—Sanction of court in exceptional circumstances only—Companies Act,* 1948 (*c.* 38), *s.* 209 (1) [Re BUGLE PRESS, LTD. Re HOUSES AND ESTATES, LTD.] 791

Trust holding securities—Whether approval of scheme alters rights as between beneficiaries in succession to income or capital. See WILL (Capital or income—*Tenant for life and remaindermen*).

Surtax. *See* SURTAX.

Winding-up—*Compulsory winding-up—Non-attendance of petitioner before hearing to show compliance with rules—Petitioner not represented at hearing—Petition dismissed with costs against petitioner—Companies (Winding-up) Rules,* 1949 (*S.I.* 1949 *No.* 330), *r.* 33 [Re ROYAL MUTUAL BENEFIT BUILDING SOCIETY] 460

Petition by judgment creditor—Majority of creditors opposing—Whether special circumstances must be shown for winding-up order—Discretion of court—Companies Act, 1948 (*c.* 38), *s.* 346 (1) [Re VUMA, LTD.].. 629

Proof—Rejection—Appeal—Function of court—Claim contingent on prospects of success in foreign proceedings [Re TREPCA MINES, LTD.] 304

COMPLAINT

Information laid where complaint should have been preferred. *See* ANIMAL (Dog—*Dangerous dog*).

COMPULSORY PURCHASE

Compensation—*Michael Angelo Taylor's Act—Street widening. See* HIGHWAY (Street—*Widening*).

CONFESSION

Matrimonial misconduct. *See* DIVORCE (Practice).

CONFLICT OF LAWS

Will—*Proper law—Estate duty. See* ESTATE DUTY (Passing of property—*Foreign property*).

CONSIDERATION

Rectification claim. *See* CONTRACT.

CONSPIRACY

Criminal. *See* CRIMINAL LAW.

CONSTITUTIONAL LAW

Peace treaty—*Administration of property—Revival of beneficial rights of foreign national. See* CURRENCY CONTROL (Debts clearing office).

Protectorate—*Agreement for constitution of protectorate. See* PRIVY COUNCIL (Eastern Africa—*Uganda*).

CONTEMPT OF COURT

Publications concerning legal proceedings—*Pending proceedings—Dispute concerning trade mark and passing off—Letters to editor of trade journal and retailer with regard to publication of advertisements and to sale of articles bearing trade mark—Test of what constitutes contempt of court in such circumstances* [CARL-ZEISS-STIFTUNG *v.* RAYNER & KEELER, LTD.] .. 289

CONTRACT

Consideration—*Rectification claim—Separation deed amended by supplemental agreement—Possible claim for rectification as consideration for amending agreement* [HORTON *v.* HORTON] 649

Construction—*Uncertainty* [FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL] 503

Mistake. *See* Offer and acceptance, *post.*

Offer and acceptance—*Identity of party—Deception as to identity—Oral offer of car for sale on basis of payment by cheque—Purchaser present in person—Mistaken belief that he was another person of standing—Belief fraudulently induced by purchaser—Cheque accepted on basis of mistake—Whether contract formed* [INGRAM *v.* LITTLE] 332

Offer for sale or invitation to treat. *See* CRIMINAL LAW (Dangerous weapons—*Flick knife*).

Service—*Director. See* COMPANY (Director).

CONTRIBUTION

National insurance contribution. *See* NATIONAL INSURANCE.

CONTRIBUTORY NEGLIGENCE

See ROAD TRAFFIC (Negligence—*Collision between motor car and unlighted motor-cycle combination in which plaintiff a passenger*).

CONVERSION

Cheque. *See* BANK (Cheque).

CONVEYANCE

By parties to themselves. *See* REAL PROPERTY (Conveyance by persons to themselves).

CO-OPERATIVE SOCIETY

Trade practices. *See* RESTRICTIVE TRADE PRACTICES (Reference).

COPYRIGHT
Income tax. *See* INCOME TAX (Income).

CORN RENTS
Assessment—*Assessment based on price of wheat in* 1799—*Periodical review of rents according to average price of wheat*—"*Price*"—*Whether price included payments under Cereals (Deficiency Payments) Order,* 1955 (*S.I.* 1955 *No.* 962), *art.* 4 (1) [Re SCREMBY CORN RENTS] 462

CORROBORATION
Bastardy cases. *See* AFFILIATION (Evidence).

COSTS
Company winding-up. *See* COMPANY (Winding-up).
Criminal cases—*Compensation—Award of recorder all compensation law allowed to acquitted defendant for costs—Difference between that and solicitor and client costs not damage to support action for malicious prosecution* [BERRY *v.* BRITISH TRANSPORT COMMISSION] .. 322
Death—*Abatement of matrimonial cause before taxation. See* DIVORCE.
Discretion—*Whether disapproval of solicitor's conduct is ground for deprivation of costs. See* SOLICITOR.
Divorce. *See* DIVORCE.
Legal aid. *See* LEGAL AID.
Solicitor. *See* SOLICITOR.
Taxation—*Review of taxation—Procedure in Chancery Division—Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *r.* 35 [PRACTICE DIRECTION] 499
Procedure in Probate, Divorce and Admiralty Division—Rules of the Supreme Court (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *r.* 35 [PRACTICE DIRECTION] 414
Procedure in Queen's Bench Division—Rules of the Supreme Court (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *r.* 35 [PRACTICE DIRECTION] 448

COUNSEL
Minutes of order drawn by counsel—*Chancery Division. See* PRACTICE (Order—*Minutes of order drawn by counsel*).

COUNTY COURT
Appeal—*Fact—Third party's appeal on question of fact—Whether claim for indemnity against third party exceeding* £200—*Plaintiffs' amended claim* £198 1s. 7d.—*Prayer limiting damages to* £400—*Judgment for plaintiffs for* £195 1s. 7d. *and costs—Defendants' claim against third party for indemnity including costs awarded to plaintiffs against defendants—County Courts Act,* 1959 (*c.* 22), *s.* 109 (2) [WILLIAM MALLINSON & SONS (MFG.), LTD. *v.* KEY TRANSPORT CO., LTD. (S. HUGHES (HIRERS), LTD. THIRD PARTY, COASTAL TRANSPORT, LTD. FOURTH PARTY, HENRY LONG (MANNINGHAM), LTD. FIFTH PARTY)] 735
Landlord and tenant—*New tenancy of business premises. See* LANDLORD AND TENANT (New tenancy).

COURT
Language—*Proceedings to be conducted in English language. See* PRACTICE (Conduct of proceedings).

COURT OF APPEAL
Alteration of law pending appeal. *See* STATUTE (Retrospective operation—*Pending proceedings*).
Extension of time for appeal—*Legal aid—Notice of appeal not filed in time because appellant awaiting grant of legal aid* [ADDISON *v.* ADDISON AND HOLDEN] 187
Jurisdiction—*Alteration of law pending appeal—Amending statute conferring jurisdiction on High Court—Whether Court of Appeal had on appeal the like jurisdiction—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 27 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959 (*c.* 39), *s.* 1 (1)—*R.S.C., Ord.* 58, *r.* 9 (3) [ATTORNEY-GENERAL *v.* VERNAZZA] 97
New trial—*No case to answer—Whether new trial can be ordered after submission of no case. See* DIVORCE (Appeal—*No case to answer*).

COURT OF PROTECTION
See MENTAL HEALTH.

CRIMINAL LAW
Autrefois convict—*Escape of prisoner—Disciplinary proceedings before, and award of punishment by, visiting justices for the offence of escaping created by Prison Rules,* 1949 (*S.I.* 1949 *No.* 1073), *r.* 42 (13)—*Subsequent trial on indictment for prison breach—Separate count for simple escape struck out—Whether award of visiting justices a bar to indictment* [R. *v.* HOGAN, R. *v.* TOMPKINS] 149
Conspiracy—*Indictment—Several conspiracies included in the same count—Invalidity—Whether other specific charges vitiated* [R. *v.* DAVEY, R. *v.* DAVEY] 533
Dangerous weapons—*Flick knife—Knife displayed in shop window with price attached—Whether "offer for sale"—Restriction of Offensive Weapons Act,* 1959 (*c.* 37), *s.* 1 (1) [FISHER *v.* BELL] 731
Depositions—*Inconsistent with witness' evidence at trial. See* Evidence—*Previous statement by witness inconsistent with his evidence at trial, post.*
Evidence—*Previous statement by witness inconsistent with his evidence at trial—Deposition—Whether statement in deposition admissible as evidence of the truth of matters stated—Proper direction to jury* [R. *v.* GOLDER, R. *v.* JONES, R. *v.* PORRITT] 457
Firearms. *See* FIREARMS.
Grievous bodily harm—*Meaning* [DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH] 161
Indictment—*Duplicity. See* Conspiracy, *ante.*
Second indictment or information not inherently bad by reason of the pendency of an earlier one for the same offence [POOLE *v.* REGINAM] 398
Inducement to enter into agreement to dispose of shares—"*Reckless*" *making of any statement or promise—No offence unless statement or promise rash and unsupported by any real basis of facts—Prevention of Fraud (Investments) Act,* 1958 (*c.* 45), *s.* 13 (1) [R. *v.* GRUNWALD] .. 380
Information by Attorney-General—*Validity of second information for same offence. See* Indictment—*Second indictment or information not inherently bad by reason of the pendency of an earlier one for the same offence, ante.*
Intention. *See* Mens rea, *post.*
Investments—*Fraud. See* Inducement to enter into agreement to dispose of shares, *ante.*

PAGE

CRIMINAL LAW—*continued.*

Mens rea—*Presumption of having intended natural consequences of acts* [DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH] 161

Murder—*Capital murder—Intent—Police officer acting in execution of his duty—Defence that prisoner had no intention to kill or do grievous bodily harm—Direction to jury—Presumption of intending natural consequence of acts—Objective test—"Reasonable man"—"Grievous bodily harm"—Offences against the Person Act*, 1861 (*c.* 100), *s.* 18 [DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH] 161

Diminished responsibility—"Abnormality of mind"—Whether such as substantially to impair mental responsibility for acts—Question for jury—Homicide Act, 1957 (*c.* 11), *s.* 2 (1) [R. *v.* BYRNE] 1

Obstruction—*Police constable—Picketing. See* TRADE DISPUTE (Picketing).

Trial—*Direction to jury—Unanimity in verdict* [R. *v.* DAVEY, R. *v.* DAVEY] 533

Verdict—*Unanimity of jury. See* Trial—*Direction to jury, ante.*

CROWN

Crown servant—*Dismissal—Dismissal at pleasure by Crown—Whether regulations made by Army Council under letters patent excluded Crown's right to dismiss employee at pleasure—Whether employee determined own employment under regulations—War Department (Outstations) Civilian Staff Regulations*, 1950, *reg.* 437, *reg.* 438 [RIORDAN *v.* THE WAR OFFICE] 774

CRUELTY

Divorce, as ground of. *See* DIVORCE.

CURRENCY CONTROL

Debts clearing office—*Beneficial title to money—Price of goods imported in* 1939 *into United Kingdom—Money paid to Anglo-Roumanian Clearing Office—Clearing scheme brought to an end—Outbreak of war—Money transferred to Custodian of Enemy Property—Peace treaty—Transfer to Administrator of Roumanian Property—Debts Clearing Offices and Import Restrictions Act*, 1934 (*c.* 31), *s.* 1—*Clearing Office (Roumania) Order*, 1936 (*S.R. & O.* 1936 *No.* 427), *as amended by Clearing Office (Roumania) Amendment Order*, 1939 (*S.R. & O.* 1939 *No.* 750)—*Treaty of Peace (Roumania) Order*, 1948 (*S.I.* 1948 *No.* 118), *art.* 1 (5) (*g*) [FISCHLER *v.* ADMINISTRATOR OF ROUMANIAN PROPERTY] 433

DAMAGES

Malicious prosecution. *See* MALICIOUS PROSECUTION.

Measure of damages—*Personal injury. See* NEGLIGENCE (Damages—*Personal injury*).

Negligence. *See* NEGLIGENCE.

DANGEROUS MACHINERY

See FACTORY.

DEATH

Abatement. *See* DIVORCE (Costs—*Death of petitioner after decree nisi but before decree absolute*).

DEATH DUTY

See ESTATE DUTY.

DEBTS CLEARING OFFICE

See CURRENCY CONTROL.

DEED

Separation. *See* HUSBAND AND WIFE (Separation deed).

DEMURRAGE

See SHIPPING.

DEPOSITIONS

See CRIMINAL LAW (Evidence—*Previous statement by witness inconsistent with his evidence at trial*).

DE-RATING

See RATES.

DESERTION

See DIVORCE.

DESIGN

Practice and procedure—*Motions—Registered Designs Act*, 1949 (*c.* 88)—*R.S.C., Ord.* 53F [PRACTICE DIRECTION] 593

DEVELOPMENT

Land. *See* TOWN AND COUNTRY PLANNING.

DIMINISHED RESPONSIBILITY

Defence. *See* CRIMINAL LAW (Murder).

DIRECTOR

See COMPANY.

DISCOVERY

Originating summons—*Landlord and tenant—New tenancy—Originating summons adjourned into court for trial with witnesses—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 30 (1) (*f*) [WINE SHIPPERS (LONDON), LTD. *v.* BATH HOUSE SYNDICATE, LTD.] 283

DISSOLUTION

Partnership. *See* PARTNERSHIP.

DIVIDEND

Income tax—*Exemption. See* INCOME TAX (Profits—*Computation of profits—Dividend received, being dividend paid from capital profits of payor company not assessable to tax*).

DIVORCE

Adultery—*Confession—Statement taken by petitioner's solicitor. See* Practice—*Confession, post. Evidence—Register of births—Illegitimate child—Entry in register signed by reputed father—No identification of father's signature—Name and occupation of co-respondent the same as those entered as being the father's—Appearance entered by co-respondent but no defence to charge of adultery—Whether evidence justified finding of adultery against co-respondent—Costs against co-respondent—Births and Deaths Registration Act*, 1953 (*c.* 20), *s.* 10, *s.* 34 [JACKSON *v.* JACKSON AND PAVAN] 621

Alimony—*Pendente lite—Wife receiving national assistance—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 19 (1) [SLATER *v.* SLATER] 217

DIVORCE—*continued.*
Appeal—*No case to answer—Submission wrongly accepted by trial court—Two types of submission—Power of appellate court to order a re-hearing—Right of party who submitted no case to give evidence at re-hearing* [STOREY *v.* STOREY] 279
Costs—*Co-respondent—Knowledge that respondent is married woman* [JACKSON *v.* JACKSON AND PAVAN] 621
Death of petitioner after decree nisi but before decree absolute—Whether his executors can enforce an order for taxation of costs against co-respondent—Attorneys' and Solicitors' Act, 1870 (*c.* 28), *s.* 19—*Law Reform (Miscellaneous Provisions) Act*, 1934 (*c.* 41), *s.* 1 (1) [KELLY *v.* KELLY AND BROWN] 232
Taxation—Review of taxation—Procedure—Rules of the Supreme Court (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *r.* 35 [PRACTICE DIRECTION] 414
Cruelty—*Mental disorder—Unjust accusations firmly believed by respondent—Assault by respondent—Reasonable apprehension of future injury to petitioner* [ROBINS *v.* ROBINS] 66
Respondent of unsound mind—Test of legal responsibility—Respondent suffering from paranoid schizophrenia—Expression of regret by respondent—Whether respondent knew that what she was doing was wrong—Meaning of "wrong" in the M'Naghten rules when applied as a defence in divorce—Cogency of evidence of medical expert who saw respondent once only [SOFAER *v.* SOFAER (BY HER GUARDIAN)] 468
Defence. *See* Cruelty—*Mental disorder, ante.*
Desertion—*Separation agreement—Separation agreement made before* 1938—*Wife then in desertion—Subsequent offers by wife to return to husband—Petition by husband—Cross-prayer for divorce by wife—Divorce (Insanity and Desertion) Act*, 1958 (*c.* 54), *s.* 3 [PEARCE *v.* PEARCE] 21
Evidence—*Adultery. See* Adultery, *ante.*
Medical witness—Cogency of evidence of expert medical witness who had only seen patient once. See Cruelty—*Respondent of unsound mind—Test of legal responsibility, ante.*
Insanity—*Notice indorsed on documents served. See* Practice—*Persons under disability, post.*
Maintenance—*Application—Leave of judge—Claim not included in petition but made twelve and a half years after decree absolute—At date of petition maintenance could not be claimed in petition—At date of notice of application for maintenance leave of judge required if no claim for maintenance in petition—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 19 (3), *s.* 29—*Matrimonial Causes (Property and Maintenance) Act*, 1958 (*c.* 35), *s.* 1—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3), *proviso* (ii) [EAKETTS *v.* EAKETTS] 581
Wife—Registration of order in magistrates' court—Variation of rate of payments—Matters to be considered—Appeal to judge in chambers—Maintenance Orders Act, 1958 (*c.* 39), *s.* 4 (2) (*a*), (7)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 61 [MILLER *v.* MILLER] .. 115
Matrimonial home—*Rights of spouses. See* HUSBAND AND WIFE (Property).
Mental disability—*Notice to be indorsed on documents for service. See* Practice—*Persons under disability, post.*
Nullity. *See* NULLITY.
Practice—*Confession—Respondent interviewed by petitioner's solicitor who took statement—Propriety of solicitor's conduct—Costs* [DAVIES *v.* DAVIES] 248
Persons under disability—Documents—Notice to be indorsed on documents for service—Additional provision where patient is to be served—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 66 (10), (13), *as substituted by Matrimonial Causes (Amendment) (No.* 2) *Rules*, 1960 (*S.I.* 1960 *No.* 1261), *r.* 3 [PRACTICE NOTE] 352
Pleading—Answer—Answer by respondent containing cross-prayer for divorce—Supplemental petition by petitioner—Answer by respondent to supplemental petition containing cross-petition for divorce—Respondent's cross-prayer and cross-petition on file at hearing—Withdrawal of cross-prayer and cross-petition—Service of new petition on petitioner in court—Registrar's certificate dispensed with and suits consolidated—Decree nisi—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (2) [JACOBS *v.* JACOBS] 578
Trial—No case to answer—Submission—Election to call no evidence—Power of appellate court if submission wrongly accepted. See Appeal, *ante.*

DOG
See ANIMAL.

DUTY
Statutory. *See* COAL MINING; FACTORY (Dangerous machinery).

EASTERN AFRICA
See PRIVY COUNCIL.

ECCLESIASTICAL LAW
Faculty—*Jurisdiction—Demolition of church—Dangerous structure—Urgency—Procedure—Safeguards* [Re PARISH CHURCH OF ST. GEORGE, BIRMINGHAM] 185

EDUCATION
Income tax—*Children of overseas employees of company. See* INCOME TAX (Annual payment—*Covenant to pay trustees for seven years*).

EMPLOYMENT
Remuneration. *See* MASTER AND SERVANT (Wages).

ENGINEER
Certificate. *See* BUILDING CONTRACT (Road construction).

EQUITY OF REDEMPTION
See MORTGAGE.

ESTATE AGENT
Commission—*Agreement to pay commission if a "prospective purchaser" signed agreement to purchase and if vendor signed agreement to sell—Vendor's and purchaser's agreements expressed to be subject to contract—Both agreements signed—Purchaser unable to complete until mortgage obtained—Property sold to another person within ten days of agreements being signed—Whether estate agent entitled to commission* [DREWERY *v.* WARE-LANE] 529

ESTATE DUTY
Company—*Shares—Valuation—Allowance for contingent liabilities—Balancing charge—Liability not existing at the date of the death—Finance Act*, 1940 (*c.* 29), *s.* 50, *s.* 55—*Finance Act*, 1894 (*c.* 30), *s.* 7 (5)—*Income Tax Act*, 1952 (*c.* 10), *s.* 292 [Re SUTHERLAND (*decd.*)] .. 270
Exemptions and remissions—*Pictures and objects of artistic interest—Bequest of exempted chattels "free of duty"—Incidence of duty payable on future sale—Finance Act*, 1930 (*c.* 28), *s.* 40 [Re BEDFORD (DUKE) (*decd.*)] 756

PAGE

ESTATE DUTY—*continued.*

Passing of property—*Foreign property—Immovable property—English will—Trust for sale—Death of life tenant—Proper law of disposition—Finance Act*, 1949 (*c.* 47), *s.* 28 (2) [PHILIPSON-STOW *v.* INLAND REVENUE COMRS.] 814

Rates of estate duty—*Plant and machinery used in business—Partnership—Death of partner—Partnership dissolved by death—Application of reduced rates—Finance Act*, 1954 (*c.* 44), *s.* 28 (1) [BURDETT-COUTTS *v.* INLAND REVENUE COMRS.] 153

Settlement with reservation—*Revocation—Power of revocation with consent of trustees—Discretion of trustees to withhold consent absolute—Whether donee of power, being settlor, was competent to dispose of property—Estate and Succession Duties Act*, 1941 (*Laws of Barbados, No.* 16 *of* 1941), *s.* 3 (*a*) [COMR. OF ESTATE AND SUCCESSION DUTIES *v.* BOWRING] 188

ESTOPPEL

Equitable estoppel—*Mortgage—Sale. See* MORTGAGE (Sale—*Exercise of power*).

EVIDENCE

Corroboration—*Bastardy cases. See* AFFILIATION.

Criminal proceedings, in. *See* CRIMINAL LAW.

Divorce. *See* DIVORCE.

Expert—*Costs. See* LEGAL AID (Costs—*Taxation*).

Medical witness—Cogency. See DIVORCE (Cruelty—*Respondent of unsound mind—Test of legal responsibility*).

Judicial notice—*Arbitration procedure—Arbitrators becoming advocates before umpire. See* ARBITRATION (Procedure—*Umpire*).

Arbitrator as advocate before umpire. See ARBITRATION (Procedure—*Umpire*).

Statements on other occasions—*Previous statements by witness to same effect as his evidence given at trial—Disciplinary proceedings before committee of General Medical Council* [FOX *v.* GENERAL MEDICAL COUNCIL] 225

EXPERT

Witness. *See* Divorce (Cruelty—*Respondent of unsound mind—Test of legal responsibility*); LEGAL AID (Costs—*Taxation*).

FACTORY

Dangerous machinery—*Duty to fence—Horizontal milling machine—Machine comprising traversing table carrying block in nature of vice—Bolts to be milled affixed to block—Whether block, when moving and carrying bolts, dangerous part of machinery—Factories Act*, 1937 (*c.* 67), *s.* 14 (1) [EAVES *v.* MORRIS MOTORS, LTD.] 656

Truck for conveying factory product—Whether machinery requiring to be fenced—Factories Act, 1937 (*c.* 67), *s.* 14 (1) [CHERRY *v.* INTERNATIONAL ALLOYS, LTD.] 264

Definition—*Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether process of making water wholesome "the altering or cleaning" of water—Whether pump house a factory—Factories Act*, 1937 (*c.* 67), *s.* 151 (1) (*b*), (iii), (6) [LONGHURST *v.* GUILDFORD GODALMING AND DISTRICT WATER BOARD] 664

Offence—*Defence of occupier—Third party alleged actual offender. See* TRADE MARK (False trade description—*Exemption from penalty claimed by employers—Procedure*).

Statutory duty—*Breach. See* Dangerous machinery—*Duty to fence, ante.*

FACULTY

See ECCLESIASTICAL LAW.

FALSE TRADE DESCRIPTION

See TRADE MARK.

FENCING

Dangerous machinery. *See* FACTORY (Dangerous machinery—*Duty to fence*).

FINE

Magistrates. *See* MAGISTRATES (Sentence).

FIREARMS

Airgun—*Sale to person under the age of seventeen—Whether airgun "lethal weapon"—Firearms Act*, 1937 (*c.* 12), *s.* 19 (1), *s.* 32 (1) [MOORE *v.* GOODERHAM] 575

Certificate—*Owner of rifle holding firearm certificate lending rifle to person not holding certificate nor exempt from holding certificate—Instruction to shoot rats—"Sporting purposes only"—Firearms Act*, 1937 (*c.* 12), *s.* 4 (7) [MORTON *v.* CHANEY, SAME *v.* CHRISTOPHER] 632

FLICK KNIFE

See CRIMINAL LAW (Dangerous weapons).

FOOD AND DRUGS

Prosecution—*Defence—Third party—Procedure—Appeal. See* TRADE MARK (False trade description—*Exemption from penalty claimed by employers—Procedure*).

HIGHWAY

Access—*Proposed erection of raised paving on access to garage—Refuge in the nature of a footway—Refuge in highway but not in carriageway—Highway authority's statutory powers—Highways Act*, 1959 (*c.* 25), *s.* 67 (1), (2), (3), *s.* 68 (1), *s.* 85 (1), (3) [CHING GARAGE, LTD. *v.* CHINGFORD CORPN.] 79

Construction—*Contract. See* BUILDING CONTRACT (Road construction).

Negligence—*Road traffic. See* ROAD TRAFFIC (Negligence).

Nuisance on. *See* NUISANCE.

Obstruction—*Street refuge. See* Access, *ante.*

Street—*Private street works—Making-up—Expenses—Apportionment to premises—Street lighting—Subterranean drainage—Resolution did not express dissatisfaction with existing street lights or mention subterranean drainage—Whether justices had power to amend resolution—Whether expenses could be apportioned to premises on the far side of public footpath adjoining street—"Front"—"Adjoin"—Private Street Works Act*, 1892 (*c.* 57), *s.* 6 [WARE URBAN DISTRICT COUNCIL *v.* GAUNT] 778

Occupation way or road laid out alongside footpath repairable by inhabitants at large—Whether road subject to provisions of Highway Act, 1835 (*c.* 50), *s.* 23 [WARE URBAN DISTRICT COUNCIL *v.* GAUNT] 778

HIGHWAY—Street—*continued.*
Occupation way used after housing development as a right of footway by public—Resolution passed by local authority concerning proposed street works—Objection by frontager—Whether occupation way repairable by public at large or excepted under Highway Act, 1835 (*c.* 50), *s.* 23—*Whether part of a street within the meaning of Private Street Works Act*, 1892 (*c.* 57), *s.* 5 [MARGATE CORPN. *v.* ROACH] 774
Widening—Michael Angelo Taylor's Act—Compensation—Local authority not owner at relevant date—Yearly tenant of kiosk—Tenancy determinable by six months' notice at any time—Six months' notice to quit given by local authority under statute—Loss of security under Landlord and Tenant Act, 1954—*Whether compensation payable—Metropolitan Paving Act*, 1817 (*c.* xxix), *s.* 90 [PEARL *v.* LONDON COUNTY COUNCIL] 588
Street refuge. *See* Access, *ante.*
User—*Duty owed to other users* [DAWRANT *v.* NUTT] 681

HOUSE OF LORDS
Appeal to—*Leave to appeal—Refusal of leave to appeal against refusal of leave to bring proceedings—Lunacy Act*, 1890 (*c.* 5), *s.* 330 (2), *as substituted by Mental Treatment Act*, 1930 (*c.* 23), *s.* 16 (1) [WHITEHOUSE *v.* BOARD OF CONTROL] 182

HUSBAND AND WIFE
Maintenance—*Divorce. See* DIVORCE (Maintenance).
Justices—Jurisdiction. See MAGISTRATES.
Summary jurisdiction. See MAGISTRATES.
Property—*Joint account—Whether arrangement for joint banking account creates egal rights between spouses during marriage* [GAGE *v.* KING] 62
Matrimonial home—Possession—Adulterous wife in possession—Wife petitioning for divorce on ground of cruelty—Summons by husband for possession—Order by registrar adjourning summons till after hearing of divorce suit or provision of alternative accommodation—Jurisdiction—Discretion—Appeal against registrar's order—Whether interlocutory or final—Married Women's Property Act, 1882 (*c.* 75), *s.* 17—*R.S.C., Ord.* 58, *r.* 4 (1) [SHORT *v.* SHORT] 6
Separation deed—*Supplemental amending agreement providing retroactively for deduction of tax from periodical payments—Possible claim for rectification as consideration for amending agreement* [HORTON *v.* HORTON] 649

IDENTITY
Contract. *See* CONTRACT (Offer and acceptance).

ILLEGALITY
Landlord and tenant. *See* LANDLORD AND TENANT (Agreement for lease).

IMPLICATION
See WILL.

INCOME TAX
Additional assessment—*Discovery—Appeal—"Discovery" after determination of assessments on appeal—Whether additional assessments precluded. See* Appeal—*Finality of determination, post.*
Annual payment—*Covenant to pay to trustees for seven years—Trust as part of scheme for overseas employees of company—Provision for education of employees' children—Trustees' discretion to make payments to employees' children—No consideration from employee or child* [BARCLAYS BANK, LTD. *v.* NAYLOR (INSPECTOR OF TAXES)] 173
Appeal—*Finality of determination—Appeal against original assessment determined by agreement—Subsequent discovery of dividends excluded from trading receipts—Discovery not based on fresh facts and original assessments made on basis that dividends should be excluded—Whether additional assessments in respect of dividends as trading receipts could be raised notwithstanding the determination of the appeal—Income Tax Act*, 1952 (*c.* 10), *s.* 41 (1), *s.* 50 (2), *s.* 510 (1) [CENLON FINANCE CO., LTD. *v.* ELLWOOD (INSPECTOR OF TAXES), ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO., LTD., TABLEAU HOLDINGS, LTD. *v.* WILLIAMS (INSPECTOR OF TAXES), WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS, LTD.] 390
Assessment—*Additional assessment. See* Appeal—*Finality of determination, ante.*
Capital or income. *See* WILL (Capital or income).
Deduction of tax—*Rectification of agreement. See* HUSBAND AND WIFE (Separation deed—*Supplemental amending agreement providing retroactively for deduction of tax from periodical payments*).
Discovery. *See* Appeal—*Finality of determination, ante.*
Dividend—*Nature of exemption of dividend from tax in hands of recipient. See* Profits—*Computation of profits—Dividend received, being dividend paid from capital profits of payor company not assessable to tax, post.*
Exemption—*Dividend. See* Profits—*Computation of profits—Dividend received, being dividend paid from capital profits of payor company not assessable to tax, post.*
Foreign possessions—*Income arising from possessions out of United Kingdom—Income arising from securities out of United Kingdom—Taxpayer's life interest in American estates—Income credited in New York bank account—Cheques drawn by taxpayer in dollars on account—Cheques purchased by English banks—Proceeds credited to taxpayer's English bank account—Whether sums received by taxpayer in United Kingdom—Income Tax Act*, 1918 (*c.* 40), *Sch.* D, *Case IV*, *r.* 2, *Case V*, *r.* 2 [THOMSON (INSPECTOR OF TAXES) *v.* MOYSE] 684
Income—*Copyright—Actor selling film rights in book—Whether adventure in the nature of trade—Income Tax Act*, 1952 (*c.* 10), *s.* 123 (1), *Sch. D, Case* I [SHINER *v.* LINDBLOM (INSPECTOR OF TAXES), LINDBLOM (INSPECTOR OF TAXES) *v.* SHINER] 832
Income arising from possessions out of the United Kingdom. See Foreign possessions, *ante.*
Proceeds of sale of cheques for dollars—Whether income arising from securities out of the United Kingdom [THOMSON (INSPECTOR OF TAXES) *v.* MOYSE] 684
Profits—*Computation of profits—Dividend received, being dividend paid from capital profits of payor company not assessable to tax—Whether assessable trading receipt to be brought into charge to tax by recipient company—Income Tax Act*, 1952 (*c.* 10), *Sch. D, Case I, s.* 122, *s.* 123 (1) [CENLON FINANCE CO., LTD. *v.* ELLWOOD (INSPECTOR OF TAXES), ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO., LTD., TABLEAU HOLDINGS, LTD. *v.* WILLIAMS (INSPECTOR OF TAXES), WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS, LTD.] 390

PAGE

INCOME TAX—Profits—*continued.*
Profession—Actor selling film rights in book—Income Tax Act, 1952 (*c.* 10), *s.* 123 (1), *Sch. D, Case* II [SHINER *v.* LINDBLOM (INSPECTOR OF TAXES), LINDBLOM (INSPECTOR OF TAXES) *v.* SHINER] 832
Profits tax. *See* PROFITS TAX.

INDICTMENT
See CRIMINAL LAW.

INDUSTRIAL AND PROVIDENT SOCIETIES
Restrictive practices. *See* RESTRICTIVE TRADE PRACTICES (Reference—*Co-operative societies*).

INFANT
Divorce. *See* DIVORCE (Practice—*Persons under disability*).
Maintenance—*Summary matrimonial jurisdiction—Child's maintenance and wife's maintenance separate subjects of complaint—Whether husband's reasonable belief in wife's adultery a defence to her application for maintenance for child—Summary Jurisdiction (Married Women) Act*, 1895 (*c.* 39), *s.* 4 [COOKE *v.* COOKE] 39
Ward of court—*Jurisdiction—Leave to take ward out of jurisdiction—Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

INJUNCTION
Statute—*Contravention—Relator action for injunction after repeated contraventions—Scope of court's discretion in relator action for an injunction* [ATTORNEY-GENERAL (ON THE RELATION OF MANCHESTER CORPN.) *v.* HARRIS] 207

INSANITY
Divorce—*Defence. See* DIVORCE (Cruelty).
See also DIVORCE (Practice—*Persons under disability*).

INTENTION
Presumption. *See* CRIMINAL LAW (Mens rea).

INTERPRETER
Foreign plaintiff—*Conduct of proceedings. See* PRACTICE (Conduct of proceedings).

INVESTMENT CLAUSE
See TRUST AND TRUSTEE (Variation of trusts by the court).

JUDGMENT
Assignment—*Recovery of possession—Whether judgment for recovery of land passes with land on conveyance thereof* [CHUNG KWOK HOTEL CO., LTD. *v.* FIELD] 143
Order—*Consent order—Drawing up in Chancery Division* [PRACTICE DIRECTION] 415
Drawing-up—Chancery Division. See PRACTICE (Order).
Minutes of order drawn by counsel—Chancery Division [PRACTICE DIRECTION] 415
Procedural orders made in chambers—Drawing up in Chancery Division [PRACTICE DIRECTION] 415
Whether leave of the court or refusal of leave to bring proceedings is an order, final or interlocutory. See HOUSE OF LORDS (Appeal to—*Leave to appeal*).

JUDICIAL NOTICE
Arbitrator acting as advocate. *See* ARBITRATION (Procedure—*Umpire*).

JUDICIAL TRUSTEE
Appointment—*Master's powers. See* PRACTICE (Chambers—*Chancery Division*).

JURISDICTION
Court of Appeal, of. *See* COURT OF APPEAL.
Nullity, in. *See* NULLITY.

JURY
Verdict—*Unanimity. See* CRIMINAL LAW (Trial—*Direction to jury*).

JUS RELICTAE
Will—*Jus relictae mentioned in English will. See* WILL (Implication).

LANDLORD AND TENANT
Agreement for lease—*Illegality—Use of premises—Town and country planning—User requiring planning permission—Permission refused—Landlord's right to recover rent—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 12 (1) [BEST *v.* GLENVILLE] 478
Agricultural holding. *See* AGRICULTURE (Agricultural holding).
Lease—*Contract to grant lease more than twenty-one years after date of contract—Validity—Law of Property Act*, 1925 (*c.* 20), *s.* 149 (3) [WEG MOTORS, LTD. *v.* HALES] 762
Covenant—Whether option agreement not under seal a covenant. See OPTION (Option to renew lease—*Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease*).
Illegality. See Agreement for lease, *ante*.
Parties—Freeholders letting premises to themselves. See REAL PROPERTY (Conveyance by persons to themselves).
New tenancy—*Business premises—Opposition by landlord—Answer—Failure of landlord to state, in his answer to tenants' originating application, his objection to terms proposed by tenants—Whether court required to hear evidence as to reasonableness of terms—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 29 (1), *s.* 33, *s.* 34, *s.* 69 (2)—*County Court Rules*, 1936 (*as amended*), *Ord.* 40, *r.* 8 (2), *Form* 336 [MORGAN *v.* JONES] 583
Discovery. See DISCOVERY (Originating summons).
Notice to quit—*Validity—Notice to quit dwelling—Notice of not less than four weeks' duration—Four clear weeks necessary—Rent Act*, 1957 (*c.* 25), *s.* 16 [THOMPSON *v.* STIMPSON] .. 500
Option to purchase reversions. *See* OPTION (Purchase).
Recovery of possession—*Judgment for possession at future date—Conveyance of landlord's interest between judgment and date for possession—No express assignment of benefit of judgment—Whether benefit passed—Whether benefit assignable—Whether judgment enforceable* [CHUNG KWOK HOTEL CO., LTD. *v.* FIELD] 143
Tenancy—*Year to year—Characteristics of tenancy and meaning of description* [GLADSTONE *v.* BOWER] 353
Town and country planning—*Agreement to let for unauthorised use. See* Agreement for lease—*Illegality, ante*.

LANDS TRIBUNAL
Rating matters. *See* RATES.

LANGUAGE
Court proceedings—*English language. See* PRACTICE (Conduct of proceedings).

LAY DAYS
See SHIPPING (Demurrage—*Computation*).

LEASE
By parties to themselves. *See* REAL PROPERTY (Conveyance by parties to themselves).
Contract to grant—*Validity. See* LANDLORD AND TENANT.
Option. *See* OPTION (Option to renew lease).

LEGAL AID
Appeal—*Notice of appeal—Filing. See* COURT OF APPEAL (Extension of time for appeal—*Legal aid*).
Costs—*Taxation—Expert evidence—Solicitor and client costs—Disallowance, or partial disallowance, of items allowed in full on party and party taxation—Disbursements not previously authorised—Amounts received in full by legal aid fund from defendants—Legal Aid and Advice Act*, 1949 (*c.* 51), *s.* 12 (1)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 14 (4), (5), (6), *as amended by Legal Aid (General) (Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954 *No.* 166), *and Legal Aid (General) (Amendment No.* 2) *Regulations*, 1955 (*S.I.* 1955 *No.* 1829) [ULLAH *v.* HALL LINE, LTD.] 488

LIBEL
Privilege—*Absolute privilege—Qualified privilege—Communications to Bar Council—Libel alleged contained in letters of complaint against Queen's Counsel addressed to secretary of Bar Council—No complaint made to Benchers of Inn of Court—Letters not protected by absolute privilege but by qualified privilege* [LINCOLN *v.* DANIELS] 205

LIMITATION OF ACTION
Bankruptcy—*Doctrine that time ceases to run when receiving order made. See* BANKRUPTCY.
Mortgage—*Equity of redemption incapable of surviving after estate statute barred. See* MORTGAGE (Equity of redemption).

LIMITATION OF LIABILITY
Shipping. *See* SHIPPING.

LONDON
Michael Angelo Taylor's Act—*Compensation. See* HIGHWAY (Street—*Widening*).

MACHINERY
Dangerous. *See* FACTORY (Dangerous machinery).

MAGISTRATES
Bastardy cases. *See* AFFILIATION.
Complaint—*Police—Complaint preferred by police officer. See* ANIMAL (Dog—*Dog attacking boy*).
Dog—*Dangerous. See* ANIMAL (Dog).
Husband and wife—*Jurisdiction—Potentially polygamous marriage—Marriage by proxy in Ghana valid by local law but potentially polygamous—Failure to have second ceremony before registrar or in church to make marriage monogamous union—Whether wife can obtain matrimonial relief in England—Marriage Ordinance*, 1884 (*c.* 127 *of Laws of the Gold Coast* (1951) *Revised*), *s.* 44 [SOWA *v.* SOWA] 196
Maintenance—Registration of High Court order—Variation by magistrates of rate of payments—Matters to be considered—Appeal to judge in chambers—Maintenance Orders Act, 1958 (*c.* 39), *s.* 4 (2) (*a*), (7)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 61 [MILLER *v.* MILLER] 115
Wilful neglect to maintain—Wife claiming for herself and for child—Separate subjects of complaint—Reasonable belief by husband in wife's adultery—Answer to wife's complaint of maintenance for herself but no answer to her complaint for maintenance for child—Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 4 [COOKE *v.* COOKE] .. 39
Procedure—*Third party summoned by defendant as actual offender. See* TRADE MARK (False trade description—*Exemption from penalty claimed by employers*).
Sentence—*Fine—Mitigation—National insurance contribution arrears recoverable as a penalty—Whether court can reduce amount of arrears adjudged recoverable—Magistrates' Courts Act*, 1952 (*c.* 55), *s.* 27 (1), *s.* 126 (1), (3)—*National Insurance Act*, 1946 (*c.* 67), *s.* 8—*National Insurance (Contributions) Regulations*, 1948 (*S.I.* 1948 *No.* 1417), *reg.* 19 (5) [LEACH *v.* LITCHFIELD] 739

MAINTENANCE
Infant. *See* INFANT.
Wife. *See* DIVORCE; MAGISTRATES (Husband and wife).

MALICIOUS PROSECUTION
Damage necessary to support action—*Charge of statutory offence punishable by fine only—Insufficient damage entailed to support action unless charge injures fair fame of plaintiff—What amounts to injury to fair fame—Whether difference between solicitor and client costs and costs awarded to a successful appellant in criminal proceedings is sufficient damage to support an action for malicious prosecution—Prosecution for pulling communication cord contrary to the Regulation of Railways Act*, 1868 (*c.* 119), *s.* 22 [BERRY *v.* BRITISH TRANSPORT COMMISSION] 322

MARRIAGE
Nullity. *See* NULLITY.
Polygamous—*Potentially polygamous—Whether relief obtainable in England. See* MAGISTRATES (Husband and wife—*Jurisdiction—Potentially polygamous marriage*).

MASTER AND SERVANT
Contract of service—*Director. See* COMPANY (Director).
Safe system of working. *See* SAFE SYSTEM OF WORK.
Trade dispute—*Lawful dismissal of shop employee—Whether shop employee a "workman"—Whether lawful dismissal of workman can be subject of trade dispute—Picketing of employers' business premises—Nuisance—Trade Unions Act*, 1939 (*Leeward Islands No.* 16 *of* 1939), *s.* 2, *as amended—Trade Disputes (Arbitration and Inquiry) Act*, 1939 (*Leeward Islands No.* 17 *of* 1939), *s.* 2 (1) [BIRD *v.* O'NEAL] 254

PAGE

MASTER AND SERVANT—*continued.*
Wages—*Illness—Bonus—Where contract silent and no implied term to contrary, remuneration remains payable during employee's absence through sickness—Production manager at skirt factory—Remuneration under contract of service comprising salary of £30 per week plus bonus of 2d. per skirt manufactured—Manager entitled to bonus as well as salary during absence through sickness* [ORMAN *v.* SAVILLE SPORTSWEAR, LTD.] 105
Wrongful dismissal—*Crown servant—Whether action for. See* CROWN (Crown servant—*Dismissal*).

MATRIMONIAL HOME
Title to. *See* HUSBAND AND WIFE (Property).

MEDICAL PRACTITIONER
Appeal under Medical Act. *See* PRIVY COUNCIL (Medical Act appeal).

MEDICINE
Sale of medicine—*Medicine containing poison. See* POISON (Sale by retail).

MEMORANDUM OF ASSOCIATION
See COMPANY.

MENS REA
See CRIMINAL LAW.

MENTAL DISORDER.
Divorce—*Defence. See* DIVORCE (Cruelty).

MENTAL HEALTH
Jurisdiction—*Management of property of patient—Settlement or gift of any property of patient for maintenance or benefit of patient's family, or for making provision for other persons—By whom statutory powers exercisable—Mental Health Act*, 1959 (*c.* 72), *s.* 102 (1) (*b*), (*c*), *s.* 103 (1) (*d*) [PRACTICE DIRECTION] 447

MERCHANDISE MARKS ACTS
See TRADE MARK.

MINUTES OF ORDER
Chancery Division. *See* PRACTICE (Order).

MISNOMER
Process—*Misnomer of parties. See* PRACTICE (Parties).

MISTAKE
Contract—*Identity of party. See* CONTRACT (Offer and acceptance—*Identity of party*).

MOIETY
Gift of, in will. *See* WILL (Implication).

MONEY
Debts clearing office. *See* CURRENCY CONTROL (Debts clearing office).

MORTGAGE
Charge by way of legal mortgage—*Estate of mortgagor* [WEG MOTORS, LTD. *v.* HALES] .. 762
Equity of redemption—*Limitation of action—Second mortgagee's estate and right to recover possession statute-barred—Equity of redemption incapable of surviving in gross* [COTTERELL *v.* PRICE] 315
Possession of mortgaged property—*Adjournment of proceedings. See* PRACTICE (Adjournment of proceedings—*Inherent power to adjourn proceedings*).
Mortgagee establishing right to possession—Discretion to allow mortgagor time to assign mortgage [BRAITHWAITE *v.* WINWOOD] 642
Sale—*Exercise of power—Equitable estoppel—Conduct estopping mortgagee from exercising power* [BRAITWHAITE *v.* WINWOOD] 642

MOTOR CYCLIST
Negligence. *See* ROAD TRAFFIC (Negligence).

MOTOR VEHICLE
Machinery—*Whether machinery within Factories Act*, 1937. *See* FACTORY (Dangerous machinery—*Truck for conveying factory product*).

MURDER
See CRIMINAL LAW.

NATIONAL ASSISTANCE
Alimony—*Whether national assistance taken into consideration in awarding alimony pendente lite. See* DIVORCE (Alimony—*Pendente lite*).

NATIONAL INSURANCE
Contributions—*Recovery—Arrears of contributions—"Recoverable as a penalty"—Whether a penalty—Whether magistrates' court has jurisdiction to remit arrears—National Insurance Act*, 1946 (*c.* 67), *s.* 8—*National Insurance (Contributions) Regulations*, 1948 (*S.I.* 1948 *No.* 1417), *reg.* 19 (5)—*Magistrates' Courts Act*, 1952 (*c.* 55), *s.* 27 (1), *s.* 126 (1), (3) [LEACH *v.* LITCHFIELD] 739

NEGLIGENCE
Damages—*Personal injury—Measure of damages—Loss of amenities of life—Loss of future earning capacity—Child aged twenty months—Mental defective as result of injury—Expense of home help and of child's entering private institution in the first instance—Probability that child would spend most of his life in state institution—Total award unlikely to be used by or on behalf of child* [OLIVER *v.* ASHMAN] 677
Special damage—Expenses incurred by husband in respect of wife's injuries paid by husband out of joint bank account—Responsibility for motor accident apportioned as to two-thirds to husband—Which spouse entitled to recover expenses, as special damage, against defendant [GAGE *v.* KING] 62
Driving of motor vehicle. *See* ROAD TRAFFIC.
No case to answer—*Whether defendant submitting no case should be put to his election* [STOREY *v.* STOREY] 279
Road traffic. *See* ROAD TRAFFIC.

NEW TENANCY
Business premises. *See* LANDLORD AND TENANT.

NEW TRIAL
See DIVORCE (Appeal—*No case to answer*).

NEW SOUTH WALES
See PRIVY COUNCIL (Australia).

NEW ZEALAND
See PRIVY COUNCIL.

NO CASE
Divorce. *See* DIVORCE (Appeal).

NOLLE PROSEQUI
See PRIVY COUNCIL (Eastern Africa—*Criminal law*).

NOTICE TO QUIT
See AGRICULTURE (Agricultural holding); LANDLORD AND TENANT.

NUISANCE
Highway—*Motor vehicle—Unlighted motor vehicle on road in darkness—Vehicle being towed by lorry—Lorry and vehicle stopped at place where vehicle within light of street lamp—Vehicle not a nuisance because not a dangerous obstruction* [PARISH *v.* JUDD] 33
Picketing. *See* MASTER AND SERVANT (Trade dispute—*Lawful dismissal of shop employee*).

NULLITY
Approbation of unconsummated marriage—*Whether or not a discretionary bar—Delay* [G. *v.* G. (OTHERWISE H.)] 56
Jurisdiction—*Marriage celebrated in England—Wife, petitioner, domiciled and resident in England at time of marriage and resident in England when petition presented—Husband neither domiciled nor resident in England when petition presented—Whether English courts had jurisdiction to entertain wife's petition on ground of husband's wilful refusal or incapacity to consummate the marriage* [ROSS SMITH (OTHERWISE RADFORD) *v.* ROSS SMITH, ROSS SMITH *v.* ROSS SMITH (OTHERWISE RADFORD)] 70

OBSTRUCTION
Police—*Trade dispute. See* TRADE DISPUTE (Picketing).

OPTION
Option to renew lease—*Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease—Whether option for renewal of lease or void as infringing rule against perpetuities—Whether obligation to grant new lease ran with reversion —Whether agreement was "covenant" within Law of Property Act,* 1925 (*c.* 20), *s.* 142 (1) [WEG MOTORS, LTD. *v.* HALES] 762
Purchase—*Option to purchase freehold—Tenant's option conferred by tenancy agreement to purchase "at any time" at fixed price—Term of tenancy agreement a five years' term—Property becoming subject to Rent Restrictions Acts after date of agreement—Tenant holding over as statutory tenant—Exercise of option while statutory tenant—Validity* [LONGMUIR *v.* KEW] 26

ORDER
Drawing-up—*Chancery Division. See* PRACTICE.
Minutes—*Chancery Division—Consent orders. See* PRACTICE.

ORIGINATING SUMMONS
Discovery. *See* DISCOVERY.

PARTICULARS
See PRACTICE.

PARTIES
See PRACTICE (Parties; Third-party procedure).

PARTNERSHIP
Conversion—*Property in bank cheques fraudulently obtained by one partner from partnership bank. See* BANK (Cheque—*Conversion—Property in bank cheque*).
Dissolution—*Death—Partnership for joint lives—Whether interest in partnership business passed on death* [BURDETT-COUTTS *v.* INLAND REVENUE COMRS.] 153

PASSING-OFF
Contempt of court—*Pending proceedings for passing-off—Warning letters concerning advertisements and sales. See* CONTEMPT OF COURT (Publications concerning legal proceedings).

PATENT
Practice and procedure—*Motions—Patents Act,* 1949 (*c.* 87)—*R.S.C., Ord.* 53A [PRACTICE DIRECTION] 593

PAYMENT OUT OF COURT
Masters' powers. *See* PRACTICE (Chambers—*Chancery Division*).

PENALTY
Exemption from, under Merchandise Marks Act, 1926 (*c.* 53), *s.* 6. *See* TRADE MARK (False trade description).

PERPETUITIES
Rule against perpetuities—*Option to renew lease. See* OPTION (Option to renew lease—*Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease*).

PERSON MENTALLY DISORDERED
Divorce. *See* DIVORCE (Practice—*Persons under disability*).
Mental health jurisdiction. *See* MENTAL HEALTH.

PERSON OF UNSOUND MIND
Action—*Leave to bring—Appeal. See* HOUSE OF LORDS (Appeal to—*Leave to appeal*).
Court of Protection. *See* MENTAL HEALTH.
Divorce—*Defence. See* DIVORCE (Cruelty—*Mental disorder*).
Mental health jurisdiction. *See* MENTAL HEALTH.

PERSONAL INJURIES
See NEGLIGENCE (Damages).

PHARMACY
Medicine containing poison—*Sale. See* POISON (Sale by retail).

PICKETING
See MASTER AND SERVANT (Trade dispute—*Lawful dismissal of shop employee*); TRADE DISPUTE.

PAGE

PLEADING
Divorce. *See* DIVORCE (Practice).
Particulars. *See* PRACTICE (Particulars).
Safe system of working—*Failure to provide—Whether plaintiff need plead a particular system which would be safe* [DIXON *v.* CEMENTATION CO., LTD.] 417

POISON
Sale by retail—*Sale by or under supervision of registered pharmacist—Exemption with respect to medicines—Failure to comply with conditions of exemption—Whether in itself an offence—Meaning of "medicine"—Pharmacy and Poisons Act*, 1933 (*c.* 25), *s.* 18, *s.* 19, *s.* 24 [R. *v.* STAINCROSS JUSTICES, *Ex parte* TEASDALE] 572

POLICE
Obstruction of. *See* TRADE DISPUTE (Picketing—*Breach of peace anticipated*).

POLYGAMOUS MARRIAGE
Potentially polygamous. *See* MAGISTRATES (Husband and wife—*Jurisdiction*).

POSSESSION
Demised property, of. *See* LANDLORD AND TENANT (Recovery of possession).

POWER OF APPOINTMENT
Exercise—*Fraudulent exercise—Appointment as preliminary step to variation of trust. See* TRUST AND TRUSTEE (Variation of trusts by the court).
General power—*Consent necessary—Whether donee in position of owner* [COMR. OF ESTATE AND SUCCESSION DUTIES *v.* BOWRING] 188

PRACTICE
Adjournment of proceedings—*Inherent power to adjourn proceedings—Mortgagee's claim for possession—Principal sum not repayable by instalments* [BRAITHWAITE *v.* WINWOOD] .. 642
Admiralty. *See* ADMIRALTY.
Arbitration. *See* ARBITRATION (Procedure).
Chambers—*Chancery Division—Masters' powers—Rules of the Supreme Court (Chancery Provisions)*, 1954 (*S.I.* 1954 *No.* 1728)—*R.S.C., Ord.* 55, *r.* 15 [PRACTICE NOTE] 497
Chancery Division—*Drawing up orders. See* Order, *post*.
Conduct of proceedings—*Language—Foreign plaintiff wishing to conduct proceedings through interpreter—Discretion of court* [Re TREPCA MINES, LTD.] 304
Costs. *See* COSTS.
Court of Appeal. *See* COURT OF APPEAL.
Designs. *See* DESIGN.
Divorce. *See* DIVORCE.
Language—*Proceedings in English language. See* Conduct of proceedings, *ante*.
Order—*Drawing up procedural orders made in chambers—Chancery Division* [PRACTICE DIRECTION] 415
Minutes of order drawn by counsel—Consent orders—Chancery Division [PRACTICE DIRECTION] 416
Particulars—*Pleading—Traverse of negative allegation—Negative pregnant with affirmative allegation—Denial that defendant "failed to furnish any such particulars without reasonable excuse"—R.S.C., Ord.* 19, *r.* 7, *r.* 19 [INLAND REVENUE COMRS. *v.* JACKSON] 31
Parties—*Adding persons as parties—Defendant—Amendment of writ to change defendant "E.B. (a firm)" to "E.B., Ltd."—Whether a correction of a mere misnomer—Amendment sought after limitation period expired* [DAVIES *v.* ELSBY BROTHERS, LTD.] 672
Fourth party. See Third-party procedure, *post*.
Patents. *See* PATENT.
Payment out of court—*Masters' powers. See* Chambers—*Chancery Division, ante*.
Restrictive Practices Court. *See* RESTRICTIVE TRADE PRACTICES (Court).
Service—*Service out of jurisdiction—Chancery Division—Masters' powers. See* Chambers—*Chancery Division, ante*.
Third-party procedure—*Application by third party to join fifth party as additional fourth party—R.S.C., Ord.* 16A, *r.* 11 (1), *Ord.* 16, *r.* 11 [PIDDOCK *v.* CLIFFORD PRODUCTS, LTD. (INDUSTRIAL GUARDING EQUIPMENT, LTD. THIRD PARTY, BALDWIN INSTRUMENT CO., LTD. FOURTH PARTY, B.A.L., LTD. FIFTH PARTY)] 805
Trial—*No case to answer—Submission in action for negligence. See* DIVORCE.

PRELIMINARY ACT
See ADMIRALTY (Practice).

PRESUMPTION
Intention—*Presumption of having intended natural consequences of acts. See* CRIMINAL LAW (Mens rea).

PRISON
Breach—*Criminal offence. See* CRIMINAL LAW (Autrefois convict).
Disciplinary proceedings before visiting justices—*Whether justices a court of competent jurisdiction for purposes of bar to subsequent indictment for same matter. See* CRIMINAL LAW (Autrefois convict).

PRIVATE STREET WORKS
See HIGHWAY (Street).

PRIVILEGE
Libel. *See* LIBEL.

PRIVY COUNCIL
Australia—*New South Wales—Bank—Conversion—Unauthorised cheques drawn on partnership trust account by one partner—Bank cheques issued by bank thereon pursuant to partner's application—Bank cheques cashed by payee with collecting bank—Whether collecting bank converted bank cheques* [COMMERCIAL BANKING CO. OF SYDNEY, LTD. *v.* MANN] 482
Rates—Valuation—Racecourse—Land subject to restrictive trusts, conditions and provisos materially affecting its value—Whether, in ascertaining "unimproved value" of land, valuation should take into account existence of restrictions—New South Wales Valuation of Land Act, 1916-1951, *s.* 6 [GOLLAN *v.* RANDWICK MUNICIPAL COUNCIL] 449

PRIVY COUNCIL—*continued.*

Barbados—*Settlement—Power of revocation—Consent of trustees necessary—Whether donee of power, being settlor, was competent to dispose of property—Estate and Succession Duties Act,* 1941 (*Laws of Barbados, No.* 16 *of* 1941), *s.* 3 (*a*) [COMR. OF ESTATE AND SUCCESSION DUTIES *v.* BOWRING] 188

Eastern Africa—*Criminal law—Nolle prosequi—Second information for same offence on same facts signed before nolle prosequi entered—No fresh committal—Validity of second information—Kenya Criminal Procedure Code* (*Laws of Kenya,* 1948, *c.* 27), *s.* 82 (1) [POOLE *v.* REGINAM] 398

Uganda—Constitutional law—Legislative council—Procedure for representation of Buganda in legislative council—Alleged fundamental changes invalidating a term of Buganda Agreement, 1955—*Buganda Agreement,* 1955 (*Laws of Uganda,* 1955, *p.* 383), *art.* 7 (2), *Sch.* 2, *reg.* 5—*Royal Instruction dated June* 5, 1920 (*Laws of Uganda,* 1951, *Vol.* VI, *p.* 104), *cl.* XVA, *cl.* XXV, *cl.* XXVI, *as amended by Royal Instructions dated Dec.* 17, 1957 (*Laws of Uganda,* 1957, *p.* 435) [KATIKIRO OF BUGANDA *v.* ATTORNEY-GENERAL] 849

Medical Act appeal—*Appeal from determination of disciplinary committee of General Medical Council—"Due inquiry" by committee—Nature of appeal to Privy Council—Medical Act,* 1956 (*c.* 76), *s.* 33 (1) (*b*) [FOX *v.* GENERAL MEDICAL COUNCIL] 225

New Zealand—*Workman's compensation—Workman—Governing director of company exercising full and unrestricted control of company's affairs but also working for company as pilot and being paid wages—Death of governing director while acting as pilot on company's business—Whether contract of service with company—New Zealand Workers' Compensation Act,* 1922 (1922, *No.* 39), *as amended, s.* 2 [LEE *v.* LEE'S AIR FARMING, LTD.] 420

West Indies—*Windward Islands and Leeward Islands—Master and servant—"Trade dispute"—Lawful dismissal of shop employee—Whether shop employee a "workman"—Whether lawful dismissal of workman can be subject of trade dispute—Trade Unions Act,* 1939 (*Leeward Islands No.* 16 *of* 1939), *s.* 2, *as amended—Trade Disputes* (*Arbitration and Inquiry*) *Act,* 1939 (*Leeward Islands No.* 17 *of* 1939), *s.* 2 (1) [BIRD *v.* O'NEAL] 254

PROBATE

Costs—*Review of taxation—Procedure. See* COSTS (Taxation—*Review by court*).

PROCEDURE

Designs. *See* DESIGN (Practice and procedure).

Patents. *See* PATENT (Practice and procedure).

Third party summoned by defendant as actual offender. *See* TRADE MARK (False trade description—*Exemption from penalty claimed by employers*).

PROCEEDINGS

Adjournment. *See* PRACTICE (Adjournment of proceedings).

PROFESSIONAL MISCONDUCT

Solicitor. *See* SOLICITOR.

PROFITS TAX

Computation of profits—*Deduction—Capital expenditure—Payments under lease—Payments for right of entry and compensation for damage—Opencast coal mining—Transient and recurrent operation—Income Tax Act,* 1952 (*c.* 10), *s.* 137 [H. J. RORKE, LTD. *v.* INLAND REVENUE COMRS., INLAND REVENUE COMRS. *v.* H. J. RORKE, LTD.] 359

Distribution—*Director-controlled company—Payments to a director for manufacture and sale of patented article under licence from the director, the patentee—Full consideration received by company—Whether payments were amounts applied by way of remuneration, loans or otherwise for the benefit of any person—Finance Act,* 1947 (*c.* 35), *s.* 36 (1) [INLAND REVENUE COMRS. *v.* H. DUNNING & CO. (1946), LTD.] 75

Gross relevant distribution—Repayment or return of share capital—Exclusion of distribution of capital—Company in voluntary liquidation—Transfer of assets to new company—Direction that profits tax be computed as if capital not previously increased—Validity—Finance Act, 1937 (*c.* 54), *s.* 20 (2) (*b*)—*Finance Act,* 1947 (*c.* 35), *s.* 35 (1) (*c*), *s.* 36 (4)—*Finance Act,* 1951 (*c.* 43), *s.* 32 (1), (3), (4) [ACKLAND & PRATTEN, LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS.] 367

PROOF

Double—*Rules against double proof. See* SHIPPING (Limitation of liability—*Fund paid into court—Claims*).

PROSECUTION

Malicious. *See* MALICIOUS PROSECUTION.

QUARTER SESSIONS

Appeal to—*Exemption from penalty—Information by employers against employees alleged to be actual offenders dismissed—Notice of appeal to be given to employees—Merchandise Marks Act,* 1926 (*c.* 53), *s.* 6—*Magistrates' Courts Act,* 1952 (*c.* 55), *s.* 84 (1) [R. *v.* EPSOM JUSTICES, *Ex parte* DAWNIER MOTORS, LTD.] 635

RATES

Agricultural buildings—*Used solely in connexion with "agricultural operations" thereon, viz., on "agricultural land"—Pig progeny testing station—Ploughing of land unconnected with buildings—Rating and Valuation* (*Apportionment*) *Act,* 1928 (*c.* 44), *s.* 2 (2) [NATIONAL PIG PROGENY TESTING BOARD *v.* GREENALL (VALUATION OFFICER)] 556

Appeal from lands tribunal. *See* Lands Tribunal, *post.*

De-rating—*Industrial hereditament—Laundry—Retail shop—Accommodation for public resort—Customers leaving articles in basket and collecting at office—Customers leaving and collecting articles on slab—Delivery by van—Rating and Valuation* (*Apportionment*) *Act,* 1928 (*c.* 44), *s.* 3 (1), (4) [ALMOND (VALUATION OFFICER) *v.* HEATHFIELD LAUNDRY (BIRMINGHAM), LTD., CUSHING (TRADING AS FAKENHAM STEAM LAUNDRY) *v.* WEBBER (VALUATION OFFICER)] 700

Exemption—*Scientific society—"Purposes of science . . . exclusively"—"Development of mechanical engineering"—"Annual voluntary contributions"—Subscriptions of members—Advantages of membership of organisation of professional men—Whether subscriptions were "voluntary" subscriptions—Scientific Societies Act,* 1843 (*c.* 36), *s.* 1 [INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER)] 715

Lands Tribunal—*Appeal by Case Stated from tribunal—Form of order of Court of Appeal—R.S.C., Ord.* 58A, *r.* 3 (4), (5) [NATIONAL PIG PROGENY TESTING BOARD *v.* GREENALL (VALUATION OFFICER)] 556

RATES—Lands Tribunal—*continued.*
Case Stated—Form—Title of case [NATIONAL PIG PROGENY TESTING BOARD *v.* GREENALL (VALUATION OFFICER)] 556
Ratcable occupation—*Art gallery—Trust of gallery for enjoyment by the public in perpetuity—Gallery vested in local authority* [CLAYTON (VALUATION OFFICER) *v.* KINGSTON-UPON-HULL CORPN.] 840

RATS
Shooting—"*Sporting purposes.*" *See* FIREARMS (Certificate).

REAL PROPERTY
Conveyance by persons to themselves—*Parol grant of lease of premises for a term not exceeding three years—Law of Property Act*, 1925 (*c.* 20), *s.* 52, *s.* 54 (2), *s.* 72 (4), *s.* 205 (1) (ii) [RYE *v.* RYE] 810

RECTIFICATION
See CONTRACT (Consideration—*Rectification claim*).

REDUCTION OF CAPITAL
See COMPANY.

REGISTER OF BIRTHS
Entry—*Evidence of adultery. See* DIVORCE (Adultery—*Evidence*).

RELATOR ACTION
See ATTORNEY-GENERAL (Remedy).

RESTRICTIVE TRADE PRACTICES
Agreement—*Registration—Boundary agreement between co-operative societies. See* Reference—*Co-operative societies, post.*
Court—*Practice—Undertaking—Variation—Proposed recommendations by trade associations to members of terms and conditions of home trade—Recommendation by Registrar to Board of Trade that terms and conditions are of no substantial economic significance—Release from undertakings to extent necessary to make recommendations of terms, etc., to traders—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 12, *s.* 20 (3) [Re THE YARN SPINNERS' AGREEMENT (No. 2), Re THE COTTON YARN DOUBLERS' ASSN'S. AGREEMENT (No. 2)] .. 809
Reference—*Black Bolt and Nut Association of Great Britain—Minimum fixed price scheme—Discounts—Inter-trading between members—Obligation not to supply goods to government departments, railways, harbour boards or other large users at prices lower than lowest proposed quotation reported by any member to secretary of Association—Whether removal of restrictions would deny public substantial benefit—Whether restrictions reasonably required for purposes connected with maintenance of other restrictions accepted by parties—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 21 (1) (*b*), (*g*) [Re BLACK BOLT AND NUT ASSN. OF GREAT BRITAIN'S AGREEMENT] 122
Co-operative societies—Boundary agreement—Agreement by two societies not to canvass or solicit customers or deal in or supply goods or open any shop on other side of demarcation line—Whether removal of restrictions would deny to public substantial benefit—Agreement not to accept members on other side of demarcation line—Whether a restriction—Restrictive Trade Practices Act, 1956 (*c.* 68), *s.* 6 (1), *s.* 21 (1) (*b*) [Re DONCASTER CO-OPERATIVE SOCIETY, LTD.'S AND RETFORD CO-OPERATIVE SOCIETY, LTD.'S AGREEMENT] 541

REVOCATION
Power. *See* ESTATE DUTY (Settlement with reservation).

ROAD TRAFFIC
Negligence—*Collision between motor car and unlighted motor cycle combination in which plaintiff a passenger—Plaintiff's knowledge that motor cycle combination had no lights—Lack of reasonable care by plaintiff for her own safety—Contributory negligence* [DAWRANT *v.* NUTT] 681
Damages. See NEGLIGENCE (Damages—*Personal injury*).
Unlighted motor vehicle stationary on dark night—Prima facie evidence of negligence, there being no street lighting [PARISH *v.* JUDD] 33

ROYAL FORCES
Civilian employee. *See* CROWN (Crown servant—*Dismissal*).

SAFE SYSTEM OF WORK
Permitting unsafe system to be in operation—*Whether workman required to plead and prove alternative system of work which would have been safe* [DIXON *v.* CEMENTATION CO., LTD.] .. 417

SALE OF GOODS
Offer for sale or invitation to treat. *See* CRIMINAL LAW (Dangerous weapons—*Flick knife*).

SALE OF LAND
Conveyance—*By parties to themselves. See* REAL PROPERTY (Conveyance by persons to themselves).

SCHEME OF ARRANGEMENT
See COMPANY.

SCIENTIFIC SOCIETY
Exemption from rating. *See* RATES (Exemption).

SENTENCE
See MAGISTRATES.

SEPARATION AGREEMENT
See HUSBAND AND WIFE (Separation deed).

SERVANT
Civilian employee at War Department depôt. *See* CROWN (Crown servant—*Dismissal*).

SETTLEMENT
Accumulation—*Accrual of son's share to daughter's settled share on his death under thirty—Arrangements to (1) expunge trust for accumulation and (2) confer interest in son's share on his children if he died under thirty—Arrangement (2) to avoid need for proceedings for rectification—Approval of (1) granted and (2) withheld—Variation of Trusts Act*, 1958 (*c.* 53), *s.* 1 [Re TINKER'S SETTLEMENT] 85
Investment—*Shares of exempt private company—Effect on exemption. See* COMPANY (Private company—*Exempt private company*).
Mental disorder—*Settlement by patient. See* MENTAL HEALTH (Jurisdiction).

SETTLEMENT—*continued.*
Revocation—*Power of revocation with consent. See* ESTATE DUTY (Settlement with reservation—*Revocation*).
Variation of trusts by the court—*Specified description or specified class—Next of kin entitled on death of applicant—Whether order of court binds existing potential next of kin—Variation of Trusts Act*, 1958 (*c.* 53), *s.* 1 (1) (*b*) [Re SUFFERT'S SETTLEMENT] 561

SHARE
Valuation for estate duty. *See* ESTATE DUTY (Company).

SHIPPING
Collision—*Action—Preliminary acts. See* ADMIRALTY (Practice).
Demurrage—*Computation—Lay days—Readiness for discharge—Vessel chartered to carry part cargo of flour—Option to owners to complete cargo en route to discharging port—Flour cargo overstowed by other cargo loaded en route—Lay days commencing only when all flour cargo accessible for discharge* [GOVERNMENT OF CEYLON *v.* SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS] 797
Time lost waiting for berth—Ship kept waiting because discharging berth not available—During waiting period ship not in physical condition to discharge cargo because of overstowage but ready in all other respects—Whether time spent waiting to count as discharging time [GOVERNMENT OF CEYLON *v.* SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS] .. 797
Limitation of liability—*Fund paid into court—Claims—Claim by harbour board for expenses of raising wreck, etc.—Claim by owners of wreck for liability to harbour board for excess of expenses over proceeds of sale of wreck, etc.—Double proof—Duty of harbour board to mitigate loss—Whether owners could claim against fund—Whether harbour board should give credit for amount of owners' claim—Mersey Docks and Harbour Board Act*, 1954 (*c.* xlv), *s.* 3 (3) [THE LIVERPOOL (No. 2)].. 307

SHOP
Display of goods in shop—*Whether offer for sale. See* CRIMINAL LAW (Dangerous weapons—*Flick knife*).

SOLICITOR
Costs—*Professional conduct—Petitioner's solicitor interviewing respondent to obtain confession of adultery—Exclusion of these costs from order for costs on granting decree nisi—Whether a judicial exercise of discretion—Need to show that costs unnecessarily incurred—R.S.C., Ord.* 65, *r.* 11 [DAVIES *v.* DAVIES] 248
Professional misconduct—*Divorce—Petitioner's solicitor interviewing respondent and taking written confession of matrimonial misconduct—Whether conduct unprofessional* [DAVIES *v.* DAVIES] 248

SPECIFIC PERFORMANCE
Summary procedure—*Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

STATUTE
Constitutional agreement—*Construed, where given force of law, by rules of construction applicable to statutes. See* PRIVY COUNCIL (Eastern Africa—*Uganda—Constitutional law*).
Construction—*Criminal and penal statutes—Failure to comply with any of the provisions of a Part of an Act—One section in that Part an exempting provision—Failure to comply with requirement of exempting enactment—Whether an offence—Pharmacy and Poisons Act*, 1933 (*c.* 25), *s.* 18, *s.* 19, *s.* 24 [R. *v.* STAINCROSS JUSTICES, *Ex parte* TEASDALE].. 572
Uncertainty [FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL] 503
White paper—Whether admissible for construing a document having the force of statute [KATIKIRO OF BUGANDA *v.* ATTORNEY-GENERAL] 849
Words interpreted in accordance with prior judicial interpretation of words in pari materia—Rent Act, 1957 (*c.* 25), *s.* 16 [THOMPSON *v.* STIMPSON] 500
Injunction against contravention. *See* INJUNCTION (Contravention of statute).
Retrospective operation—*Pending proceedings—Alteration of law after judgment and before appeal—Duty of Court of Appeal—Vested substantive right not to be interfered with—Distinction for matters of procedure—Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 27 (1)—*Supreme Court of Judicature (Amendment) Act*, 1959 (*c.* 39), *s.* 1 (1)—*R.S.C., Ord.* 58, *r.* 9 (3) [ATTORNEY-GENERAL *v.* VERNAZZA] 97

STATUTORY DUTY
Breach. *See* COAL MINING; FACTORY (Dangerous machinery).

STOCK EXCHANGE
Take over bid—*Intended misapplication of building society's funds. See* CRIMINAL LAW (Inducement to enter into agreement to dispose of shares).

STREET
See HIGHWAY.

SURTAX
Undistributed income—*Subsidiary company—Control—Control by reference to beneficial ownership of shares and control not by reference thereto contrasted—Joint ownership of share with controlling voting power—Voting rights in company whose name stands first on share register—Finance Act*, 1922 (*c.* 17), *s.* 21 (6)—*Finance Act*, 1936 (*c.* 34), *s.* 19 (1)—*Finance Act*, 1937 (*c.* 54), *s.* 14 (1) [INLAND REVENUE COMRS. *v.* HARTON COAL CO., LTD. (IN LIQUIDATION)] 48

TAXATION
Costs. *See* COSTS; LEGAL AID (Costs).

TENANCY
New—*Business premises. See* LANDLORD AND TENANT (New tenancy).
Option. *See* OPTION.
Year to year. *See* LANDLORD AND TENANT.

THIRD-PARTY PROCEDURE
County court—*Appeal. See* COUNTY COURT (Appeal).
See also PRACTICE.

TIME
Extension of time. *See* COURT OF APPEAL (Extension of time for appeal).
" Not less than four weeks before the date on which "—*Exclusive of both first and last days—Rent Act*, 1957 (*c.* 25), *s.* 16 [THOMPSON *v.* STIMPSON].. 500

PAGE

TITHE
Corn rent in lieu of tithe. *See* CORN RENTS (Assessment).

TOWN AND COUNTRY PLANNING
Development—*Permission for development—Condition—Permission to build cottages on condition that occupants employed in agriculture, etc.—Validity—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 14 (1), *s.* 36 [FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL] 503

Landlord and tenant. *See* LANDLORD AND TENANT (Agreement for lease—*Illegality*).

Validity of Minister's action—*Application to High Court to challenge validity—"Person aggrieved"—Refusal by local planning authority of permission to develop land by digging chalk—Appeal to Minister against refusal under s.* 16 *of Town and Country Planning Act*, 1947—*Local inquiry held at which objections made and evidence given by four adjoining landowners—Inspector's recommendation to Minister that appeal be dismissed on ground of detriment to adjoining landowners—Appeal allowed by Minister—Whether landowners persons aggrieved by Minister's action—Town and Country Planning Act*, 1959 (*c.* 53), *s.* 31 (1) (*b*) [BUXTON *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT] 408

TRADE
Restrictive practices. *See* RESTRICTIVE TRADE PRACTICES.

TRADE DISPUTE
Picketing—*Breach of peace anticipated—Obstruction of police—Right of police to take steps to prevent anticipated breach of peace—Whether police justified in limiting number of pickets—Discretion of police officer to take steps that he thought proper—Prevention of Crimes Amendment Act*, 1885 (*c.* 75), *s.* 2 [PIDDINGTON *v.* BATES, ROBSON *v.* RIBTON-TURNER].. 660

See also MASTER AND SERVANT.

TRADE MARK
False trade description—*Exemption from penalty claimed by employers—Procedure—Claim to exemption to be considered only after employers found guilty—Merchandise Marks Act*, 1926 (*c.* 53), *s.* 6 [R. *v.* EPSOM JUSTICES, *Ex parte* DAWNIER MOTORS, LTD.] 635

Rectification of register—*Expunging entry—Pending proceedings—Contempt of court—Alleged contempt by warning letters on behalf of registered proprietor. See* CONTEMPT OF COURT (Publications concerning legal proceedings).

TRADE UNION
Trade dispute. *See* MASTER AND SERVANT (Trade dispute).

TRADING WITH THE ENEMY
Custodian of enemy property—*Peace treaty—Transfer to administrator—Revival of beneficial rights* [FISCHLER *v.* ADMINISTRATOR OF ENEMY PROPERTY] 433

TRIAL
See CRIMINAL LAW.

TROVER
See BANK (Cheque—*Conversion*).

TRUST AND TRUSTEE
Appointment of new trustee—*Practice—Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

Charitable trust. *See* CHARITY.

Execution of trusts—*Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

Judicial trustee—*Appointment—Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

Uncertainty. *See* CHARITY (Uncertainty).

Variation of trusts by the court—*Exercise of special power of appointment as a preliminary step to proposed arrangement—Genuine intention to benefit objects of power—Possible advantage to appointor if scheme approved—Whether fraud on power—Whether proposed arrangement should be approved—Variation of Trusts Act*, 1958 (*c.* 53), *s.* 1 [Re ROBERTSON'S WILL TRUSTS] 146

Investment clause—Enlargement to include power to invest in equities—Form of clause—Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 [Re THOMPSON'S WILL TRUSTS].. 378

Specified description or specified class—Next of kin. See SETTLEMENT (Variation of trusts by the court—*Specified description or specified class*).

UGANDA
See PRIVY COUNCIL (Eastern Africa).

UMPIRE
See ARBITRATION (Procedure).

UNCERTAINTY
Condition. *See* TOWN AND COUNTRY PLANNING (Development—*Permission for development—Condition*).

VARIATION OF TRUST
Court, by. *See* TRUST AND TRUSTEE (Variation of trusts by the court).

Variation of Trusts Act, 1958. *See* SETTLEMENT (Variation of trusts by the court).

VERDICT
Unanimity. *See* CRIMINAL LAW (Trial—*Direction to jury*).

VESTING ORDER
Chancery Division—*Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

WAGES
Right to. *See* MASTER AND SERVANT.

WAR
Peace—*Administration of property—Revival of beneficial interests. See* TRADING WITH THE ENEMY (Custodian of enemy property).

WARD OF COURT
Jurisdiction—*Leave to take ward out of jurisdiction—Masters' powers. See* PRACTICE (Chambers—*Chancery Division*).

WATER SUPPLY
Pumping station—*Whether a factory. See* FACTORY (Definition).

WEIGHTS AND MEASURES
Prosecution—*Defence—Third party—Procedure—Appeal.* *See* TRADE MARK (False trade description—*Exemption from penalty claimed by employers—Procedure*).

WEST INDIES
See PRIVY COUNCIL.

WIFE
Property. *See* HUSBAND AND WIFE (Property).

WILL
Capital or income—*Tenant for life and remaindermen—Apportionment—Debenture—Scheme of arrangement—Cancellation of all unpaid interest on allotment of new securities and payment of cash—Apportionment of securities and cash—Companies Act*, 1948 (*c.* 38), *s.* 206 [Re MORRIS'S WILL TRUSTS] 548
Implication—*Moiety remaining "after my wife shall have received her jus relictae" bequeathed by testator domiciled in England—Whether implied gift of other moiety—Meaning of "moiety"* [Re ANGUS'S WILL TRUSTS] 835
Survivor—"*My surviving children*"—*Gift to testator's surviving children if any child should die without leaving issue—Interpretation of "survive" or "survivor"* [Re JAMES'S WILL TRUSTS] 744

WINDING-UP
Company, of. *See* COMPANY.

WINDWARD ISLANDS AND LEEWARD ISLANDS
See PRIVY COUNCIL (West Indies).

WITNESS
Criminal proceedings, in. *See* CRIMINAL LAW (Evidence).

WORKMAN
"Worker". *See* PRIVY COUNCIL (New Zealand—*Workman's compensation*).

WRIT
Amendment—*Parties.* *See* PRACTICE (Parties).

CASES NOTED

PAGE

Adams *v.* Adams (1842) (11 L.J.Ch. 305). *Followed in* Re Angus's Will Trusts 835

Alexander *v.* Rayson ([1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205). *Considered in* Storey *v.* Storey 279

Associated Provincial Picture Houses, Ltd. *v.* Wednesbury Corpn. ([1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641). *Applied in* Fawcett Properties, Ltd. *v.* Buckingham C.C. 503

Astle *v.* Astle ([1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6). *Followed in* Robins *v.* Robins 66

Atkinson, Re ([1904] 2 Ch. 160; 73 L.J.Ch. 585; 90 L.T. 825). *Applied in* Re Morris's Will Trusts 548

A.-G. *v.* Birmingham, Tame & Rea District Drainage Board ([1910] 1 Ch. 61; 79 L.J.Ch. 144; 101 L.T. 801). *Dictum of* FARWELL, L.J., *approved in* A.-G. *v.* Harris 207

A.-G. *v.* Esher Linoleum Co., Ltd. ([1901] 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414). *Distinguished in* Ware U.D.C. *v.* Gaunt 778

A.-G. *v.* Harris ([1959] 2 All E.R. 393; [1960] 1 Q.B. 31; [1959] 3 W.L.R. 205). *Reversed.* C.A. 207

A.-G. *v.* Johnson ([1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720). *Considered and criticised in* Philipson-Stow *v.* Inland Revenue Comrs. 814

A.-G. *v.* Premier Line, Ltd. ([1932] 1 Ch. 313; 101 L.J.Ch. 135; 146 L.T. 299). *Dictum of* EVE, J., *applied in* A.-G. *v.* Harris 207

A.-G. *v.* Sharp ([1930] All E.R. Rep. 746; [1931] 1 Ch. 133; 99 L.J.Ch. 446; 143 L.T. 370). *Dictum of* LAWRENCE, L.J., *applied in* A.-G. *v.* Harris 207

A.-G. *v.* Smith ([1958] 2 All E.R. 558; [1958] 2 Q.B. 180; [1958] 3 W.L.R. 88). *Dictum of* LORD GODDARD, C.J., *explained in* Best *v.* Glenville 478

Auger *v.* Beaudry ([1920] A.C. 1010; 89 L.J.P.C. 251; 124 L.T. 106). *Considered and applied in* Re James's Will Trusts 744

Baindail *v.* Baindail ([1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320). *Applied in* Sowa *v.* Sowa 196

Battersea Metropolitan Borough *v.* British Iron & Steel Research Assocn. ([1949] 1 K.B. 457; [1949] L.J.R. 654). *Dictum of* JENKINS, J., *approved in* Institution of Mechanical Engineers *v.* Cane 715

Bendall *v.* McWhirter ([1952] 1 All E.R. 1307; [1952] 2 Q.B. 466). *Considered in* Short *v.* Short 6

Benham *v.* Gambling ([1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290). *Distinguished in* Oliver *v.* Ashman 677

Benn, Re (1885) (29 Ch.D. 839; 53 L.T. 240). *Considered and applied in* Re James's Will Trusts 744

Blacker *v.* Blacker ([1960] 2 All E.R. 295, 296; [1960] 2 W.L.R. 807). *Observations of* WILLMER, L.J., *applied in* Jacobs *v.* Jacobs 578

Borthwick, Re ([1948] 2 All E.R. 635; [1948] Ch. 645; [1949] L.J.R. 50). *Applied in* Wine Shippers (London), Ltd. *v.* Bath House Syndicate, Ltd. 283

Brown *v.* National Coal Board ([1960] 1 All E.R. 108; [1960] 1 W.L.R. 67). *Affirmed.* C.A. 594

Bugle Press, Ltd., Re ([1960] 1 All E.R. 768; [1960] 2 W.L.R. 658). *Decision of* BUCKLEY, J., *affirmed* 791

Casey *v.* Casey ([1949] 2 All E.R. 117, 118; [1949] P. 433; [1949] L.J.R. 1649). *Principle stated by* SOMERVELL, L.J., *applied in* Ross Smith *v.* Ross Smith 70

Chester Corpn. *v.* Briggs ([1923] All E.R. Rep. 222; [1924] 1 K.B. 239; 93 L.J.K.B. 69; 130 L.T. 221). *Applied in* Ware U.D.C. *v.* Gaunt 778

Ching Garage, Ltd. *v.* Chingford Corpn. ([1959] 3 All E.R. 175; [1959] 1 W.L.R. 959). *Reversed.* C.A. 79

Churston Settled Estates, Re ([1954] 1 All E.R. 725; [1954] Ch. 334; [1954] 2 W.L.R. 386). *Approved in* Comr. of Estate and Succession Duties *v.* Bowring 188

Coats (J. & P.) *v.* Chadwick ([1894] 1 Ch. 347; 63 L.J.Ch. 328; 70 L.T. 228). *Distinguished in* Carl-Zeiss-Stiftung *v.* Rayner & Keeler, Ltd. 289

Colfar *v.* Coggins & Griffith (Liverpool), Ltd. ([1945] 1 All E.R. 328; [1945] A.C. 203; 114 L.J.K.B. 150; 172 L.T. 206). *Dictum of* VISCOUNT SIMON, L.C., *explained in* Dixon *v.* Cementation Co., Ltd. 417

Cotman *v.* Brougham ([1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162). *Considered and applied in* Anglo Overseas Agencies, Ltd. *v.* Green 244

Cox *v.* Cutler & Sons, Ltd. & Hampton Court Gas Co. ([1948] 2 All E.R. 667; [1949] L.J.R. 297). *Dictum of* SCOTT, L.J., *considered in* Longhurst *v.* Guildford Godalming and District Water Board 664

Crofts *v.* Waterhouse (1825) (4 L.J.O.S.C.P. 75). *Applied in* Parish *v.* Judd 33

Crown Bedding Co., Ltd. *v.* I.R. Comrs. ([1946] 1 All E.R. 452). *Applied in* Ackland & Pratten, Ltd. *v.* I.R. Comrs. 367

Dann *v.* Hamilton ([1939] 1 All E.R. 59; [1939] 1 K.B. 509; 108 L.J.K.B. 255; 160 L.T. 433). *Considered in* Dawrant *v.* Nutt 681

Daw *v.* Eley (1868) (L.R. 7 Eq. 49; 38 L.J.Ch. 113). *Distinguished in* Carl-Zeiss-Stiftung *v.* Rayner & Keeler, Ltd. 289

Duffy, Re ([1948] 2 All E.R. 760; [1949] Ch. 35; [1949] L.J.R. 137). *Followed in* Re Sutherland (*decd.*) 270

East Barnet U.D.C. *v.* Stacey ([1939] 2 All E.R. 624; [1939] 2 K.B. 867; 109 L.J.K.B. 54; 160 L.T. 563). *Dictum of* LORD HEWART, C.J., *considered and applied in* Ware U.D.C. *v.* Gaunt 778

Evans *v.* Bartlam ([1937] 2 All E.R. 648; [1937] A.C. 473; 106 L.J.K.B. 570; sub nom. Bartlam *v.* Evans, 157 L.T. 313). *Applied in* Miller *v.* Miller 115

—— ([1937] 2 All E.R. 656; [1937] A.C. 489; 106 L.J.K.B. 575; sub nom. Bartlam *v.* Evans, 157 L.T. 316). *Dictum of* LORD WRIGHT *considered in* Short *v.* Short 6

Fawcett Properties, Ltd. *v.* Buckingham C.C. ([1959] 2 All E.R. 321; [1959] Ch. 543; [1959] 2 W.L.R. 884). *Affirmed.* H.L. 503

Fenton, Re ([1930] All E.R. Rep. 15; [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273). *Applied in* The Liverpool (No. 2) 307

Finn *v.* Kerslake ([1931] All E.R. Rep. 242; [1931] A.C. 457; 100 L.J.K.B. 271; 145 L.T. 73). *Distinguished in* Almond *v.* Heathfield Laundry (Birmingham), Ltd. 700

Fishwick *v.* Gyani ([1925] 1 K.B. 617; 94 L.J.K.B. 392; 132 L.T. 761). *Considered in* Leach *v.* Litchfield 739

Fourmaids, Ltd. *v.* Dudley Marshall (Properties), Ltd. ([1957] 2 All E.R. 37; [1957] Ch. 321; [1957] 2 W.L.R. 934). *Dictum of* HARMAN, J., *not applied in* Braithwaite *v.* Winwood 642

G. *v.* M. (1885) (10 App. Cas. 171; 53 L.T. 398). *Followed in* G. *v.* G. (*otherwise* H.) 56

Gillingham Bus Disaster Fund, Re ([1958] 1 All E.R. 37; [1958] Ch. 300; [1957] 3 W.L.R. 1069). *Decision of* HARMAN, J., *applied in* Re Harpur's Will Trusts 237

Gilmour *v.* MacPhillamy ([1930] A.C. 712; 143 L.T. 606; *sub nom.* Re Charles Gilmour, 99 L.J.P.C. 199). *Considered and applied in* Re James's Will Trusts 744

Gladstone *v.* Bower ([1959] 3 All E.R. 475; [1960] 1 Q.B. 170; [1959] 3 W.L.R. 815). *Affirmed* C.A. 353

PAGE

Goldthorpe *v.* Bain ([1952] 2 All E.R. 23; [1952] 2 Q.B. 455). *Explained and distinguished in* Chung Kwok Hotel Co., Ltd. *v.* Field 143

Gresham Life Assurance Soc. *v.* Bishop ([1902] A.C. 287; 71 L.J.K.B. 618; 86 L.T. 693). *Distinguished in* Thomson *v.* Moyse 684

Hall *v.* Lietch (1870) (L.R. 9 Eq. 376; 23 L.T. 298). *Considered and distinguished in* Re Angus's Will Trusts 835

Harrison *v.* Harrison ([1901] 2 Ch. 136; 70 L.J.Ch. 551; 85 L.T. 39). *Considered and applied in* Re James's Will Trusts 744

Hart *v.* Tulk (1852) (22 L.J.Ch. 652; 21 L.T.O.S. 175). *Dictum of* KNIGHT BRUCE, L.J., *applied in* Re James's Will Trusts 744

Harvey *v.* Anning (1902) (87 L.T. 687). *Distinguished in* Cracknell *v.* Smith 569

Hawks *v.* Hawks & Fenwick (1876) (1 P.D. 137; 45 L.J.P. 41; 34 L.T. 659). *Followed in* Kelly *v.* Kelly and Brown 232

Hill (otherwise Petchey) *v.* Hill ([1959] 3 All E.R. 754; [1959] 3 W.L.R. 828). *Not followed in* Ross Smith *v.* Ross Smith 70

Hinckley & South Leicestershire Permanent Benefit Building Society *v.* Freeman ([1940] 4 All E.R. 212; [1941] Ch. 32; 110 L.J.Ch. 36; 164 L.T. 399). *Applied in* Braithwaite *v.* Winwood .. 642

Hoare *v.* M. & W. Grazebrook, Ltd. ([1957] 1 All E.R. 470; [1957] 1 W.L.R. 638). *Considered in* Eaves *v.* Morris Motors, Ltd. 656

Holmes Road, Kentish Town, Re Nos. 55 & 57 ([1958] 2 All E.R. 311; [1959] Ch. 298; [1958] 2 W.L.R. 975). *Applied in* Davies *v.* Elsby Brothers, Ltd. 672

Hughes *v.* Bank of New Zealand ([1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463). *Applied in* Cenlon Finance Co., Ltd. *v.* Ellwood 390

Hutchinson *v.* Hutchinson ([1947] 2 All E.R. 792). *Considered in* Short *v.* Short 6

Hyde *v.* Hyde (1866) (L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188). *Applied in* Sowa *v.* Sowa 196

Inderwick *v.* Tatchell ([1903] A.C. 120; 72 L.J.Ch. 393; 88 L.T. 399). *Considered and applied in* Re James's Will Trusts 744

Inland Revenue Comrs. *v.* Brooks ([1915] A.C. 478; 84 L.J.K.B. 404; 112 L.T. 523). *Applied in* Cenlon Finance Co., Ltd. *v.* Ellwood 390

Inland Revenue Comrs. *v.* Forrest (1890) (15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36). *Considered in* Institution of Mechanical Engineers *v.* Cane 715

Inland Revenue Comrs. *v.* Gordon ([1952] 1 All E.R. 866; [1952] A.C. 552). *Not followed in* Thomson *v.* Moyse 684

Inland Revenue Comrs. *v.* National Book League ([1957] 2 All E.R. 644; [1957] Ch. 488; [1957] 3 W.L.R. 222). *Distinguished in* Barclays Bank, Ltd. *v.* Naylor 173

Institution of Mechanical Engineers *v.* Cane ([1960] 1 All E.R. 129; [1960] 1 Q.B. 388; [1960] 2 W.L.R. 48). *Affirmed.* H.L. 715

Karsberg (B.), Ltd., Re ([1955] 3 All E.R. 854; [1956] 1 W.L.R. 57). *Considered and distinguished in* Re Vuma, Ltd. 629

Keating *v.* Horwood ([1926] All E.R. Rep. 88; 135 L.T. 29). *Distinguished in* Fisher *v.* Bell .. 731

Kinnane *v.* Kinnane ([1953] 2 All E.R. 1144; [1954] P. 41; [1953] 3 W.L.R. 782). *Applied in* Cooke *v.* Cooke 39

Lambeth Overseers *v.* London County Council ([1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795). *Distinguished in* Clayton *v.* Kingston-upon-Hull Corpn. 840

Langrick *v.* Langrick & Funnell ([1920] P. 90; 89 L.J.P. 114; 123 L.T. 94). *Applied in* Jackson *v.* Jackson and Pavan 621

Laurie *v.* Raglan Building Co., Ltd. ([1941] 3 All E.R. 332; [1942] 1 K.B. 152; 111 L.J.K.B. 292; 166 L.T. 63). *Considered in* Storey *v.* Storey 279

Leconfield, Re (1904) (90 L.T. 399). *Considered in* Re Duke of Bedford (*decd.*) 756

Lewis *v.* High Duty Alloys, Ltd. ([1957] 1 All E.R. 740; [1957] 1 W.L.R. 632). *Considered and criticised in* Eaves *v.* Morris Motors, Ltd. 656

Lightbound *v.* Higher Bebington Local Board (1885) (16 Q.B.D. 584, 585; 55 L.J.M.C. 96; 53 L.T. 813). *Dictum of* BOWEN, L.J., *applied in* Ware U.D.C. *v.* Gaunt 778

Lilley *v.* Roney (1892) (61 L.J.Q.B. 727). *Distinguished in* Lincoln *v.* Daniels 205

Liverpool (No. 2), The ([1960] 1 All E.R. 465; [1960] 2 W.L.R. 541). *Reversed.* C.A. 307

Lockett *v.* Withey (1908) (99 L.T. 838). *Criticised in* R. *v.* Nottingham JJ., *Ex p.* Brown 625

Longhurst *v.* Guildford Godalming and District Water Board ([1960] 1 All E.R. 54; [1960] 2 W.L.R. 383). *Decision of* LORD PARKER, C.J., *affirmed in part* 664

Lyderhorn Sailing Ship Co., Ltd. *v.* Duncan Fox & Co. ([1909] 2 K.B. 929; 79 L.J.K.B. 105; 101 L.T. 295; 11 Asp. M.L.C. 291). *Applied in* Government of Ceylon *v.* Société Franco-Tunisienne d'Armement-Tunis 779

Mabro *v.* Eagle Star & British Dominions Insurance Co., Ltd. ([1932] All E.R. Rep. 411; [1932] 1 K.B. 485; 101 L.J.K.B. 205; 146 L.T. 433). *Applied in* Davies *v.* Elsby Brothers, Ltd. .. 672

Maitland *v.* R.T. & J. Raisbeck & Hewitt, Ltd. ([1944] 2 All E.R. 272; [1944] K.B. 689; 113 L.J.K.B. 549; 171 L.T. 118). *Applied in* Parish *v.* Judd 33

Malcolm *v.* Cheek ([1947] 2 All E.R. 881; [1948] 1 K.B. 400; [1948] L.J.R. 388). *Applied in* R. *v.* Epsom JJ., *Ex p.* Dawnier Motors, Ltd. 635

Manley *v.* Sartori ([1926] All E.R. Rep. 663; [1927] 1 Ch. 163; 96 L.J.Ch. 67; 136 L.T. 239). *Dictum of* ROMER, J., *applied in* Burdett-Coutts *v.* I.R. Comrs. 153

Margate Corpn. *v.* Roach ([1960] 3 All E.R. 774). *Followed in* Ware U.D.C. *v.* Gaunt 778

Marrison *v.* Bell ([1939] 1 All E.R. 745; [1939] 2 K.B. 187; 108 L.J.K.B. 481; 160 L.T. 276). *Applied in* Orman *v.* Saville Sportswear, Ltd. 105

Melton, Re ([1918] 1 Ch. 60; 87 L.J.Ch. 29; 117 L.T. 690). *Dictum of* SCRUTTON, L.J., *applied in* The Liverpool (No. 2) 307

Miller, Re ([1914] 1 Ch. 511; 83 L.J.Ch. 457; 110 L.T. 505). *Considered in* Philipson-Stow *v.* Inland Revenue Comrs. 814

Moore *v.* Hewitt ([1947] 2 All E.R. 270; [1947] K.B. 831; [1947] L.J.R. 1276; 177 L.T. 576). *Distinguished in* Cracknell *v.* Smith 569

Moses, Re ([1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519). *Considered in* Philipson-Stow *v.* Inland Revenue Comrs. 814

National Assocn. of Local Government Officers *v.* Bolton Corpn. ([1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312). *Considered in* Bird *v.* O'Neal 254

New Plymouth Borough Council *v.* Taranaki Electric Power Board ([1933] A.C. 682; 102 L.J.P.C. 213; 149 L.T. 594). *Dictum of* LORD MACMILLAN *considered in* Ware U.D.C. *v.* Gaunt .. 778

North River Freighters, Ltd. *v.* H.E. The President of India ([1956] 1 All E.R. 50; [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117). *Applied in* Government of Ceylon *v.* Société Franco-Tunisienne d'Armement-Tunis 797

—— ([1956] 1 All E.R. 59; [1956] 1 Q.B. 350; [1956] 2 W.L.R. 130). *Dictum of* PARKER, L.J., *considered in* Government of Ceylon *v.* Société Franco-Tunisienne d'Armement-Tunis 797

Ogden, Re ([1933] All E.R. Rep. 720; [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162). *Applied in* Re Harpur's Will Trusts 237

O'Grady *v.* M. Saper, Ltd. ([1940] 3 All E.R. 527; [1940] 2 K.B. 469; 109 L.J.K.B. 785; 163 L.T. 165). *Applied in* Orman *v.* Saville Sportswear, Ltd. 105

PAGE

Oriental Commercial Bank, Re (1871) (7 Ch. App. 103; 41 L.J.Ch. 218; 25 L.T. 650). *Dictum of* MELLISH, L.J., *applied in* The Liverpool (No. 2) 307
O'Sullivan *v.* English Folk Dance & Song Soc. ([1955] 2 All E.R. 853; [1955] 1 W.L.R. 923). *Dictum of* SIR RAYMOND EVERSHED, M.R., *approved in* Institution of Mechanical Engineers *v.* Cane . . 715
Pachner *v.* Parker (formerly Pachner) ([1960] 1 All E.R. 159; [1960] 1 W.L.R. 486). *Applied in* Eaketts *v.* Eaketts 581
Palmer *v.* Palmer ([1954] 3 All E.R. 497; [1955] P. 9; [1954] 3 W.L.R. 761). *Dictum of* HODSON, L.J., *followed in* Sofaer *v.* Sofaer 468
Parry *v.* Aluminium Corpn., Ltd. (1940) (162 L.T. 236). *Considered in* Storey *v.* Storey 279
Parvin *v.* Morton Machine Co., Ltd. ([1952] 1 All E.R. 670; [1952] A.C. 515). *Applied in* Cherry *v.* International Alloys, Ltd. 264
Pennington, Re ([1914] 1 Ch. 203; 109 L.T. 814). *Explained and Distinguished in* Re Morris's Will Trusts 548
Perpetual Exors. & Trustees Assocn. of Australia, Ltd. *v.* Australia (Commonwealth) Taxation Comr. ([1954] 1 All E.R. 339; [1954] A.C. 114; [1954] 2 W.L.R. 171). *Applied in* Burdett-Coutts *v.* I.R. Comrs. 153
Perrins *v.* Draper ([1953] 2 All E.R. 863; [1953] 1 W.L.R. 1178). *Followed in* National Pig Progeny Testing Board *v.* Greenall 556
Petrie *v.* MacFisheries, Ltd. ([1939] 4 All E.R. 281; [1940] 1 K.B. 258; 109 L.J.K.B. 263; 161 L.T. 408). *Applied in* Orman *v.* Saville Sportswear, Ltd. 105
Philipson-Stow *v.* Inland Revenue Comrs. ([1959] 3 All E.R. 879; [1960] Ch. 313; [1960] 2 W.L.R. 32). *Reversed.* H.L. 814
Phillips *v.* Brooks, Ltd. ([1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249). *Considered and distinguished in* Ingram *v.* Little 332
Piercy, Re ([1895] 1 Ch. 83; 64 L.J.Ch. 249; 71 L.T. 745). *Considered in* Philipson-Stow *v.* Inland Revenue Comrs. 814
Pinson *v.* Lloyds & National Provincial Foreign Bank, Ltd. ([1941] 2 All E.R. 641, 644; [1941] 2 K.B. 80, 84; 110 L.J.K.B. 661, 664; 165 L.T. 363, 364). *Dicta of* GODDARD, L.J., *and of* STABLE, J., *as applied by* HARMAN, J., in Duke's Court Estates, Ltd. *v.* Associated British Engineering, Ltd. ([1948] 2 All E.R. 140; [1948] 1 Ch. 463), *applied in* I.R. Comrs. *v.* Jackson . . 31
Pope *v.* D. Murphy & Son, Ltd. ([1960] 2 All E.R. 873; [1960] 2 W.L.R. 861). *Followed in* Oliver *v.* Ashman 677
Pyx Granite Co., Ltd. *v.* Ministry of Housing and Local Government ([1958] 1 All E.R. 633; [1958] 1 Q.B. 572; [1958] 2 W.L.R. 384). *Dictum of* LORD DENNING *applied in* Fawcett Properties, Ltd. *v.* Buckingham C.C. 503
Quartz Hill Gold Mining Co. *v.* Eyre (1883) (11 Q.B.D. 674; 52 L.J.K.B. 488; 49 L.T. 249). *Applied in* Berry *v.* British Transport Commission 322
—— (11 Q.B.D. 690; 52 L.J.Q.B. 493; 49 L.T. 251). *Dicta of* BOWEN, L.J., *applied in* Berry *v.* British Transport Commission 322
Quilter *v.* Mapleson (1882) (9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561). *Considered in* A.-G. *v.* Vernazza 97
R. *v.* Bates ([1952] 2 All E.R. 842). *Not followed in* R. *v.* Grunwald 381
R. *v.* Birch (1924) (93 L.J.K.B. 385). *Followed in* R. *v.* Golder 457
R. *v.* Dawson ([1960] 1 All E.R. 558; [1960] 1 W.L.R. 163). *Applied in* R. *v.* Davey 533
R. *v.* Derby Recorder, *Ex p.* Spalton ([1944] 1 All E.R. 721; [1944] K.B. 611; 113 L.J.K.B. 556; 171 L.T. 222). *Applied in* R. *v.* Epsom JJ., *Ex p.* Dawnier Motors, Ltd. 635
R. *v.* Hughes (1879) (4 Q.B.D. 614; 48 L.J.M.C. 151; 40 L.T. 685). *Distinguished in* R. *v.* Nottingham JJ., *Ex p.* Brown 625
R. *v.* Linnaean Soc. of London (1854) (23 L.T.O.S. 186; *sub nom.* Linnean Soc. of London *v.* St. Anne's, Westminster (Churchwardens & Overseers), 23 L.J.M.C. 148). *Distinguished in* Institution of Mechanical Engineers *v.* Cane 715
R. *v.* London & Southampton Ry. Co. (1839) (8 L.J.Q.B. 220). *Applied in* Pearl *v.* L.C.C. . . 588
R. *v.* MacKinnon ([1958] 3 All E.R. 657; [1959] 1 Q.B. 150; [1958] 3 W.L.R. 688). *Not followed in* R. *v.* Grunwald 381
R. *v.* Miles (1890) (24 Q.B.D. 423; 59 L.J.M.C. 56; 62 L.T. 572). *Explained and approved in* R. *v.* Hogan 149
R. *v.* Mills ([1939] 2 All E.R. 299; [1939] 2 K.B. 90; 108 L.J.K.B. 449; 160 L.T. 439). *Followed in* R. *v.* Davey 533
R. *v.* National Arbitration Tribunal, *Ex p.* Bolton Corpn. ([1941] 2 All E.R. 800; [1941] 2 K.B. 405; 110 L.J.K.B. 622). *Considered in* Bird *v.* O'Neal 254
R. *v.* Smith ([1960] 2 All E.R. 450; [1960] 3 W.L.R. 92). *Reversed.* H.L. 161
R. *v.* Steane ([1947] 1 All E.R. 813; [1947] K.B. 997; [1947] L.J.R. 969; 177 L.T. 122). *Distinguished in* Director of Public Prosecutions *v.* Smith 161
R. *v.* Ward ([1956] 1 All E.R. 565; [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423). *Explained in* Director of Public Prosecutions *v.* Smith 161
Ramsden *v.* Ramsden ([1954] 2 All E.R. 623; [1954] 1 W.L.R. 1105). *Dictum of* LORD MERRIMAN, P., *adopted in* Storey *v.* Storey 279
Rayson *v.* South London Tramways Co. ([1893] 2 Q.B. 304; 62 L.J.Q.B. 593; 69 L.T. 491). *Considered and criticised in* Berry *v.* British Transport Commission 322
Read *v.* Donovan ([1947] 1 All E.R. 37; [1947] K.B. 326; [1947] L.J.R. 849; 176 L.T. 124). *Considered in* Moore *v.* Gooderham 575
Reed (Dennis), Ltd. *v.* Goody ([1950] 1 All E.R. 927; [1950] 2 K.B. 292). *Dictum of* HODSON, J., *applied in* Drewery *v.* Ware-Lane 529
Reigate *v.* Union Manufacturing Co. (Ramsbottom) ([1918] 1 K.B. 605; 87 L.J.K.B. 730; 118 L.T. 483). *Dicta of* SCRUTTON, L.J., *applied in* Orman *v.* Saville Sportswear, Ltd. 105
Richards *v.* Richards & Flockton (1940) (111 L.J.P. 20 n.). *Followed in* Kelly *v.* Kelly and Brown 232
Richmond (Surrey) Corpn. *v.* Robinson ([1955] 1 All E.R. 321; *sub nom.* Robinson *v.* Richmond (Surrey) B.C., [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333). *Explained and distinguished in* Margate Corpn. *v.* Roach 774
—— *Distinguished in* Ware U.D.C. *v.* Gaunt 778
Rider *v.* Ford ([1923] All E.R. Rep. 562; [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347). *Distinguished in* Longmuir *v.* Kew 26
Riordan *v.* War Office ([1959] 3 All E.R. 552; [1959] 1 W.L.R. 1046). *Affirmed.* C.A. 774*n*
Ritz Cleaners, Ltd. *v.* West Middlesex Assessment Committee ([1937] 2 All E.R. 368; [1937] 2 K.B. 642; 106 L.J.K.B. 398; 157 L.T. 423). *Distinguished in* Almond *v.* Heathfield Laundry (Birmingham), Ltd. 700
Rogers *v.* News of the World (*Cited by* SELLERS, L.J., *in* Kimpton *v.* Steel Co. of Wales, Ltd. ([1960] 2 All E.R. 277; [1960] 1 W.L.R. 530)). *Dictum of* LORD EVERSHED, M.R., *applied in* Cherry *v.* International Alloys, Ltd. 264
Roland-Linie Schiffahrt G.m.b.H. *v.* Spillers, Ltd. ([1956] 3 All E.R. 383; [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620). *Applied in* Government of Ceylon *v.* Société Franco-Tunisienne d'Armement-Tunis 797
St. Martin's Theatre, Re ([1959] 3 All E.R. 298; [1959] 1 W.L.R. 872). *Explained in* Wine Shippers (London), Ltd. *v.* Bath House Syndicate, Ltd. 283

PAGE

Salomon *v.* Salomon & Co. ([1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426). *Applied in* Lee *v.* Lee's Air Farming, Ltd. 420

Savoy Overseers *v.* Art Union of London ([1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497). *Applied in* Institution of Mechanical Engineers *v.* Cane 715

Schneider *v.* Eisovitch ([1960] 1 All E.R. 169; [1960] 2 W.L.R. 169). *Criticised in* Gage *v.* King 62

Scott, Re, ([1916] 2 Ch. 268; 85 L.J.Ch. 528; 114 L.T. 1114). *Applied in* Re Duke of Bedford (*decd.*) 756

Scott *v.* Scott ([1959] 1 All E.R. 535; [1959] P. 108; [1959] 2 W.L.R. 501). *Dictum of* SACHS, J., *not followed in* G. *v.* G. (*otherwise* H.) 56

Scremby Corn Rents, Re ([1960] 2 All E.R. 650; [1960] 1 W.L.R. 668). *Affirmed.* C.A. .. 462

Sheffield Corpn. *v.* Luxford ([1929] All E.R. Rep. 583; [1929] 2 K.B. 182-184; 98 L.J.K.B. 514; 141 L.T. 267). *Dictum of* TALBOT, J., *considered in* SHORT *v.* SHORT 6

Sidebotham, Re (1880) (14 Ch.D. 465; 49 L.J.Bcy. 43; 42 L.T. 785). *Dictum of* JAMES, L.J., *applied in* Buxton *v.* Minister of Housing and Local Government 408

Smith *v.* Law Guarantee & Trust Society, Ltd. ([1904] 2 Ch. 569; 73 L.J.Ch. 733; 91 L.T. 545). *Applied in* Re Morris's Will Trusts 548

Sneddon *v.* Lord Advocate ([1954] 1 All E.R. 255; [1954] A.C. 257; [1954] 2 W.L.R. 211). *Considered in* Re Prenn's Settlement 564

Starkie *v.* Starkie (No. 2) ([1953] 2 All E.R. 1523; [1954] 1 W.L.R. 106). *Observations of* LORD MERRIMAN, P., *applied in* Cooke *v.* Cooke 39

Stephens *v.* Mysore Reefs (Kangundy) Mining Co., Ltd. ([1902] 1 Ch. 745; 71 L.J.Ch. 295; 86 L.T. 221). *Not followed in* Anglo Overseas Agencies, Ltd. *v.* Green 244

Sterne *v.* Sterne ([1957] 1 All E.R. 792; [1957] P. 168; [1957] 2 W.L.R. 544). *Explained in* Slater *v.* Slater 217

Stewart *v.* Stewart ([1947] 2 All E.R. 814; [1948] 1 K.B. 513; [1948] L.J.R. 801). *Observations of* TUCKER, L.J., *applied in* Short *v.* Short 6

Stollery, Re ([1926] All E.R. Rep. 67; [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430). *Applied in* Jackson *v.* Jackson and Pavan 621

Stow Bardolph Gravel Co., Ltd. *v.* Poole ([1954] 3 All E.R. 637; [1954] 1 W.L.R. 1503). *Followed in* H. J. Rorke, Ltd. *v.* I.R. Comrs. 359

Straker *v.* Kidd (1878) (3 Q.B.D. 225; 47 L.J.Q.B. 366; 4 Asp. M.L.C. 34). *Dicta of* LUSH, J., *considered and not followed in* Government of Ceylon *v.* Société Franco-Tunisienne d'Armement-Tunis 797

Strand & Savoy Properties, Ltd., Re ([1960] 2 All E.R. 327; [1960] 3 W.L.R. 1). *Followed in* Weg Motors, Ltd. *v.* Hales 762

Sugden *v.* Sugden ([1957] 1 All E.R. 302; [1957] P. 134; [1957] 2 W.L.R. 213). *Dictum of* DENNING, L.J., *applied in* Kelly *v.* Kelly and Brown 232

Sutherland (*decd.*), Re ([1959] 2 All E.R. 682; [1960] Ch. 134; [1959] 3 W.L.R. 543). *Affirmed.* C.A. 270

Thompson *v.* Milk Marketing Board ([1952] 2 All E.R. 344; [1952] 2 Q.B. 817). *Followed in* National Pig Progeny Testing Board *v.* Greenall 556

Thomson *v.* Moyse ([1959] 1 All E.R. 660; [1959] Ch. 464; [1959] 2 W.L.R. 577). *Reversed.* H.L. 684

Toogood & Sons, Ltd. *v.* Green ([1932] All E.R. Rep. 309; [1932] A.C. 663; 101 L.J.K.B. 453; 147 L.T. 201). *Applied in* Almond *v.* Heathfield Laundry (Birmingham), Ltd. 700

Union Bank of Australia, Ltd. *v.* McClintock ([1922] 1 A.C. 240; 91 L.J.P.C. 108; 126 L.T. 588). *Applied in* Commercial Banking Company of Sydney, Ltd. *v.* Mann 482

Vernazza, Re ([1960] 1 All E.R. 183; [1960] 1 Q.B. 197; [1960] 2 W.L.R. 135). *Reversed in part.* H.L. 97

Waite *v.* Littlewood (1872) (8 Ch. App. 70; 42 L.J.Ch. 216; 28 L.T. 123). *Considered and applied in* Re James's Will Trusts 744

Wake *v.* Varah (1876) (2 Ch.D. 348; 45 L.J.Ch. 533; 34 L.T. 437). *Considered and applied in* Re James's Will Trusts 744

Walkling, Ltd. *v.* Robinson ([1929] All E.R. Rep. 658; 99 L.J.K.B. 171; 143 L.T. 105). *Explained and distinguished in* R. *v.* Epsom JJ., *Ex p.* Dawnier Motors, Ltd. 635

Wiffen *v.* Bailey & Romford Urban Council ([1915] 1 K.B. 600; 84 L.J.K.B. 688; 112 L.T. 274). *Applied in* Berry *v.* British Transport Commission 322

Wiles *v.* Maddison ([1943] 1 All E.R. 315; 168 L.T. 280). *Distinguished in* Fisher *v.* Bell. .. 731

Wilson *v.* Wilson ([1958] 3 All E.R. 195; [1958] 1 W.L.R. 1090). *Considered in* Storey *v.* Storey 279

Wine Shippers (London), Ltd. *v.* Bath House Syndicate, Ltd. ([1960] 2 All E.R. 511; [1960] 1 W.L.R. 613). *Reversed.* C.A. 283

Woodcock (Jess B.) & Sons, Ltd. *v.* Hobbs ([1955] 1 All E.R. 455; [1955] 1 W.L.R. 152). *Considered in* Short *v.* Short 6

STATUTES, ETC., NOTED

PAGE

PUBLIC GENERAL STATUTES

Affiliation Proceedings Act, 1957 (*c.* 55), *s.* 4 .. 569
Agricultural Holdings Act, 1948 (*c.* 63)—
s. 2 (1) .. 353
s. 24 (2) (*d*) .. 429
Attorneys' and Solicitors' Act, 1870 (*c.* 28), *s.* 19 .. 232
Bankruptcy Act, 1914 (*c.* 59), *Sch.* 2, *r.* 13 (*c*) .. 315
Births and Deaths Registration Act, 1953 (*c.* 20), *ss.* 10, 34 .. 621
Charitable Trusts (Validation) Act, 1954 (*c.* 58), *ss.* 1 (1), 2, 3 (1), (2), (3) .. 237
Companies Act, 1948 (*c.* 38)—
s. 129 .. 564
s. 141 .. 222
s. 206 .. 548
s. 209 (1) .. 791
s. 346 (1) .. 629
Sch. 7, *para.* 3 (1), (6) .. 564
County Courts Act, 1959 (*c.* 22), *s.* 109 (2) .. 735
Debts Clearing Offices and Import Restrictions Act, 1934 (*c.* 31), *s.* 1 .. 433
Divorce (Insanity and Desertion) Act, 1958 (*c.* 54), *s.* 3 .. 21
Dogs Act, 1871 (*c.* 36), *s.* 2 .. 625, 653
Factories Act, 1937 (*c.* 67)—
s. 14 (1) .. 264, 656
s. 137 (1) .. 635
s. 151 (1) (*b*), (iii), (6) .. 664
Finance Act, 1894 (*c.* 30), *s.* 7 (5) .. 270
Finance Act, 1922 (*c.* 17), *s.* 21 (6) .. 48
Finance Act, 1930 (*c.* 28), *s.* 40 .. 756
Finance Act, 1936 (*c.* 34), *s.* 19 (1) .. 48
Finance Act, 1937 (*c.* 54)—
s. 14 (1) .. 48
s. 20 (2) (*b*) .. 367
Finance Act, 1940 (*c.* 29), *ss.* 50, 55 .. 270
Finance Act, 1947 (*c.* 35)—
s. 35 (1) (*c*) .. 367
s. 36 (1) .. 75
(4) .. 367
Finance Act, 1949 (*c.* 47), *s.* 28 (2) .. 814
Finance Act, 1951 (*c.* 43), *s.* 32 (1), (3), (4) .. 367
Finance Act, 1954 (*c.* 44), *s.* 28 (1) .. 153
Firearms Act, 1937 (*c.* 12)—
s. 4 (7) .. 632
ss. 19 (1), 32 (1) .. 575
Food and Drugs Act, 1955 (*c.* 16), *s.* 113 (1) .. 635
Highway Act, 1835 (*c.* 50), *s.* 23 .. 774, 778
Highways Act, 1959 (*c.* 25), *ss.* 67 (1), (2), (3), 68 (1), 85 (1), (3) .. 79
Homicide Act, 1957 (*c.* 11), *s.* 2 (1) .. 1
Income Tax Act, 1918 (*c.* 40), *Sch. D, Case IV*, *r.* 2, *Case V*, *r.* 2 .. 684
Income Tax Act, 1952 (*c.* 10)—
ss. 41 (1), 50 (2), 122 .. 390
s. 123 (1), *Sch. D, Case I* .. 390, 832
Case II .. 832
s. 137 .. 359
s. 292 .. 270
s. 510 (1) .. 399
Landlord and Tenant Act, 1954 (*c.* 56)—
s. 29 (1) .. 583
s. 30 (1) (*f*) .. 283
ss. 33, 34, 69 (2) .. 583
Law of Property Act, 1925 (*c.* 20)—
ss. 52, 54 (2), 72 (4) .. 810
ss. 142 (1), 149 (3) .. 762
s. 205 (1) (ii) .. 810
Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41), *s.* 1 (1) .. 232
Legal Aid and Advice Act, 1949 (*c.* 51), *s.* 12 (1) .. 488
Lunacy Act, 1890 (*c.* 5), *s.* 330 (as substituted by Mental Treatment Act, 1930 (*c.* 23), *s.* 16 (1)) 182
Magistrates' Courts Act, 1952 (*c.* 55)—
s. 27 (1) .. 739
s. 42 .. 625
s. 84 (1) .. 635
s. 100 (1) .. 625
s. 126 (1), (3) .. 739
Maintenance Orders Act, 1958 (*c.* 39), *s.* 4 (2) (*a*), (7) .. 115
Married Women's Property Act, 1882 (*c.* 75), *s.* 17 .. 6
Matrimonial Causes Act, 1950 (*c.* 25)—
s. 19 (1) .. 217
(3), *s.* 29 .. 581
Matrimonial Causes (Property and Maintenance) Act, 1958 (*c.* 35), *s.* 1 .. 581
Medical Act, 1956 (*c.* 76), *s.* 33 (1) (*b*) .. 255
Mental Health Act, 1959 (*c.* 72), *ss.* 102 (1) (*b*), (*c*), 103 (1) (*d*) .. 447
Merchandise Marks Act, 1926 (*c.* 53), *s.* 6 .. 635
Mines and Quarries Act, 1954 (*c.* 70), *s.* 48 (1), (2) .. 594
National Insurance Act, 1946 (*c.* 67), *s.* 8 .. 739
Offences against the Person Act, 1861 (*c.* 100), *s.* 18 .. 161
Patents Act, 1949 (*c.* 87) .. 593
Pharmacy and Poisons Act, 1933 (*c.* 25), *ss.* 18, 19, 24 .. 572

PAGE

Prevention of Crimes Amendment Act, 1885 (*c.* 75), *s.* 2 660
Prevention of Fraud (Investments) Act, 1958 (*c.* 45), *s.* 13 (1) 380
Private Street Works Act, 1892 (*c.* 57)—
s. 5 774
s. 6 778
Rating and Valuation (Apportionment) Act, 1928 (*c.* 44)—
s. 2 (2) 556
s. 3 (1) (4) 700
Registered Designs Act, 1949 (*c.* 88) 593
Regulation of Railways Act, 1868 (*c.* 119), *s.* 22 322
Rent Act, 1957 (*c.* 25), *s.* 16 500
Restriction of Offensive Weapons Act, 1959 (*c.* 37), *s.* 1 (1) 731
Restrictive Trade Practices Act, 1956 (*c.* 68)—
s. 6 (1) 541
ss. 12, 20 (3) 809
s. 21 (1) (*b*) 122, 541
(*g*) 122
Sale of Food (Weights and Measures) Act, 1926 (*c.* 63), *s.* 12 (5) 635
Scientific Societies Act, 1843 (*c.* 36), *s.* 1 715
Shops Act, 1950 (*c.* 28), *s.* 71 (6) 635
Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 4 39
Supreme Court of Judicature (Amendment) Act, 1959 (*c.* 39), *s.* 1 (1) 97
Town and Country Planning Act, 1947 (*c.* 51)—
s. 12 (1) 478
ss. 14 (1), 36 503
Town and Country Planning Act, 1959 (*c.* 53), *s.* 31 (1) (*b*) 408
Variation of Trusts Act, 1958 (*c.* 53)—
s. 1 .. .. 85, 146, 378
(1) (*b*) 561

PRIVATE STATUTES

Mersey Docks and Harbour Board Act, 1954 (*c. xlv*), *s.* 3 (3) 307
Metropolitan Paving Act, 1817 (*c. xxix*), *s.* 90 588

COMMONWEALTH AND DEPENDENCIES

Buganda Agreement, 1955 (Laws of Uganda, 1955, p. 383), *art.* 7 (2), *Sch.* 2, *reg.* 5 849
Estate and Succession Duties Act, 1941 (Laws of Barbados, No. 16 of 1941), *s.* 3 (*a*) .. 188
Kenya Criminal Procedure Code (Laws of Kenya, 1948, *c.* 27), *s.* 82 (1) 398
Marriage Ordinance, 1884 (*c.* 127 of Laws of the Gold Coast (1951) Revised), *s.* 44 196
New South Wales Valuation of Land Act, 1916-1951, *s.* 6 449
New Zealand Workers' Compensation Act, 1922 (1922, No. 39), as amended, *s.* 2 420
Royal Instruction dated June 5, 1920 (Laws of Uganda, 1951, Vol. VI, p. 104), *cll. XVA, XXV, XXVI* (as amended by Royal Instructions dated Dec. 17, 1957 (Laws of Uganda, 1957, p. 435)) 849
Trade Disputes (Arbitration and Inquiry) Act, 1939 (Leeward Islands No. 17 of 1939), *s.* 2 (1) 254
Trade Unions Act, 1939 (Leeward Islands No. 16 of 1939), *s.* 2, as amended 254

RULES

Companies (Winding-up) Rules, 1949 (*S.I.* 1949 *No.* 330), *r.* 33 460
County Court Rules, 1936 (as amended), *Ord.* 40, *r.* 8 (2) Form 336 583
Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619)—
r. 3 (2) 578
(3), *proviso* (ii) 581
r. 61 115
Prison Rules, 1949 (*S.I.* 1949 *No.* 1073), *r.* 42 (13) 149
R.S.C.—
Ord. 16, *r.* 11 (1), *Ord.* 16A, *r.* 11 (1) 805
Ord. 19, *rr.* 7, 19 31
r. 28 (1) 612
Ord. 53A 593
Ord. 53F 593
Ord. 55, *r.* 15 497
Ord. 58, *r.* 4 (1) 6
r. 9 (3) 97
Ord. 58A, *r.* 3 (4), (5) 556
Ord. 65, *r.* 11 248
Rules of the Supreme Court (Chancery Provisions), 1954 (*S.I.* 1954, *No.* 1728) 497
Rules of the Supreme Court (No. 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *r*, 35 .. .. .. 414, 448, 499

REGULATIONS

Legal Aid (General) Regulations, 1950 (*S.I.* 1950 *No.* 1395), *reg.* 14 (4), (5), (6), as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (*S.I.* 1954 *No.* 166) and Legal Aid (General) (Amendment No. 2) Regulations, 1955 (*S.I.* 1955 No. 1829) 488
National Insurance (Contributions) Regulations, 1948 (*S.I.* 1948 *No.* 1417), *reg.* 19 (5) .. 739
War Department (Outstations) Civilian Staff Regulations, 1950, *regs.* 437, 438 .. .. 774*n*

ORDERS

Clearing Office (Roumania) Order, 1936 (*S.R. & O.* 1936, *No.* 427), as amended by Clearing Office (Roumania) Amendment Order, 1939 (*S.R. & O.* 1939 *No.* 750) 433
Treaty of Peace (Roumania) Order, 1948 (*S.I.* 1948 *No.* 118), *art.* 1 (5) (*g*) 433

MISCELLANEOUS

Institution of Civil Engineers' General Conditions of Contract (4th Edn.), *cl.* 66 88

WORDS AND PHRASES

	PAGE
A man is not to be put in peril upon an ambiguity	507, 511, 513, 517, 524
Abnormality of mind	1
Adjoin. See "Fronting, adjoining or abutting".	
After ("after my wife shall have received her jus relictae")	835
Agricultural operation [Rating and Valuation (Apportionment) Act, 1928, s. 2 (2)]	556
Agricultural land [Rating and Valuation (Apportionment) Act, 1928, s. 2 (2)]	556
Altering or cleaning	664
Ambiguity (no man "put in peril upon an ambiguity")	503
Annual voluntary contributions [voluntary character]	715
At any time	26
Compensation. See also "Pecuniary compensation".	
Complaint [Dogs Act, 1871, s. 2]	653
Covenant [within s. 142 (1) of Law of Property Act, 1925]	762
Development of mechanical engineering	715
Discovers. See "If the surveyor discovers [income tax]".	
Disposition ["disposition under or by reason of which property passes"; Finance Act, 1949, s. 28 (2)]	814
Due inquiry [Medical Act, 1956, s. 33 (1) (b)]	225
Engineering. See "Development of mechanical engineering".	
Free of duty	756
Front. See "Fronting, adjoining or abutting".	
Fronting, adjoining or abutting [Private Street Works Act, 1892, s. 6]	778
Grievous bodily harm	161
If the surveyor discovers [income tax]	390
Inquiry. See "Due inquiry".	
Jus relictae	835
Less ("Not less than four weeks"—notice to quit)	500
Lethal weapon	575
Medicine [in s. 19 of the Pharmacy and Poisons Act, 1933]	572
My surviving children	744
Not less than four weeks before the date on which	500
Offer for sale [Restriction of Offensive Weapons Act, 1959]	731
Penalty. See "Recoverable as a penalty".	
Peril (no man "put in peril upon an ambiguity")	503
Person aggrieved	408
Pecuniary compensation [within s. 126 (1) of the Magistrates' Courts Act, 1952]	739
Price	462
Prospective purchaser	529
Purposes of science . . . exclusively	715
Reasonable man	161
Recoverable as a penalty	739
Regulating ("proper law regulating the devolution . . .")	814
Science. See "Purposes of science . . . exclusively".	
Secured creditor	315
Sporting purposes only	632
Surviving. See "My surviving children".	
Survivor ("my surviving children")	744
Tenancy from year to year	353
Trade dispute	254
Unimproved value	449
Voluntary contributions. See "Annual voluntary contributions".	
Withholding ("as to the withholding by the engineer of any certificate")	88
Worker [New Zealand Workers' Compensation Act, 1922, s. 2]	420
Workman	254
Wrong [in defence under M'Naghten Rules in divorce]	468

CORRIGENDA

[1960] 3 All E.R.

p. 114. ORMAN *v.* SAVILLE SPORTSWEAR, LTD. Solicitors: read "*Osmond, Bard & Westbrook* (for the plaintiff); *Arnold & Co.* (for the defendants)" instead of as printed.

p. 518. FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL. Line C.4: read "*Western Ry. Co.* (39), *Roberts* v. *Hopwood* (40); and I take it that, if the authority act reasonably, the result will be reasonable. Out of these various shades of" instead of as printed.

p. 582. EAKETTS *v.* EAKETTS. Letter G, counsel and solicitors: for "wife" read "husband", for "husband" read "wife".

p. 612. THE BEAVERFORD. Line H.3: read "the collision (p. 615, letter H, post) and as, it was alleged that, officials of the" instead of as printed.

p. 659. EAVES *v.* MORRIS MOTORS, LTD. Solicitors: following "*Buller, Jeffries & Kenshole*, Birmingham" read "agents for *Herbert & Gowers & Co.*, Oxford".

THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

R. *v.* BYRNE.

[Court of Criminal Appeal (Lord Parker, C.J., Hilbery and Diplock, JJ.), June 20, July 4, 1960.]

Criminal Law—Murder—Diminished responsibility—"Abnormality of mind"—Whether such as substantially to impair mental responsibility for acts—Question for jury—Homicide Act, 1957 (5 & 6 *Eliz.* 2 c. 11), *s.* 2 (1).

The appellant admitted to strangling a girl in a hostel and mutilating her dead body. Medical evidence showed that the appellant was a sexual psychopath, that he suffered from abnormality of mind, that such abnormality of mind arose from a condition of arrested development of mind or inherent causes, that the killing was done under the influence of his perverted sexual desires and that, though he was not insane within the meaning of the M'Naghten Rules, his sexual psychopathy could properly be described as partial insanity. The appellant's only defence to the killing was that he was suffering from diminished responsibility as defined by s. 2 of the Homicide Act, 1957*, and so was guilty only of manslaughter, not of murder. In summing-up, the trial judge directed the jury that if they came to the conclusion that the facts could be summarised as follows, namely, (a) that from an early age the appellant had been subject to perverted violent desires and in some cases had indulged in them, (b) that the impulse or urge of these desires was stronger than the normal impulse or urge of sex to such an extent that the subject found it very difficult or perhaps impossible in some cases to resist putting the desire into practice, (c) that the act of killing was done under such impulse or urge, and (d) that setting aside these sexual addictions and practices, the appellant was normal in every other respect—those facts with nothing more would not bring the case within the section and did not constitute such abnormality of mind as substantially to impair a man's mental responsibility for his acts. The jury returned a verdict of murder and the appellant was sentenced to imprisonment for life. On appeal,

Held: the direction to the jury that the defence of diminished responsibility was not available, even though they found that facts stated under heads (b) and (c) above were established, withdrew from them a question

* Section 2 of the Act of 1957 reads:

"(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

"(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

"(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

Subsection (4) is not material.

which it was their province to decide on a balance of probabilities, viz., whether the appellant's inability or difficulty, due to his abnormality, to exercise will-power to control his physical acts was such as substantially to impair his mental responsibility for the killing; a jury properly directed would have concluded that the defence under s. 2 of the Homicide Act, 1957, was established and accordingly a verdict of manslaughter would be substituted.

Per CURIAM: (i) " abnormality of mind " in s. 2 (1) of the Homicide Act, 1957, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal and is a question for a jury; but the aetiology of abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) was a matter to be determined on expert evidence (see p. 4, letters E and H, post).

(ii) where the abnormality of mind is such as affects the accused's self-control, the step between " he did not resist his impulse " and " he could not resist his impulse " is one which, in the present state of medical knowledge, is incapable of scientific proof (see p. 5, letter A, post).

Appeal allowed.

[As to the defence of insanity, see 10 HALSBURY'S LAWS (3rd Edn.) 287, 288, paras. 530, 531.

For the Homicide Act, 1957, s. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *M'Naughton's Case*, 4 State Tr. N.S. 847; 14 Digest (Repl.) 60, *246*.

R. v. *Duffy*, [1949] 1 All E.R. 932; 15 Digest (Repl.) 940, *9011*.

R. v. *Spriggs*, [1958] 1 All E.R. 300; [1958] 1 Q.B. 270; 42 Cr. App. Rep. 69; [1958] 2 W.L.R. 162; 3rd Digest Supp.

Appeal.

The appellant, Patrick Joseph Byrne, was convicted at Birmingham Assizes on Mar. 24, 1960, before STABLE, J., and a jury, of the murder of Sydney Stephanie Baird on Dec. 23, 1959, and was sentenced to imprisonment for life under s. 9 (1) of the Homicide Act, 1957. He appealed against the conviction on the ground of misdirection by the judge on the defence of diminished responsibility under s. 2* of the Act of 1957.

The cases enumerated below were cited in argument in addition to those in the judgment†.

R. K. Brown, Q.C., and *J. A. D. Owen* for the appellant.

J. G. S. Hobson, Q.C., and *Mrs. E. K. Lane, Q.C.*, for the Crown.

Cur. adv. vult.

July 4. **LORD PARKER, C.J.**, read the following judgment of the court: The appellant was convicted of murder before STABLE, J., at Birmingham Assizes and sentenced to imprisonment for life. The victim was a young woman whom he strangled in the Y.W.C.A. hostel, and after her death he committed horrifying mutilations on her dead body. The facts as to the killing were not disputed, and were admitted in a long statement made by the appellant. The only defence was that in killing his victim the appellant was suffering from diminished responsibility as defined by s. 2 of the Homicide Act, 1957, and was accordingly guilty, not of murder, but of manslaughter.

Three medical witnesses were called by the defence, the senior medical officer at Birmingham prison and two specialists in psychological medicine. Their

* See p. 1, ante.

† *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107 at p. 144, per LORD HERSCHELL; *R.* v. *Matheson*, [1958] 2 All E.R. 87; *R.* v. *Walden*, [1959] 3 All E.R. 203.

A uncontradicted evidence was that the appellant was a sexual psychopath, that he suffered from abnormality of mind, as, indeed, was abundantly clear from the other evidence in the case, and that such abnormality of mind arose from a condition of arrested or retarded development of mind or inherent causes. The nature of the abnormality of mind of a sexual psychopath, according to the medical evidence, is that he suffers from violent perverted sexual desires which he B finds it difficult or impossible to control. Save when under the influence of his perverted sexual desires, he may be normal. All three doctors were of opinion that the killing was done under the influence of his perverted sexual desires, and, although all three were of opinion that he was not insane in the technical sense of insanity laid down in the rules in *M'Naghten's Case* (1), it was their view that his sexual psychopathy could properly be described as partial insanity.

C In his summing-up the learned judge, after summarising the medical evidence, gave to the jury a direction of law, on the correctness of which this appeal turns. He told the jury that, if on the evidence they came to the conclusion that the facts could be fairly summarised as follows:

> " (i) from an early age [the appellant] has been subject to these perverted, violent desires and in some cases has indulged his desires; (ii) the impulse or urge of these desires is stronger than the normal impulse or urge of sex to such an extent that the subject finds it very difficult or perhaps impossible in some cases to resist putting the desire into practice; (iii) the act of killing this girl was done under such impulse or urge; and, (iv) setting aside these sexual addictions and practices, [the appellant] was normal in every other respect "

D

E

—those facts, with nothing more, would not bring a case within the section and " do not constitute such abnormality of mind as substantially to impair a man's mental responsibility for his acts." He went on to say:

> " In other words, mental affliction is one thing. The section is there to protect them. The section is not there to give protection where there is nothing else than what is vicious and depraved."

F

Taken by themselves those last words are unobjectionable, but it is contended on behalf of the appellant that the direction, taken as a whole, involves a misconstruction of the section, and had the effect of withdrawing from the jury an issue of fact which it was peculiarly their province to decide.

G Section 2 of the Homicide Act, 1957, is dealing with the crime of murder in which there are, at common law, two essential elements: (i) the physical act of killing another person, and (ii) the state of mind of the person who kills or is a party to the killing, namely, his intention to kill or to cause grievous bodily harm. Section 2 (1) does not deal with the first element. It modified the existing law as respects the second element, that is, the state of mind of the person who H kills or is a party to the killing. Before the passing of the Homicide Act, 1957, a person who killed or was party to a killing could escape liability for murder—as for any other crime requiring mens rea—if he showed that at the time of the killing he was insane within the meaning of the M'Naghten Rules (2), that is,

> ". . . that . . . [he] was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was I doing; or, if he did know it, that he did not know he was doing what was wrong."

If established, this defence negatives mens rea and the accused was, and still is, entitled to a special verdict of " guilty of the act but insane " at the time of doing the act, which is an acquittal of any crime. The test is a rigid one: it relates solely to a person's intellectual ability to appreciate (a) the physical act that he is

---

(1) (1843), 10 Cl. & Fin. 200.
(2) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. at p. 210, per Tindal, C.J.

doing, and (b) whether it is wrong. If he has such intellectual ability, his power to control his physical acts by exercise of his will is irrelevant.

The ability of the accused to control his physical acts by exercise of his will was relevant before the passing of the Homicide Act, 1957, in one case only: that of provocation. Loss of self-control on the part of the accused so as to make him for the moment not master of his mind had the effect of reducing murder to manslaughter if (i) it was induced by an act or series of acts done by the deceased to the accused, and (ii) such act or series of acts would have induced a reasonable man to lose his self-control and act in the same manner as the accused acted (see *R.* v. *Duffy* (3)). Whether loss of self-control induced by provocation negatived the ordinary presumption that a man intended the natural ordinary consequences of his physical acts so that in such a case the prosecution had failed to prove the essential mental element in murder (namely, that the accused intended to kill or to inflict grievous bodily harm) is academic for the purposes of our consideration. What is relevant is that loss of self-control has always been recognised as capable of reducing murder to manslaughter, but that the criterion has always been the degree of self-control which would be exercised by a reasonable man, that is to say, a man with a normal mind.

It is against that background of the existing law that s. 2 (1) of the Homicide Act, 1957, falls to be construed. To satisfy the requirements of the subsection the accused must show (a) that he was suffering from an abnormality of mind; and (b) that such abnormality of mind (i) arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury, and (ii) was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing. "Abnormality of mind", which has to be contrasted with the time-honoured expression in the M'Naghten Rules "defect of reason", means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts.

Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it. The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence. Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from "abnormality of mind" from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises: Was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant but the question involves a decision, not merely whether there was some impairment of the mental responsibility of the accused for his acts, but whether such impairment

(3) [1949] 1 All E.R. 932.

A can properly be called " substantial ", a matter on which juries may quite legitimately differ from doctors.

Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control, the step between " he did not resist his impulse " and " he could not resist his impulse " is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori, there is no scientific measurement of the B degree of difficulty which an abnormal person finds in controlling his impulses. These problems, which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way. This court has repeatedly approved directions to the jury which have followed directions given in Scots cases where the doctrine of diminished responsibility forms part of the common law. We need not repeat them. They are quoted in *R.* v. *Spriggs* C (4). They indicate that such abnormality as " substantially impairs his mental responsibility " involves a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity.

It appears to us that the learned judge's direction to the jury that the defence under s. 2 of the Act was not available, even though they found the facts set out D in No. (ii) and No. (iii) of the learned judge's summary (5), amounted to a direction that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibility. For the reasons which we have already expressed, we think that this construction of the Act is wrong. Inability to exercise will-power to control physical acts, provided that it is due to ab- E normality of mind from one of the causes specified in the parenthesis in the subsection, is, in our view, sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established and, in the case of difficulty, whether F the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts. The direction in the present case thus withdrew from the jury the essential determination of fact which it was their province to decide.

As already indicated, the medical evidence as to the appellant's ability to control his physical acts at the time of the killing was all one way. The evidence G of the revolting circumstances of the killing and the subsequent mutilations, as of the previous sexual history of the appellant, pointed, we think plainly, to the conclusion that the appellant was what would be described in ordinary language as on the border-line of insanity or partially insane. Properly directed, we do not think that the jury could have come to any other conclusion than that the defence under s. 2 of the Homicide Act, 1957, was made out. The appeal H will be allowed and a verdict of manslaughter substituted for the verdict of murder. The only possible sentence, having regard to the tendencies of the appellant, is imprisonment for life. The sentence will, accordingly, not be disturbed.

Appeal allowed. Sentence confirmed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

---

(4) [1958] 1 All E.R. 300; [1958] 1 Q.B. 270. (5) See p. 3, letter D, ante.

A

SHORT *v.* SHORT.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), April 4, 5, May 6, 1960.]

Husband and Wife—Property—Matrimonial home—Possession—Adulterous wife in possession—Wife petitioning for divorce on ground of cruelty—Summons by husband for possession—Order by registrar adjourning summons till after hearing of divorce suit or provision of alternative accommodation—Jurisdiction—Discretion—Appeal against registrar's order—Whether interlocutory or final—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 17—*R.S.C., Ord.* 58, *r.* 4 (1).

B

A husband and wife lived in a flat let to the husband at a rent of £250 per annum. While the husband was in a sanatorium the wife petitioned for divorce on the ground of his cruelty. On his return from the sanatorium she refused to re-admit him to the flat. Later the wife applied to the court for leave to amend her petition so as to ask for discretion, and in her affidavit in support of this application admitted that she had committed adultery in the flat after the husband had left the sanatorium. The husband then filed an answer denying cruelty and praying for a divorce on the ground of this adultery. He also took out a summons under s. 17 of the Married Women's Property Act, 1882*, for possession of the flat. The registrar adjourned the further hearing of this summons until after the divorce proceedings had been heard or the husband had provided suitable alternative accommodation for the wife.

C

D

Held: (i) the remedy under s. 17 was discretionary, and (DEVLIN, L.J., dissenting) the adjournment of the summons by the registrar was in the circumstances a judicial exercise of his discretion with which the Court of Appeal would not interfere.

E

Observations of TUCKER, L.J., in *Stewart* v. *Stewart* ([1947] 2 All E.R. at p. 814) applied.

(ii) the registrar's order, and the appeal therefrom, were interlocutory.

F

Per DEVLIN, L.J.: (i) the true view of the rights of spouses in their matrimonial home, although the property might be vested at law in one spouse, was that the right of ownership of the one spouse was qualified by a lesser right in the other; and any discretion of the court to stay the enforcement by the owning spouse of rights of ownership arose out of conflict between those rights and the lesser right of the other spouse (see p. 15, letter E, post), and was not the product of s. 17 of the Married Women's Property Act, 1882 (see p. 17, letter G, post).

G

Bendall v. *McWhirter* ([1952] 1 All E.R. 1307) and *Jess B. Woodcock & Sons, Ltd.* v. *Hobbs* ([1955] 1 All E.R. 445) considered.

(ii) in the present case the wife's lesser right in the matrimonial home had been terminated by her admitted adultery (see p. 14, letter H, and p. 15, letter H, post), no right remained in her that could conflict with the husband's ownership, and the court, therefore, should not stay enforcement of his right to possession, for s. 17 was procedural and any such discretion as it conferred was no wider than an ordinary discretion to be exercised having regard to the ordinary right of a party bringing proceedings to have them determined according to law (see p. 18, letter I, post).

H

I

Dictum of TALBOT, J., in *Sheffield Corpn.* v. *Luxford* ([1929] All E.R. Rep. at p. 583); *Hutchinson* v. *Hutchinson* ([1947] 2 All E.R. 792) and dictum of LORD WRIGHT in *Evans* v. *Bartlam* ([1937] 2 All E.R. at p. 656) considered.

(iii) it would be a better practice if s. 17 were not used for interlocutory purposes, but that such a matter as the present should come before the judge on interlocutory application for an injunction, when alimony pendente

---

* The relevant provisions of s. 17 are set out at p. 16, letter D, post.

A lite could also be considered (see p. 19, letter I, and p. 20, letter G, post).
Appeal dismissed.

[As to what order can be made on a summons under s. 17 of the Married Women's Property Act, 1882, see 19 HALSBURY'S LAWS (3rd Edn.) 900, para. 1492; and for cases on the subject, see 27 DIGEST (Repl.) 263, 264, *2122-2125*; as to a wife's rights in the matrimonial home, see 19 HALSBURY'S LAWS (3rd B Edn.) 849, para. 1388.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

Cases referred to:

Bendall v. *McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.

C *Bolton* v. *Prentice*, (1744), 1 Selwyn's N.P. 233; 2 Stra. 1214; 93 E.R. 1136; 27 Digest (Repl.) 190, *1472*.

Bramwell v. *Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 27 Digest (Repl.) 261, *2109*.

Churcher v. *Street*, [1959] 1 All E.R. 23; [1959] Ch. 251; [1959] 2 W.L.R. 66; 3rd Digest Supp.

D *Cobb* v. *Cobb*, [1955] 2 All E.R. 696; [1955] 1 W.L.R. 731; 3rd Digest Supp.

Doe d. Merigan v. *Daly*, (1846), 8 Q.B. 934; 7 L.T.O.S. 160; 115 E.R. 1126; sub nom. *Doe d. Daley* v. *Daley*, 15 L.J.Q.B. 295; 27 Digest (Repl.) 260, *2103*.

Evans v. *Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; sub nom. *Bartlam* v. *Evans*, 157 L.T. 311; Digest Supp.

E *Govier* v. *Hancock*, (1796), 6 Term Rep. 603; 2 C. & P. 25, n.; 101 E.R. 726; 27 Digest (Repl.) 82, *624*.

Hutchinson v. *Hutchinson*, [1947] 2 All E.R. 792; 27 Digest (Repl.) 263, *2121*.

Kelner v. *Kelner*, [1939] 3 All E.R. 957; [1939] P. 411; 108 L.J.P. 138; 27 Digest (Repl.) 657, *6183*.

Lee v. *Lee*, [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.; 3rd Digest Supp.

F *Manby* v. *Scott*, (1663), 1 Keb. 482; 1 Lev. 4; 83 E.R. 1065; 27 Digest (Repl.) 192, *1494*.

Middleton v. *Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 31 Digest (Repl.) 698, *7894*.

Pargeter v. *Pargeter*, [1946] 1 All E.R. 570; 27 Digest (Repl.) 260, *2104*.

Sheffield Corpn. v. *Luxford, Same* v. *Morrell*, [1929] All E.R. Rep. 581; [1929] 2 K.B. 180; 98 L.J.K.B. 512; 141 L.T. 265; 93 J.P. 235; Digest Supp.

G *Shipman* v. *Shipman*, [1924] All E.R. Rep. 365; [1924] 2 Ch. 140; 93 L.J.Ch. 382; 131 L.T. 394; 27 Digest (Repl.) 258, *2091*.

Stewart v. *Stewart*, [1947] 2 All E.R. 813; [1948] 1 K.B. 507; [1948] L.J.R. 799; 27 Digest (Repl.) 263, *2125*.

Vaughan v. *Vaughan*, [1953] 1 All E.R. 209; [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; 3rd Digest Supp.

H *Wake* v. *Taylor*, (July 8, 1952), "The Times".

Waller v. *Waller*, [1956] 2 All E.R. 234; [1956] P. 300; [1956] 2 W.L.R. 1071; 3rd Digest Supp.

Welton v. *Welton*, [1927] All E.R. Rep. 431; [1927] P. 162; 96 L.J.P. 75; 136 L.T. 675; 27 Digest (Repl.) 486, *4253*.

I *Woodcock (Jess B.) & Sons, Ltd.* v. *Hobbs*, [1955] 1 All E.R. 445; [1955] 1 W.L.R. 152; 3rd Digest Supp.

Interlocutory Appeal.

The parties married in April, 1957, and went to live in a flat let to the husband at a rent of £250 per annum. In August, 1958, the husband entered a sanatorium as a voluntary patient and while he was there the wife obtained leave of the court to present a petition within three years of the marriage for divorce on the ground of the husband's cruelty. The petition was presented on Nov. 13, 1958. The husband left the sanatorium in February, 1959, but the wife refused to have

him back in the flat. In October, 1959, the wife applied to the court for leave to amend her petition by adding a prayer for discretion. In her affidavit in support of this application she admitted that she had committed adultery in the flat on four nights in August, 1959. Leave to amend was given and the petition was amended on Oct. 30, 1959. Subsequently the husband filed an answer in which he prayed for divorce on the grounds of this adultery. By her reply the wife admitted the adultery but pleaded that it was conduced to by the husband's cruelty.

After the wife had amended her petition the husband took out a summons under the Married Women's Property Act, 1882, s. 17, for an order that the wife should give him possession of the flat. In his affidavit in support of this summons the husband referred to the wife's affidavit in support of her application for leave to amend her petition and swore that she had therein admitted committing adultery in the flat in August, 1959. The wife filed no affidavit and adduced no evidence. On Jan. 22, 1960, Mr. Registrar KINSLEY made an order on the summons that "unless the husband provides alternative reasonable and suitable accommodation the application do stand over until after the hearing of the cause. Otherwise adjourned. Costs reserved". On Feb. 29, 1960, the husband gave notice of appeal against this order. By R.S.C., Ord. 58, r. 4 (1), the time for service of notice of appeal is " (a) in the case of an appeal from an interlocutory order . . . fourteen days, . . . (c) in any other case, six weeks ". If Mr. Registrar KINSLEY's order of Jan. 22, 1960, were interlocutory, time for service of the notice of appeal expired on Feb. 5, 1960, but if this order were final time had not expired when the notice of appeal was in fact served on Feb. 29, 1960. The wife did not file a respondent's notice under R.S.C., Ord. 58, r. 6. The court treated the appeal as interlocutory, but extended the time for appealing.

F. S. Laskey for the husband, the appellant.

J. M. Cope for the wife, the respondent.

Cur. adv. vult.

May 6. The following judgments were read.

HODSON, L.J.: This is an appeal from an order of Mr. Registrar KINSLEY adjourning a summons under s. 17 of the Married Women's Property Act, 1882, taken out by a husband for possession of premises, until divorce proceedings pending between the husband and the wife have been determined, unless the husband provides suitable alternative accommodation for the wife.

The matter arises in unusual circumstances. The wife has presented a petition for divorce on the ground of the alleged cruelty of the husband. He has denied the cruelty, and alleged that in August, 1959, during his absence the wife committed adultery in his house. The wife has admitted this adultery and pleaded that it was conduced to by the cruelty of the husband. The husband is not unnaturally aggrieved that, his wife having entertained her paramour in his house in this way, the summons should be adjourned for an indefinite time when, as he maintains, the wife has by her admitted adultery forfeited all right to live in his house or be maintained by him.

The appeal, although listed in the list of final appeals, being against an order not disposing of the summons but adjourning it, was manifestly in my opinion interlocutory, and since the husband's notice of appeal was not given until after fourteen days, he was out of time. In these circumstances, the point not having been taken by the wife until very late in the proceedings, this court thought it right, while treating the appeal as interlocutory, to extend the time for appealing. The adjournment of a case is, however, discretionary, and unless it appears that the husband's right to evict his wife from the house at once was unanswerable, it is not possible to say that the discretion was not judicially exercised.

The jurisdiction under s. 17 is itself discretionary.

A " . . . The judge . . . may make such order with reference to the property in dispute . . . as he thinks fit, or may direct such application to stand over from time to time . . ."; and the question again is was the refusal to make the order sought until after the hearing of the suit for divorce a judicial exercise of discretion. It is true that at common law an adulterous wife loses her right to support unless her B adultery has been connived at or condoned by the husband, although the difficulties in the way of the husband in a common law action for ejectment may well have been insurmountable (see *Bramwell* v. *Bramwell* (1), per GODDARD, L.J.). These difficulties are removed by the Act of 1882 for, as GODDARD, L.J., pointed out, s. 17 expressly provides the procedure for deciding questions between husband and wife as to the possession of property.

C How then is the discretion to be exercised? Can it be a judicial exercise to leave an adulterous wife in the husband's house in effect excluding him from occupation of his own property even for a limited period? If the matter were looked at independently of the divorce proceedings, or any rights conferred on adulterous wives by statute, the answer might well be in favour of the husband.

The divorce proceedings cannot, however, in my opinion, be ignored; see per D TUCKER, L.J., in *Stewart* v. *Stewart* (2). That was a summons under s. 17 of the Married Women's Property Act, 1882, where a husband was the tenant of premises in which he had been living with his wife, and divorce proceedings were pending on the husband's allegation of adultery by the wife. On his application under s. 17 of the Married Women's Property Act, 1882, the county court judge made an order declaring that he was the tenant of the premises, E and that the wife should vacate them. On appeal it was held that the court would not interfere with the judge's exercise of discretion, and I read a passage from TUCKER, L.J.'s judgment (3):

" There is jurisdiction in the county court judge under this section to make an order for possession at the instance of husband or wife against the other F spouse, but the cases show that, whether in that or some other form of proceeding, the court will be very slow to make any order dealing with the legal rights of the parties which might have the effect of depriving either the wife or the husband of her or his right to occupy the matrimonial home. The cases show that, whether it is an injunction that is being granted or some other form of relief, great care must be taken in a normal case where G there is a subsisting marriage between husband and wife, the parties hitherto living together, and no order having been made by the Divorce Court or by justices giving the one the right to live apart from the other, to see that the rights of the wife or the husband should be safeguarded in the form of the order made. I do not think the cases go beyond that. It must always be a question for the exercise of the discretion of the judge on all the facts H before him whether in a particular case he thinks it proper to make the order for possession which he clearly has jurisdiction to do . . . It is true that those [i.e., the divorce] proceedings had not come to trial, and the learned judge was not asked to go into the merits of those proceedings, but, in my view, it was a matter that he was entitled to take into his consideration when he was considering whether in the circumstances he ought to make an I order for possession or not. The rights of one spouse with regard to the matrimonial home as against the other may vary with the circumstances of each case, and, although it is, no doubt, the duty of the husband to provide somewhere for the wife to live until a decree is made absolute, it does not necessarily follow (in fact, in many cases it would be very inconvenient and embarrassing) that she should be sharing rooms under the same

(1) [1942] 1 All E.R. at pp. 138, 139; [1942] 1 K.B. at p. 374.
(2) [1947] 2 All E.R. 813; [1948] 1 K.B. 507.
(3) [1947] 2 All E.R. at p. 814; [1948] 1 K.B. at p. 513.

roof as her husband. In the particular circumstances of the present case it was pressed on the learned judge that he should not make an order for possession except on the terms that it was not to take effect unless and until the husband had provided other accommodation elsewhere for the wife. That is an order which he might very well have made, but I find it impossible to say that, in refusing to make an order in that form, he was not exercising his discretion in a judicial manner."

Furthermore, in divorce proceedings the wife has a right to apply for alimony pendente lite and is not by her adultery disqualified from so applying for she is a competent suitor (*Welton* v. *Welton* (4) and *Waller* v. *Waller* (5)).

After a divorce, if a decree is pronounced in her favour or even if a decree is pronounced against her, she is still entitled to apply for maintenance under the terms of the statute; see the Matrimonial Causes Act, 1950, s. 19. Further if there is no divorce, her own adultery would not necessarily be a bar to her obtaining maintenance under the Summary Jurisdiction Acts if her adultery were found to be conduced to by the husband's conduct; see the Summary Jurisdiction (Married Women) Act, 1895, s. 6.

Inroads have thus been made on the common law position by statute to a great extent, and I am unable to hold that, because at common law her rights as a wife to bed and board have been forfeited, there is no room for the exercise of discretion to postpone at least her expulsion from the home, the occupation of which will or may have to be considered in conjunction with any application she may make for support from her husband. The statute of 1882 in conferring the discretion has, it seems, kept in mind that, at any rate so long as the marriage tie which prima facie it is in the public interest to maintain, exists, it is not always desirable that strict rights of spouses should be insisted on. Having ascertained the rights of the parties on the evidence submitted, the court is not compelled as a matter of law at the instance of either party to allow these rights to be enforced.

For these reasons I would dismiss the appeal.

WILLMER, L.J.: I have no doubt that the husband instituted these proceedings under s. 17 of the Married Women's Property Act, 1882, for the very good reason that at common law he could have had no right to bring an action for possession against his wife. In *Bramwell* v. *Bramwell* (6) GODDARD, L.J., said:

"... I have the greatest doubt ... whether a husband can bring an action for the recovery of land against his wife ... alleging that she is wrongly in occupation of the land, because, if she is wrongly in occupation of the land ... it seems to me she is a trespasser, and the Married Women's Property Act, 1882, s. 12 expressly says that a husband cannot bring an action of tort against his wife. (7) He is not, however, left without remedy, as s. 17 of the Married Women's Property Act, 1882, expressly provides the procedure for deciding a question between husband and wife as to the possession of property..."

The same view was expressed by DENNING, L.J., in *Hutchinson* v. *Hutchinson* (8), and again by ROMER, L.J., in *Bendall* v. *McWhirter* (9), and is, I think, generally accepted. If any further authority is required for this view, it is to be found in s. 12 of the Married Women's Property Act, 1882, which provides that, except for a wife's right to bring proceedings for the protection and security

(4) [1927] All E.R. Rep. 431; [1927] P. 162.
(5) [1956] 2 All E.R. 234; [1956] P. 300.
(6) [1942] 1 All E.R. at pp. 138, 139; [1942] 1 K.B. at p. 374.
(7) The rest of the passage cited is not contained in the report in [1942] 1 All E.R. 137.
(8) [1947] 2 All E.R. at p. 793.
(9) [1952] 1 All E.R. at p. 1316; [1952] 2 Q.B. at p. 485.

of her own separate property, no husband or wife shall be entitled to sue the other for a tort. The fact that the wife is alleged to have committed adultery cannot in my judgment confer on the husband a right, which he would not otherwise have, to sue her for a tort. For until the marriage is dissolved she remains his wife, however guilty she may be.

We have only to consider, therefore, what remedy is provided by s. 17 of the Act. It is at once apparent that the remedy under the section is entirely discretionary. The judge—or in this case the learned registrar—" may make such order with respect to the property in dispute . . . as he thinks fit ". This disposes at once of the first point which was put forward on behalf of the husband. For it was argued by counsel for the husband, albeit faintly, that the learned registrar's order was wrong on the ground that it violated the right, which it was contended the husband enjoyed, to obtain possession as against a wife who admitted having committed adultery. It is clear to my mind that the section cannot be construed as conferring any such right which did not exist at common law.

The second, and main, contention on behalf of the husband was that the learned registrar was guilty of a wrong exercise of his discretion in failing, in all the circumstances, to make an order for possession in favour of the husband as against a guilty wife. It is to be observed that the section specifically empowers the judge—in this case the learned registrar—to direct the application to stand over. This is precisely what the learned registrar did direct—namely, that the application should stand over till after the termination of the divorce proceedings, unless in the meantime the husband should find suitable accommodation for the wife. It is none the less contended that in all the circumstances this was not a judicial exercise of the learned registrar's discretion.

The only evidence with regard to the wife's alleged adultery which is before us is the statement in the husband's affidavit that she herself admitted it in her affidavit, which she swore in support of her application to amend her petition by adding a prayer for the exercise of the court's discretion. At present we know nothing of the circumstances in which she committed adultery, and have no means of assessing the degree of her guilt. She has herself presented a petition against the husband on the ground of cruelty, and from the fact that she obtained leave to do so before three years had elapsed from the date of the marriage we are entitled, I think, to assume that she is able to show at least a strong prima facie case. It is possible that the court will grant her relief, in the exercise of its discretion, and will pronounce a decree in her favour. It is certainly not to be assumed that, merely because the wife has committed adultery, the husband will necessarily obtain relief on the prayer in his answer. Either party may in the end of the day obtain a decree. Possibly mutual decrees will be granted in the exercise of the court's discretion. It is equally possible that neither will be granted relief. The court will in any case be bound to make the inquiries prescribed by s. 4 of the Matrimonial Causes Act, 1950, and for all that is now known it may turn out that there is some absolute bar against relief of either the one or the other (10). Moreover, it seems inevitable that questions must arise with regard to the matters specified in the proviso to s. 4 (2) of the Act which call for the exercise of the court's discretion. The wife, we know, prays for the exercise of the court's discretion, but equally on the husband's cross-prayer questions of discretion must arise. The wife's allegations of cruelty are not only relevant to her own prayer for relief, but must also be considered in relation to the husband's cross-prayer. For all that is now known it may be found that the wife's adultery was conduced to by wilful neglect or misconduct on the part of the husband. I have mentioned all these various possibilities

(10) Section 4 provides that the court shall inquire whether there has been any connivance or condonation and whether any collusion exists.

in order to make it clear that at the present stage it is quite impossible to forecast what the final result of the divorce proceedings will be. The wife is just as likely as the husband to be in the end the victorious party. Even if the husband is ultimately held entitled to relief, and the wife is not, that is not the end of the matter. The wife may still be held entitled, under s. 19 of the Act of 1950, to such maintenance as may be deemed reasonable having regard to the conduct of the parties; and this result may even follow if she alone is found to be blameworthy. Furthermore—quite apart from the question whether on any decree being pronounced the wife will be held entitled to maintenance—she is clearly entitled now to make an application for alimony pending suit.

It seems to me that if, as is only too probable, questions of alimony or maintenance for the wife are going to arise, the matter of the possession of the matrimonial home should appropriately be considered in relation thereto. In *Cobb* v. *Cobb* (11)—itself a case arising out of an application under s. 17 of the Married Women's Property Act, 1882—DENNING, L.J., is reported as saying:

> " The matter [that is the question of possession of the matrimonial home] can best be considered by the matrimonial court when it comes to deal with alimony or maintenance. That court . . . might think it right to let the wife stay in the house with a reduction in the maintenance which would otherwise be payable by the husband."

I respectfully agree with this view, and would venture to apply it to the circumstances of this case. In the situation as it is at present it would in my judgment be premature to deal with the question of possession of the matrimonial home in isolation, and without reference to the issues which are likely to arise in relation to alimony and maintenance. In such circumstances I find it impossible to say that the learned registrar fell into error, or was guilty of any wrong exercise of his discretion, in directing that this application stand over pending the determination of the divorce proceedings which have already been instituted.

It remains to mention that a question was raised whether the present appeal was out of time. If the appeal is interlocutory, it is agreed that the time for appealing expired on Feb. 5, 1960. But notice of appeal was not given until Feb. 29, 1960. For myself I cannot see how an order merely directing that the application stand over can be other than interlocutory. The appeal, therefore, is in my judgment manifestly out of time; but the respondent wife is also, as it seems to me, out of order. Although the point was taken in argument on her behalf that the appeal was out of time, I doubt whether that point was strictly open to her, seeing that no respondent's notice was filed in accordance with R.S.C., Ord. 58, r. 6. In the course of the hearing before us counsel for the husband formally applied for an extension of the time for appealing, and informed us that the delay was due partly to the intervention of negotiations between the parties, and partly to the fact that, owing to an error, an abortive notice of appeal to the judge in chambers was served in the first instance. In the absence of any merits in the respondent's objection, I think that, if it had been necessary, it would have been a proper case in which to extend the time for appealing.

The matter, however, is of no relevance since, for the reasons stated, I find it impossible to say that the learned registrar's decision was wrong, and the appeal must therefore in any event be dismissed.

DEVLIN, L.J.: I have found this to be a most troublesome case. To my mind it raises questions of principle which deserved much fuller argument than they received. If the order under appeal had been made in matrimonial proceedings on the application of the wife to restrain the husband from interfering with her enjoyment of the matrimonial home, the position would be clear. I

(11) [1955] 2 All E.R. 696 at p. 699.

should have supposed that an order permitting a wife, who confessed to having committed adultery in the matrimonial home, to remain there pendente lite, the husband being liable for the rent, was an unusual one. But I cannot doubt, in the light of what my Lords have said in their judgments, that the making of such an order would be within the discretion of the judge who heard the application.

This order, however, was made in proceedings under the Married Women's Property Act, 1882, s. 17, and an application under that Act is not an interlocutory proceeding in a divorce suit. The section provides a summary way for the court to determine questions between husband and wife as to the title to or possession of property. These questions must be determined in accordance with the common law. In my judgment, on the true construction of this section the registrar had no power to make the order which he made, although a judge might have made it if he had been hearing an interlocutory application in the divorce proceedings. This may seem on the face of it an arid distinction, but it has to be remembered that applications under s. 17 often fall to be decided when there is no divorce suit pending. The construction of the section cannot be different according to whether there are or are not divorce proceedings on foot. A construction of the section that is wide enough to justify the registrar's order in this case must be wide enough to allow him to restrict in his discretion a husband's enjoyment of his common law rights in chattels as well as in realty. The argument before us has not, of course, sought to justify the registrar's order on the ground that it could easily have been made in divorce proceedings. It has been justified, as it must be, by the claim, which I consider to be too far-reaching, that the power to make it is given by the section. The argument has thus given rise to fundamental questions about the scope and purpose of s. 17 and about the extent of the wife's rights, as established by recent authorities, in the matrimonial home.

In form the order is one that grants an adjournment. In what way, it may be asked, is that a denial of the husband's rights? I think that if one looks at the substance of the matter, and if one assumes for the moment that the husband has an absolute right to the immediate possession of the flat (whether he has is the first question to be decided) it is plain that this order denies it to him. It could not, I think, be successfully contended—I shall elaborate this point later on—that after a marriage has been dissolved, the ex-wife, whether she be innocent or guilty and whether she gets a decree or not, will have any rights in the home. The matter to be decided is therefore whether the husband or the wife is to have the right to reside in it for the remainder of the marriage. To adjourn a decision on this matter until after the conclusion of the divorce proceedings, leaving the wife in possession, is therefore to decide the point substantially in favour of the wife. To adjourn it until such time as the husband finds alternative accommodation is equally to decide the matter in favour of the wife, for it is only on the basis that the wife has some right to the house that the burden can properly be put on the husband of providing other accommodation in exchange for it.

[HIS LORDSHIP stated the facts (see pp. 7, 8, ante) and continued:] Two questions arise for our determination—(i) On these facts has the wife any right to remain in the matrimonial home? (ii) If not, is the power given by s. 17 limited to determining the question of rights and, on determining such rights, making the order which follows as a matter of law; or is there a discretionary power in it to protect the wife's position in the matrimonial home, notwithstanding that she has no rights in it?

The first question raises a new point. It is well established by a series of decisions in this court that an innocent wife, who is actually deserted, has a right to remain in the matrimonial home. The wife in this case was not innocent and was not actually deserted. She would no doubt claim, whether rightly or wrongly, that the husband's cruelty amounts to constructive desertion. I need not determine whether the established doctrine extends to cases of constructive

desertion. The point has been put more simply by the husband's counsel that, whether it does or not, it does not extend to a wife who has committed adultery. A

As I have said, this is a new point, but I do not think that there can be much doubt about the answer to it, and it was not strenuously argued before us. The nature of the wife's right has been stated in various ways in the authorities and in particular it has been most clearly and fully stated by DENNING, L.J., in *Bendall* v. *McWhirter* (12) and I do not think that it can be suggested that there is any other way of stating it that is more favourable to the wife. Speaking of the nature of the right DENNING, L.J., said (12): B

> " It bears, I think, a very close resemblance to her right to pledge her husband's credit for necessaries. Under the old common law when a husband deserted his wife, or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit for necessaries: *Bolton* v. *Prentice* (13), quoted in the notes to *Manby* v. *Scott* (14) (2 Smith L.C., 13th Edn., 469). One of the most obvious necessaries of a wife is a roof over her head, and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home the wife should have an irrevocable authority to continue the tenancy on his credit, and that when he is the owner of it she should have an irrevocable authority to stay there." C D

The word " irrevocable " needs some explanation. The termination of the licence or authority has been considered in later cases: see, for example, *Wake* v. *Taylor*, a decision of the Court of Appeal (15). I think that the law as now established is that the husband may revoke it if circumstances give him the right to do so; and the court may revoke or terminate the authority if circumstances occur which make it no longer fair and reasonable that the wife's rights should prevail against the husband's or of a party claiming through him. E

It has never yet been decided in what circumstances the authority or licence to the wife can be revoked by the husband, but I think that it must be plain from this statement of the law that the licence is good against the husband only for so long as his liability to support the wife and provide her with a roof over her head continues. It is well established (and was conceded in argument) that this liability ceases if the wife commits adultery. It is immaterial that the conduct of the husband may have conduced to the adultery; and it is immaterial that he may himself have previously committed a matrimonial offence by turning her out of doors; *Govier* v. *Hancock* (16). This sounds a stern doctrine today when we are ready to conceive that an adulterous wife may be more sinned against than sinning. If it were necessary, I should be prepared at least to consider whether with due respect for precedent it would be possible to modify the rigour of the doctrine. But it is not necessary. Relief can be obtained through the power of the court to grant alimony even to a guilty wife; and in the rare cases where the jurisdiction of a matrimonial court cannot be invoked, I can see no satisfactory alternative to the common law rule. I conclude therefore that adultery terminates the wife's licence in the sense of making it voidable, and that thereafter the husband has an absolute and unqualified right to the matrimonial home, if he is the owner of it, and the right to immediate possession. I think that this conclusion is consistent with those obiter dicta in the cases in which the possibility of the wife's misconduct is mentioned; see in particular per LORD EVERSHED, M.R., in *Middleton* v. *Baldock* (17). In *Wake* v. *Taylor* (15), the Court of Appeal, assuming without deciding that a wife's adultery would entitle the husband to revoke the licence, held that until he did so, she was entitled to remain. That was a case where a third party, the husband's landlord, sought to take advantage of F G H I

(12) [1952] 1 All E.R. at p. 1310; [1952] 2 Q.B. at p. 476.
(13) (1744), 1 Selwyn's N.P. 233.
(14) (1663), 1 Keb. 482.
(15) (July 8, 1952) " The Times ".
(16) (1796), 6 Term Rep. 603.
(17) [1950] 1 All E.R. at p. 710; [1950] 1 Q.B. at p. 662.

A the wife's adultery; and I do not think that the decision means that when the husband is claiming possession his application must be preceded by a formal revocation.

It is a possible view of the cases that the wife's right carries within itself the seed of the court's discretion, and that it is by definition a right to remain in the house until the court in its discretion decides otherwise. If this were so, it would B follow that adultery is not of itself a ground for terminating the wife's licence, but is only a matter to be taken into account in the exercise of the discretion. There are in the cases dicta by DENNING, L.J., to the effect that the licence continues until revoked by the court which, taken by themselves, might support this view. It was not a view that was pressed on us; the unlimited discretion which the wife's counsel claimed to exist was based on the statute and supported C by the authority of *Hutchinson* v. *Hutchinson* (18) and *Lee* v. *Lee* (19), cases which I shall consider subsequently. But as it is a possible interpretation, though not in my judgment the correct one, of the dicta of DENNING, L.J., I have considered it. I see no support for it in principle. Husband and wife have always each had their rights in a matrimonial home belonging to the other or to them both jointly. The court does not in its discretion confer these rights nor does it remove D them. They arise from the status of marriage. They are not rooted in discretion and so are not terminable at discretion. A right which the court could mero motu extinguish—a tenancy at the will of the court—would be a novelty hitherto unknown to the law.

In my judgment the true view is that there is a right of ownership in one spouse qualified by a lesser right in the other. Discretion does not attach itself to the E lesser right, but arises out of the conflict between the two rights. This inevitably occurs when the marriage breaks down. The right to possession which up till then has been an indivisible thing shared in common has in some way to be severed. It is then impracticable for the spouses to continue exercising together their rights in the matrimonial home, and the claim of one or other must be allowed to prevail. The court must decide which. It can do so only by deciding F what is just and reasonable in all the circumstances, and that is how the discretion arises—ex necessitate rei as ROXBURGH, J., put it in *Churcher* v. *Street* (20). The rights of husband and wife arise out of their relationship, but there is nothing about the exercise of the discretion that is peculiar to that relationship. The court determines what is just and reasonable between husband and wife in the way that it often has to do between co-owners or between such conflicting rights G as the public right to use the highway and the private right of access to property adjoining the highway.

There is, therefore, no room for the exercise of discretion unless there are conflicting rights. So the question is: when the matrimonial home belongs to one spouse, what is the duration of the other's right in it? Is it a right that lasts as long as the marriage lasts, or only for so long as the other spouse is faithful to H the marriage vows? If the former, there will be a conflict of rights, notwithstanding adultery, until the marriage is eventually dissolved, if it ever is; if the latter, the adulterous spouse forfeits his or her right. Since we are here concerned with the common law (and not with the special interlocutory jurisdiction of the court when it is engaged, as it were, in winding-up the marriage) the right can be claimed only by a spouse who is ready and willing to perform his or her I obligations. It has nothing to do with divorce, for it existed at common law long before the dissolution of marriage was thought of as a terminating event. The dicta of DENNING, L.J., must be read in the light of his clear and persuasive statement of the nature of the right which I have quoted from *Bendall* v. *McWhirter* (21). When the lord justice says that the licence to the wife continues

(18) [1947] 2 All E.R. 792. (19) [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.
(20) [1959] 1 All E.R. at p. 33.
(21) [1952] 1 All E.R. at p. 1310; [1952] 2 Q.B. at p. 476.

until the court revokes it, he is not, I think, defining the duration of the right, but is making it plain that while it exists it is not unqualified and that it must yield to the husband's right if the court in its discretion so decides.

I turn now to the second question on the basis that the clog on the husband's ownership has disappeared, and that there is no defence to his claim for possession. Is he not therefore entitled to obtain under s. 17 an order for possession ex debito justitiae? The ordinary rule of law is that when a plaintiff has established his right, he is entitled to immediate relief; the court has no discretion to refuse an order, though there may be a power to postpone its execution for a reasonable time in order to avoid undue hardship. In *Vaughan* v. *Vaughan* (22), for example, the Court of Appeal exercised a power of that sort in a case in which the husband's licence to the wife had expired. But the adjournment in the present case has not been put on that ground.

This being the ordinary rule of law, I can find nothing in the language used in s. 17 nor in a consideration of its scope and object to suggest that the power granted to the court is any wider than the normal. I find nothing to suggest that because the parties are husband and wife, the court can treat them differently from the ordinary plaintiff and defendant. The material words of the section are:

> " In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time . . ."

The powers of adjournment and over costs, and so forth, are in common form and such as a judge usually has. It is, of course, true that the operative word throughout is " may ". But it is well settled that that gives only a limited discretion.

In *Sheffield Corpn.* v. *Luxford* (23) the court had to consider this point, and I quote what appear to me to be the material passages from the judgment of TALBOT, J. (24), with whom WRIGHT, J., agreed:

> " The language of s. 138 [of the County Courts Act, 1888,] is that when there has been compliance with the conditions of the Act, with regard to which there is no dispute, ' the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name ' . . . ' May ' is a permissive expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of those cases is where there is an application to him to use the power which the Act gives him in order to enforce the legal right of the applicant. I think this is such a case. On the information before us, the legal right of the landlords was complete as soon as the notice to quit duly given had expired, and the tenant's right to remain in occupation of this house had absolutely ceased . . . That being so, I think that, as soon as the application for an order for possession is made to the judge, who has obtained from the Act of Parliament the power to make such an order, it becomes his duty to make it. If the Act contained no more than that, it would be his duty to make an order for possession then and there and without any qualifications. The Act does undoubtedly give him a certain discretion in terms, because . . . after the words ' the judge may order that possession . . . be given,' it continues ' either forthwith or on or before such day as the judge shall think fit to name '."

Section 17 uses no express words giving a discretion to postpone, and therefore

(22) [1953] 1 All E.R. 209; [1953] 1 Q.B. 762.
(23) [1929] All E.R. Rep. 581; [1929] 2 K.B. 180.
(24) [1929] All E.R. Rep. at p. 583; [1929] 2 K.B. at pp. 182-184.

A in TALBOT, J.'s words the duty is to make the order then and there. In any event, the express words in *Sheffield Corpn.* v. *Luxford* (25) did not, in TALBOT, J.'s view, authorise a postponement for more than four or five weeks. Fundamentally, a plaintiff who proves his case is entitled to an order ex debito justitiae, and there is no room for discretion. As LORD WRIGHT put it later in *Evans* v. *Bartlam* (26):

B

> " A discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae, once the facts are ascertained."

The argument that there is in s. 17 a discretion wide enough to enable the judge to refuse to give effect to the rights of the husband when undoubtedly established has been based largely on the decision of DENNING, J., in *Hutchinson* v. *Hutchinson* (27). In that case, a wife whose husband had left her in the matrimonial home, which was his property, obtained a decree of judicial separation. The husband then applied under s. 17 for an order for possession, and his counsel argued that the judge had no discretion to refuse it. DENNING, J., said (27):

C

> " At common law the husband had no right to turn his wife out of the house. He could not sue her for ejectment or trespass or any other tort. His only rights are under s. 17 of the Married Women's Property Act, 1882, which does not give him the right he is now claiming, but leaves it open to the court to make such order as it thinks fit. The court has a discretion which, of course, must be exercised judicially."

D

The judge was satisfied that it would be unjust to turn the wife out, and accordingly refused to make the order. In *Bendall* v. *McWhirter* (28) DENNING, L.J., referred to this decision saying that s. 17 gave the court a very wide discretion in the matter.

E

There is nothing here to suggest that DENNING, J., would have refused the order in a case in which the wife had no rights at all. What is argued, as I understand it, is that DENNING, J., was there creating a right for the wife out of the husband's inability to proceed otherwise than under s. 17. If so, and if the section can be used for the creation of rights, then the power of the court would certainly have to be very wide indeed. But I do not think that DENNING, J., was doing that. It had been settled long before this that either spouse has rights against the other in the matrimonial home even though it be wholly owned by the other; see, for example, *Shipman* v. *Shipman* (29). It is now settled, largely through the judgments of DENNING, L.J., himself, that the discretion which the court exercises in determining how far it is fair and reasonable for the wife to exercise her rights is not a product of s. 17. If it were, the rights of the wife could not prevail against a third party who does not proceed under that section. It is now established that the discretion must be exercised by any court before whom the question may come: *Jess B. Woodcock & Sons, Ltd.* v. *Hobbs* (30).

F

G

In *Lee* v. *Lee* (31)—a case which was relied on by counsel for the wife—SOMERVELL, L.J., referred (32) to the words of s. 17 as being " in the widest possible form ". This dictum related to the court's power to restrain the husband from exercising his proprietary rights when that exercise would bring them into conflict with the wife's right to live in the matrimonial home and her enjoyment thereof. There is no doubt that in such circumstances, the wife's right being still alive, the court has the widest possible discretion; and, this being in the early stages of the development of the doctrine, the court was not considering whether the wide discretion flowed from the statute or ex necessitate rei. The dictum

H

I

(25) [1929] All E.R. Rep. 581; [1929] 2 K.B. 180.
(26) [1937] 2 All E.R. at p. 656; [1937] A.C. at p. 489.
(27) [1947] 2 All E.R. at pp. 792-793.
(28) [1952] 1 All E.R. at p. 1310; [1952] 2 Q.B. at p. 475.
(29) [1924] All E.R. Rep. 365; [1924] 2 Ch. 140.
(30) [1955] 1 All E.R. 445.
(31) [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.
(32) [1952] 1 All E.R. at p. 1301; [1952] 2 Q.B. at p. 491.

cannot be taken quite literally, for if it be true of s. 17, it must now be true also of every other statute under which possession by a third party is sought against the wife. Certainly the dictum is no authority for the view that the discretion extends to a case in which the wife has committed adultery, for that was not under consideration.

DENNING, J.'s dicta are high authority for the view that the husband cannot proceed to turn the wife out of the home except under s. 17, but I must say with great respect that I do not regard them as putting the matter beyond doubt. It is certainly the law that the husband cannot sue his wife in tort. The question is whether an action of ejectment is an action in tort. In *Bendall* v. *McWhirter* (33) DENNING, L.J., cited as his authority the judgment of GODDARD, L.J., in *Bramwell* v. *Bramwell* (34). If that case is carefully examined in conjunction with *Pargeter* v. *Pargeter* (35), I think that it will be seen quite clearly that the doubts expressed by GODDARD, L.J., do not represent the decision of the court or even his own concluded judgment. Indeed, I think it would be difficult to hold that DENNING, J.'s dictum was correct without overruling *Bramwell* v. *Bramwell* (34). If one goes back beyond that case, it would be necessary to consider *Doe d. Merigan* v. *Daly* (36), where LORD DENMAN, C.J., treated the husband's disability as purely procedural and one that could be overcome with the assistance of John Doe, who was not, of course, married to the defendant wife. The technical difficulty could, I suppose, be overcome in the same way today by the husband's making an assignment. It would be necessary also to consider whether, if a husband sues on the termination of a presumed licence for recovery of possession, he cannot bring his action in contract; a landlord may sue in contract for a tenant's failure to give up possession in accordance with the terms of his lease (see BULLEN & LEAKE (3rd Edn., 1868) at p. 206.)

I do not go into these matters any further because, if I did find that the husband had no rights except under s. 17, I should still not be prepared to give that section any different meaning. The fact that a party has no rights until a statute gives them to him does not put him in mercy. Unless the statute provides to the contrary, he is entitled to have his statutory right enforced in the ordinary way. Moreover, it is clear that so far as the wife is concerned, s. 17 is only procedural; her substantive remedies have already been given her by s. 12. The discretion under s. 17 cannot be enlarged against her. But by virtue of what construction can it be exercised differently between the parties? It would be unreasonable if the wife could get the furniture belonging to her as soon as she proved her title to it while the husband could not get his unless the court thought he ought to have it.

I hold that the powers of the court under s. 17 are substantially the same as in any other proceeding where the ownership or possession of property is in question. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases. I accept that, as SOMERVELL, L.J., said in *Lee* v. *Lee* (37), where there are conflicting claims to a number of small items, there is power in the court to arrive at a broad conclusion. This may be attributable to the summary nature of the process, though I should myself be inclined to think of it as an example of the de minimis principle; all courts have to do rough justice from time to time. Apart from this, rights of property have to be determined according to law. The discretion to adjourn is no wider and no narrower than that possessed by any other court. The general rule is that when a case is brought on for trial by the proper process the plaintiff is entitled to have it heard and determined. So the usual ground for an adjournment is when the court would be unable to do justice if it proceeded to an immediate hearing. I should not, of course, dispute that when some relevant fact, such as adultery, is in issue, there

(33) [1952] 1 All E.R. at p. 1310; [1952] 2 Q.B. at p. 475.
(34) [1942] 1 All E.R. 137; [1942] 1 K.B. 370. (35) [1946] 1 All E.R. 570.
(36) (1846), 8 Q.B. 934. (37) [1952] 1 All E.R. at p. 1300; [1952] 2 Q.B. at p. 491.

A is power in the court to stay the proceedings until that issue has been resolved by some other court which has seisin of it. That can be done on the principle of forum non conveniens. It does not arise here since adultery is admitted, and whether the husband does or does not get a decree on the ground of adultery is irrelevant. The law on this latter point is, I think, correctly stated in LUSH ON HUSBAND AND WIFE (4th Edn.) at p. 415, where it is said:

B

> " It is the misconduct of the wife, not the ability of the husband to obtain a divorce, that discharges him from the obligation which marriage imposes upon him to support his wife."

In my judgment the court has not got and cannot ever have power to grant C possession to anyone except the husband. The position might be different if the wife had any right as a co-owner; see per DENNING, L.J., in *Cobb* v. *Cobb* (38). In the present case her interest unquestionably terminates on the dissolution of the marriage.

I have said that if there were any fact, such as adultery, in issue, which was also in issue in a pending matrimonial suit, it would be proper to stay the D summons under s. 17. Normally, in such a case, the question is more conveniently determined in the matrimonial suit which ought to be given precedence. By the same token I think that the s. 17 procedure should yield when the interlocutory procedure in a matrimonial cause is invoked. If the wife in this case, accepting that she had no right to possession, had said that she desired nevertheless to ask the judge at chambers for an injunction to restrain the husband from interfering E with her residence in the matrimonial home pendente lite, I should have thought it a proper exercise of the discretionary power to adjourn the s. 17 proceedings long enough to allow her to do so. She has not asked for that, but on the assumption that she would regard it as better than nothing, I would be prepared, in allowing the appeal, to vary the order so as to make it an order for possession unless within seven days the wife applied for an injunction restraining the F husband from interfering with her enjoyment of the flat. I express no opinion at all whether such an application should be granted.

It may be thought, assuming that the judge in chambers takes the same view of the merits as the registrar did, that this is a distinction without a difference; and that at the end of this judgment all that I have done is to lay down a roundabout way of arriving at the same result on the merits. Even if that could properly G be said, I should still have to arrive at the same decision; if I am right in thinking that it is a matter of construction of the section, one cannot construe it simply so as to give a more convenient result. But in truth I do not think that that can properly be said. The distinction is not a purely technical one. The course that has been taken not only involves a point of principle but is also, I think, objectionable on practical grounds. On principle, a bad precedent is created if a court H assumes wrongly a discretion of this sort. When rights are established according to law, it is the duty of the courts to enforce them; no more than has a minister, has a judge power to take away a man's rights or to hinder him in the obtaining of them, unless by due process of law. This is a principle to be preserved against encroachments by the judiciary as well as by the executive.

On practical grounds it is in my judgment inconvenient, if not wrong, for the I summons under s. 17 to be dealt with as if it were an interlocutory order in the matrimonial cause. It is true that the order does not exclude the husband from his flat, but, as a practical matter, it is obvious that both cannot live there at the same time, and the making of the order shows it to be the court's intention that it is the wife who should have the enjoyment of it pendente lite, and not the husband. For practical purposes the order is effective in excluding the husband from the flat and would no doubt be amplified and enforced by injunction if

---

(38) [1955] 2 All E.R. at p. 699.

necessary, as was done in *Lee* v. *Lee* (39). Since it is made pendente lite, it is the equivalent of an interlocutory injunction. Except for injunctions of a very limited class, the power to grant an injunction is by R.S.C., Ord. 54, r. 12, reserved to a judge at chambers; and all interlocutory injunctions are so reserved. An interlocutory injunction is an order that requires great delicacy in its use because it may deprive an individual, even though only temporarily, of the exercise of a right—that is, of a right that is still in dispute; and the point is a fortiori when, as here, the right is already established. It is, therefore, the rule that the discretion which is operative should be that of a judge, and not that of a registrar or a master.

This is wise, not simply because a judge speaks with the greater authority, but also because cases taken before the judge are generally argued with greater thoroughness. The present case illustrates the wisdom of guarding carefully the use of the interlocutory order. Whether or not there be a discretion under s. 17, this is the first case in which an order has been made in favour of an adulterous wife. The wife obtained this without filing an affidavit or adducing any evidence and the husband did not appear by counsel. I cannot believe that such argument as there may have been could have brought it to the mind of the registrar that he was being asked to do anything out of the ordinary course; yet his discretion is said to be paramount. I do not like suggesting rules which might fetter the exercise of a discretion where it exists, but I should have thought that there should be some evidence of hardship or other exceptional circumstances before an adulterous wife is allowed to keep the husband out of his flat. If I were not for allowing the appeal on the ground that the wife has no rights at all, I should have to consider whether I should not allow it on the ground that there was no material to support the exercise of the discretion in her favour.

On any view I think it would be much better in practice if s. 17 was not used for interlocutory purposes, and I cannot therefore regret a construction of the section—much the same as that put on it by the President (LORD MERRIMAN) in *Kelner* v. *Kelner* (40) where he was dealing with a somewhat similar point—which makes that course imperative. A difficult and confusing situation may arise if these two jurisdictions are allowed to run on parallel lines. Can the husband in this case now apply to the judge in chambers for an order in the matrimonial suit that he should be given possession of his flat without the obligation of finding alternative accommodation? If he cannot, then the point has been decided against him by the discretion of a registrar and not that of a judge. If he can, then what happens if the judge in his discretion takes a different view of the merits from that taken by the registrar? Is he bound by the registrar's order so far as it goes? If he is, then again it is the discretion of the registrar and not that of the judge which prevails. If he is not, then it would have been much better for the matter to come before him in the first instance in an application for an interlocutory injunction. He will not then have to deal, as the registrar had, with the matrimonial home in isolation, but will be able to consider alimony pendente lite in conjunction with it. Thus there will be removed what seems to me to be one of the objectionable features of the registrar's order that, without alimony being considered at all and without there being any investigation into means, the husband has in effect been ordered to contribute pendente lite to his wife's support at the rate of £250 per annum.

My Lords have dealt fully with the point that the appeal was out of time, and I need not say more than that in my judgment the objection was taken too late.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Waterhouse & Co.* (for the husband); *Theodore Goddard & Co.* (for the wife).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

(39) [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.
(40) [1939] 3 All E.R. 957; [1939] P. 411.

PEARCE *v.* PEARCE.

[COURT OF APPEAL (Hodson and Harman, L.JJ., and Phillimore, J.), June 23, 24, 1960.]

Divorce—Desertion—Separation agreement—Separation agreement made before 1938—Wife then in desertion—Subsequent offers by wife to return to husband—Petition by husband—Cross-prayer for divorce by wife—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 *Eliz.* 2 *c.* 54), *s.* 3.

A wife deserted her husband in May, 1936, and in June, 1936, a written separation agreement was made between them. Between 1942 and 1947 the wife several times approached the husband and did her best to bring about a reconciliation, but the husband refused. On Oct. 3, 1958, the husband petitioned for divorce on the ground of the wife's desertion, relying on the provision of s. 3* of the Divorce (Insanity and Desertion) Act, 1958, that, "for the purposes of s. 1 (1) (b) of the Matrimonial Causes Act, 1950 (which provides that a petition for divorce may be presented to the High Court on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition), any agreement between the petitioner and the respondent to live separate and apart . . . shall be disregarded if the agreement was entered into before Jan. 1, 1938 . . . " The wife by her answer cross-prayed for divorce on the ground of the husband's desertion.

Held: (i) the husband's petition failed because if the agreement were disregarded, pursuant to s. 3, the husband had no ground for refusing the wife's offer to return and so the wife was not in desertion when the petition was presented (see p. 24, letter E, and p. 25, letter D, post).

(ii) in considering the wife's cross-prayer for divorce the separation agreement could not be disregarded because the wife was in desertion at the time when the agreement was made, and s. 3 did not apply (see p. 24, letters C and D, and p. 25, letter I, post); accordingly her cross-prayer for divorce must be refused.

QUAERE (per HARMAN, L.J.) whether financial provisions in a pre-1938 separation agreement would be affected by the filing of a petition relying on s. 3 (see p. 25, letter H, post).

Appeal and cross-appeal dismissed.

[For the Divorce (Insanity and Desertion) Act, 1958, s. 3, see 38 HALSBURY'S STATUTES (2nd Edn.) 486.]

Appeal.

The husband appealed and the wife cross-appealed respectively against so much of the judgment of Commissioner SIR REGINALD SHARPE, Q.C., sitting at Newcastle-upon-Tyne, on Dec. 4, 1959, as dismissed the husband's petition and the wife's cross-prayer in her answer for divorce on the ground of the other spouse's desertion. The facts, which are summarised in the headnote, are stated in full in the judgment of HODSON, L.J. The case is reported only on the points arising on the Divorce (Insanity and Desertion) Act, 1958, s. 3.

Bernard B. Gillis, Q.C., and *R. A. Percy* for the husband.

W. Temple for the wife.

HODSON, L.J.: These are appeals by a husband and by a wife from an order of Commissioner SIR REGINALD SHARPE, Q.C., sitting at Newcastle-upon-Tyne, on Dec. 4, 1959. The proceedings were initiated by the husband, who petitioned for divorce on the ground of his wife's desertion. The wife denied desertion, and in her turn asked for a divorce. The proceedings would inevitably have failed, whichever spouse had initiated them, but for the reliance which was placed on the Divorce (Insanity and Desertion) Act, 1958, which is an Act

* Section 3 is printed at p. 22, letter B, post.

which enables a petition for divorce to be presented on the ground of desertion notwithstanding any separation agreement entered into before desertion became a ground for divorce in English law. The date when desertion became a ground for divorce in English law was Jan. 1, 1938, (1). The Act of 1958, s. 3, provides:

> "For the purposes of s. 1 (1) (b) of the Matrimonial Causes Act, 1950 (which provides that a petition for divorce may be presented to the High Court on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition), any agreement between the petitioner and the respondent to live separate and apart, whether or not made in writing, shall be disregarded if the agreement was entered into before Jan. 1, 1938, and either —(a) at the time when the agreement was made the respondent had deserted the petitioner without cause; or (b) the court is satisfied that the circumstances in which the agreement was made and the parties proceeded to live separate and apart were such as, but for the agreement, to amount to desertion of the petitioner by the respondent without cause."

The parties in this case were married in 1932; and a daughter was born in 1934. In May, 1936, they separated. On May 12, 1936, a letter was written on behalf of the wife referring to the fact that she had left her husband, containing this passage:

> "Dr. Pearce [that is the husband] cannot be surprised at our client having left him and returned to her parents as for the greater part of their married life there has not been domestic happiness. Our client has been compelled to submerge her personality owing to the domineering attitude adopted by her husband, she has been compelled to take medicines which have had a serious effect upon her physique and which resulted in her losing about two stones in weight, she has been placed on diet by her husband and refused food of a nourishing nature and these with others have resulted in Mrs. Pearce becoming almost a physical and nervous wreck. She has had independent medical advice since returning to Edinburgh and it will be only after some months of careful nursing and constant care before she will return to normal. These are the reasons our client has given us for her refusing to continue to cohabit with her husband."

The husband's solicitors replied denying the allegations which had been made against their client by the wife.

On June 25, 1936, an agreement for separation was entered into between the parties which is in the usual form in that it recites

> "unhappy differences having arisen between the husband and the wife and they are now living separate and apart from each other."

The deed was entered into at the instigation of the wife's solicitors. The wife got no benefit by way of monetary payment under the agreement, but her solicitors were anxious to secure that she should have the custody of the child —which no doubt she would inevitably obtain having regard to the age of the child. The agreement provided (as again is usual) that if the husband and wife should be reconciled the agreement should become void except in respect of proceedings for a breach previously committed. That agreement remained in force thereafter.

On Mar. 12, 1942, the wife communicated with her husband, and in her letter she said:

> "Perhaps you will be in Edinburgh some time soon and if so I would be glad of the opportunity to talk over a matter of some importance with you."

---

(1) I.e., the day on which the Matrimonial Causes Act, 1937, which by s. 2 first permitted divorce for desertion, came into force.

They did not meet immediately; but on Jan. 5, 1943, the wife, who had been in correspondence with her husband directly and through solicitors, wrote agreeing to his suggestion to come up to Edinburgh, when they could discuss his having the daughter, whose name was Evelyn. The wife, therefore, was using Evelyn as an attraction to get her husband to see her. They did meet. The husband was expecting to see the child, but he did not, and nothing was said at all which satisfied him. The wife did not make any direct approach to him with a view to reconciliation, but I think there can be no doubt that that is what she was anxious for and that she had used the child as a means of getting her husband to meet her. I say that because on Jan. 17, after the meeting, she wrote:

> "After leaving you on Thursday I turned back but you had gone. I wandered back and forward but just couldn't make up my mind to go home. I wanted to go down to the station but you weren't alone. Oh Ashton what an awful mess everything seems to be in. I didn't want to talk about Evelyn—not really—it was just I wanted to see and talk to you again. I didn't want to let you see how I felt and I must have succeeded pretty well for you thought me quite devoid of feeling didn't you . . . I shall be spending the weekend in Newcastle and if it is suitable to you I shall come out to see you on Sunday. I can't give you the exact time as I am not sure about buses but it will be shortly after lunch. Let me know by return if this suits you."

The husband did not reply himself but he got his solicitors to reply. They wrote on Jan. 19 referring to the letter of Jan. 17 which the husband had received and said:

> "We have been instructed to inform you that Dr. Pearce does not wish to see you at his home and is satisfied that no good purpose whatever can be served by any such visit."

There was silence after that letter had been written until Apr. 10, 1945, by which time the wife's father had died. The solicitors for the wife, acting I think in the first place on their own initiative although the wife agreed to the course which they took, wrote to the husband's solicitors with a view to bringing about a reconciliation between the husband and the wife. The husband's solicitors replied on Apr. 26, 1945, saying their client was very definite that he could not consider their suggestion for reconciliation between his wife and himself, and harked back to the interview when the wife had pretended that she wanted Evelyn to see her father, saying:

> "Our client is still very bitter about the treatment he received from your client when he saw her last in Edinburgh and this has added to the difficulty of their being reconciled . . . when he arrived at Edinburgh his wife saw him alone and made it quite clear that she never had any intention at all of even bringing the child with her for him to see but had merely used this as an excuse to get him to go to Edinburgh for the purpose of discussing her own affairs."

The solicitors for the wife wrote again on May 1, 1945, hoping for a reconciliation "for the benefit of all."

That was followed by a further meeting between the spouses at or near the husband's home in South Moor, Durham, in July, 1946. It appears that the wife was then anxious to be on good terms with her husband; but in the course of that interview she said to him "Why don't you divorce me?" Nothing further that is material transpired at that interview; and the last communication between the parties which is extant is a letter dated Aug. 18, 1947, nearly a year later, in which the wife wrote again to her husband having regard to something that the child had said to her after her return from South Moor. She concluded that letter by saying:

" Of course I already told you but I now write it to you I am more sorry than I can tell you for allowing myself to be the cause of so much unhappiness. I broke faith and did everything I promised before God not to do and God alone knows how bitterly I have had cause to regret it."

The Divorce (Insanity and Desertion) Act, 1958, came into force on July 23, 1958. On Oct. 3, 1958, the husband presented his petition; and on Dec. 9, 1958, the wife put in her answer containing her own prayer for divorce. It is convenient, I think, to deal first with the wife's appeal, because the wife cannot bring herself within the language of the Act unless at the time the agreement was made she had been deserted by her husband. It therefore becomes necessary to consider the circumstances in which the separation took place in 1936. [HIS LORDSHIP reviewed the circumstances and concluded:] I do not think that there is any possible answer to the husband's allegation, confirmed by the learned commissioner's finding, that it was the wife who deserted the husband in 1936. That being the case, she cannot bring herself within the language of the Act, and the agreement for separation cannot, so far as she is concerned, be disregarded. It has been argued on her behalf that if it is disregarded in favour of the husband it ought to be disregarded in favour of the wife. That is not so. The matter has to be looked at from the wife's point of view quite independently, as if she alone were the petitioner for divorce and without taking into account the fact that her husband is also taking proceedings against her. Looked at from the point of view of the wife as a petitioner, she deserted her husband before the relevant date, Jan. 1, 1938, and the agreement for separation which was entered into on June 25, 1936, prevents her succeeding.

But so far as the husband's appeal is concerned, he is entitled to take advantage of the Act and disregard the agreement, he having been deserted by his wife in 1936. The learned commissioner dismissed the husband's petition because, although he had been deserted in 1936, the wife throughout the period of the separation at intervals, and in particular through her solicitors in 1945, had done her best to bring about a reconciliation, and in those circumstances the commissioner could not hold that the husband had proved his case. I think that on the evidence that is the only possible conclusion. [HIS LORDSHIP then considered and rejected on the facts a submission that the husband had good cause, apart from the separation agreement, to reject the wife's overtures for reconciliation, and continued:] On the facts of this case there is no question but that the learned commissioner arrived at the right result.

That leaves the question of law on which the husband mainly relies. The notice of appeal puts the matter as the husband wishes it to be put. It is said that the learned commissioner, by virtue of the provisions of s. 3 of the Act of 1958, disregarded the existence of the separation agreement entered into between the husband and the wife on June 25, 1936, but failed to disregard the conduct of both parties wholly attributable to that agreement which he ought by law to have disregarded. What the husband says, through his counsel, is that he is entitled to disregard the agreement because the Act says that he can for the purposes of s. 1 (1) (b) of the Act of 1950—that is to say, for the purposes of getting his divorce on the ground of desertion without cause for three years immediately preceding the petition. The husband seeks to say that he is entitled to disregard it for that purpose but to regard it for his own purposes in that he was entitled, by the terms of the agreement, which remained in force and still remains in force, to reject his wife's overtures for reconciliation in 1945 and afterwards.

I think that that argument is not sustainable. It is not open to the husband, having regard to the language of the Act, " for the purposes of " s. 1 (1) (b), to use the agreement in his own favour in considering the history of the married life and to disregard it only for the purpose of getting his case of desertion on foot in the first instance.

I find it difficult to elaborate this matter, which seems to me to be quite plain.

The way in which the matter has been put on the part of the husband always came back to that—that he was entitled to disregard the agreement because the Act said that he could: nevertheless that he was entitled to regard it when it suited him so to do for the purpose of answering the request by his wife to return to him. That proposition, however it may be put, is quite unacceptable, having regard to the language of the section and the obvious intention of the Act, which was to relieve persons who were handicapped by the existence of an agreement for separation entered into before desertion became a ground for divorce.

In my judgment, therefore, the appeal on behalf of the husband fails, as does the cross-appeal of the wife; and they must be dismissed.

HARMAN, L.J.: I entirely agree. On the question of fact it seems to me that the commissioner was well justified in coming to the conclusion that he reached; and indeed I should have reached the same one myself. I need say no more about it as my Lord has dealt with the whole matter.

The question of law is a novel one. What the Divorce (Insanity and Desertion) Act, 1958, says is that, for the purposes of the desertion provisions of the Act of 1950, a separation agreement before the relevant date "shall be disregarded". Take, then, the husband's position. When he puts his petition on the file, you disregard the separation agreement altogether. What then results? You find desertion by the wife in 1936. That state of desertion continues until 1945 or 1946 and is then terminated by the offers made by the wife to return. It follows, it seems to me, as night follows day, that the husband cannot satisfy the court that, in the three years immediately preceding the presentation of the petition, he was in the position of a deserted husband. His petition must therefore fail. What he does (as the commissioner put it so well) is to try to have it both ways. The husband says that the agreement must be put out of sight when considering his petition; but that when there is this answer about efforts to be reconciled it must be remembered that, as in those days the agreement was in force and valid, he was entitled to reject his wife's overtures for reconciliation and he cannot now be handicapped by doing that which at the time he was well entitled to do. It is true that he was well entitled to reject his wife's overtures for reconciliation. He was not bound to accept them, because of the existence of the agreement. He is not bound to accept them now. Nevertheless when he puts a petition on the file the agreement is out of the way for all the purposes of his petition and the court looks at the facts as they would have been if no such agreement had ever been made. He cannot withdraw the agreement for his own case and still rely on it to defeat his wife's answer.

It does not seem to me that really the matter is of great complication. What the effect of the Act may be on other provisions of such an agreement—for instance, if there had been financial provisions—I do not propose to try to answer. It is possible that there may be questions arising out of agreements for separation where a petition of this sort has been put on the file. To the question whether the other provisions (for instance, financial provisions) in such an agreement would still continue in effect, I propose to make no answer.

As to the wife's cross-petition, it seems to rest on this rather simple-minded notion, that, as the husband has not proved that his wife has deserted him, it must follow that he has deserted her. Once his petition is rejected, the wife says, hers must be accepted, because one party to the marriage must have deserted the other. On this Act of Parliament that is not the result. The wife must prove, just as if she had been the original petitioner, that she was a deserted party at the time when the separation agreement was entered into. That she cannot prove. She does not even try to prove it in this court. Therefore her petition, no less than her husband's, is doomed to failure.

For these reasons, in addition to those given by my Lord, I agree that these appeals fail.

PHILLIMORE, J.: I agree, and I cannot usefully add anything.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bulcraig & Davis*, agents for *Hay & Kilner*, Newcastle-upon-Tyne (for the husband); *Smith & Hudson*, agents for *Waller & Houseman*, Newcastle-upon-Tyne (for the wife).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

LONGMUIR *v.* KEW.

[CHANCERY DIVISION (Cross, J.), June 28, 1960.]

Option—Purchase—Option to purchase freehold—Tenant's option conferred by tenancy agreement to purchase "at any time" at fixed price—Term of tenancy agreement a five years' term—Property becoming subject to Rent Restrictions Acts after date of agreement—Tenant holding over as statutory tenant—Exercise of option while statutory tenant—Validity.

By an agreement dated May 26, 1939, the landlord let certain premises to the tenant for the term of five years from June 1, 1939, at the rent of £52 per annum exclusive, and it was agreed that the tenant should have the right of option to purchase the freehold "at any time at £675". On May 26, 1939, the premises were not within the Rent Restrictions Acts, but became subject to the Acts later in 1939 by virtue of the Rent and Mortgage Interest Restrictions Act, 1939. After the term of five years had expired on May 31, 1944, the tenant remained in possession as a statutory tenant under the Rent Restrictions Acts and was still in possession when, on June 6, 1959, notice in writing was given to the landlord on the tenant's behalf of his intention to exercise the option. On the question of the validity of the purported exercise of the option,

Held: on the true construction of the agreement of May 26, 1939, the words "at any time" in the option to purchase meant at any time during the currency of the tenancy created by the agreement, and, therefore, the purported exercise of the right of option after the expiration of the original term of five years was invalid.

Rider v. *Ford* ([1923] All E.R. Rep. 562) distinguished.

[As to an option to purchase the landlord's interest in the demised premises, see 23 HALSBURY'S LAWS (3rd Edn.) 470, para. 1090; and for cases on the subject, see 31 DIGEST (Repl.) 61, *2179*, 78, *2319*.]

Cases referred to:

Buckland v. *Papillon*, (1866), L.R. 1 Eq. 477; 35 L.J.Ch. 387; 13 L.T. 736; *affd.* L.C., (1866), 2 Ch. App. 67; 36 L.J.Ch. 81; 15 L.T. 378; 31 Digest (Repl.) 70, *2267*.

Hutton v. *Watling*, [1947] 2 All E.R. 641; [1948] Ch. 26; *affd.* C.A., [1948] 1 All E.R. 803; [1948] Ch. 398; 2nd Digest Supp.

Leeds & Batley Breweries & Bradbury's Lease, Re, Bradbury v. *Grimble & Co.*, [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 31 Digest (Repl.) 61, *2179*.

McIlroy (William), Ltd. v. *Clements*, [1923] W.N. 81; *affd.* C.A., [1923] W.N. 149; 31 Digest (Repl.) 694, *7861*.

Moss v. *Barton*, (1866), L.R. 1 Eq. 474; 35 Beav. 197; 13 L.T. 623; 30 J.P. 243; 55 E.R. 870; 31 Digest (Repl.) 68, *2247*.

Rider v. *Ford*, [1923] All E.R. Rep. 562; [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347; 31 Digest (Repl.) 68, *2248*.

A *Sherwood* v. *Tucker*, [1924] All E.R. Rep. 354; [1924] 2 Ch. 440; 94 L.J.Ch. 66; 132 L.T. 86; 31 Digest (Repl.) 78, *2319*.

Adjourned Summons.

The plaintiff applied to the court by originating summons under R.S.C., Ord. 54A, for a declaration that, on the true construction of a memorandum of agreement dated May 26, 1939, made between the defendant, as landlord, of the one part, and the plaintiff, as tenant, of the other part, the plaintiff was entitled to an option to purchase the premises comprised therein, being No. 19, formerly No. 31, Eagle Road, Brislington, Bristol, at the price of £675, and that such option was duly exercised by a letter dated June 5, 1959, from the plaintiff's solicitors to the defendant.

B. S. Tatham for the plaintiff, the tenant.

G. A. Forrest for the defendant, the landlord.

CROSS, J.: This summons raises what is, in my judgment, by no means an easy point of construction of a tenancy agreement made on May 26, 1939, between the defendant, William James Kew, and the plaintiff, Robert Davison Longmuir, in respect of a house then known as 31, Eagle Road, Brislington, Bristol.

By the agreement the defendant, the landlord, agreed to let, and the plaintiff, the tenant, agreed to take the house, subject to the rent and conditions hereinafter contained, for the term of five years from June 1, 1939, at a rent of £52 a year exclusive. The tenant agreed to use the premises as a private dwelling-house

> " . . . and not to assign or underlet or part with the possession of the said premises without the consent in writing of the landlord."

There was a provision for the determination of the tenancy if the rent was not paid or if any of the conditions were not complied with by the tenant. Then came the clause which has given rise to the difficulty in this case:

> " And it is hereby agreed that the tenant has the right of option to purchase at any time at £675, ground rent £7. The landlord agrees that should the tenant be moved by his firm to another town he shall be released from this agreement upon giving three months' notice."

The reference to ground rent was a reference to the fee farm rent to which the property was subject, but nothing turns on that. There was a provision as to giving up the premises in a proper state of repair, and as to quiet enjoyment, which has no bearing on this point.

At the date of the agreement the property was not subject to the Rent Restrictions Acts and, therefore, there would be nothing to prevent the landlord recovering possession from the tenant at the end of the five years' term. The property became subject, however, to the Rent Restrictions Acts by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, which was passed on the outbreak of war in 1939, and on the expiry of the five years' term, on May 31, 1944, the tenant remained in possession as a statutory tenant under the Rent Acts and has so remained in possession ever since. On June 6, 1959, the tenant's solicitors served on the landlord a notice of the tenant's intention to exercise his option to purchase the property for £675, which, no doubt, at the present day is very much less than the market value of the property. The landlord contested the validity of the notice, and this summons has been taken out to decide whether or not the tenant had the right to purchase the property under the provision in the agreement. The case turns on the construction of those few words used in the agreement, which I will repeat:

> " And it is hereby agreed that the tenant has the right of option to purchase [the freehold] at any time at £675 . . ."

It is agreed that that clause cannot be read literally, so that the tenant would have the right to purchase the freehold even though he no longer had any connexion with the premises and was no longer a tenant of the landlord. It would be ridiculous to suppose that, if the tenant had gone out of possession in 1944 and had gone to live in some other part of the country and the landlord had relet the premises to somebody else, the tenant at some future date, years afterwards, could claim to purchase the property. The two rival views which have been put forward are, on the one hand, that the words " at any time " mean at any time during the term of five years created by the agreement, and, on the other hand, that they mean at any time while the tenant is a tenant of the premises under the landlord, either during the term of five years or under any continuation of the relation of landlord and tenant, whether it be by a consensual holding over or by operation of the Rent Restrictions Acts.

The question, though ultimately one of construction of the particular document, is not free from authority. There are several cases, starting with *Moss* v. *Barton* (1), which show that, where there is a provision in a tenancy agreement giving the tenant a right to continue or renew the tenancy and there is no express statement in the agreement that that right is exercisable only during a certain period and, on the face of it, it is exercisable at any time, the court will not, generally speaking, confine the exercise of the right to the original contractual period of tenancy but will allow it to be exercised after the expiry of the original period if the tenant is holding over and is still a tenant of the landlord. In *Moss* v. *Barton* (1) there was an agreement between the landlord and the tenant by which the landlord agreed to allow the tenant to occupy the premises in question for a period of three years and also agreed, at the request of the tenant, to grant him a lease of the premises for five, seven, fourteen, or twenty-one years from the expiration of the original period of three years. After the expiry of the original three years, the tenant remained in possession as tenant from year to year. It was held by LORD ROMILLY, M.R., that the tenant continued to have the right, so long as he remained tenant, to call for an extended lease for five, seven, fourteen, or twenty-one years. LORD ROMILLY, M.R., came to a similar decision in *Buckland* v. *Papillon* (2), and his decision was affirmed, on appeal (3), by LORD CHELMSFORD, L.C. By the agreement in that case the landlord agreed to let and the tenant agreed to take the property for three years at a certain rent. That agreement contained a clause that the landlord should, " whenever called upon so to do " by the tenant, grant a lease to him of the premises in question

> " . . . for a period of three years, seven years, or the remainder of the term . . . that [the landlord] has at present in his power to grant . . ."

There again the tenant remained in occupation after the end of the original period without applying for a lease. It was held that his assignee in bankruptcy had a right to call for the extended lease under the words " whenever called upon so to do " as long as he was still the tenant of the landlord. The court did not confine the words " whenever called upon so to do " to the period of the original term.

Next comes the case of *Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury* v. *Grimble & Co.* (4). There, in contradistinction to the cases to which I have referred, the option in question was an option to purchase a reversion and not an option for the renewal of the term. A lease for seven years from June 1, 1903, contained a proviso that, if the lessee should be desirous of purchasing the unexpired residue of the leasehold reversion and should —these were the important words—" at any time six calendar months before the determination of this lease " give to the lessors a written notice to that effect, then the person giving such notice should be the purchaser of the unexpired residue of the term at the price of £3,000. After the original term had expired,

(1) (1866), L.R. 1 Eq. 474. (2) (1866), L.R. 1 Eq. 477. (3) (1866), 2 Ch. App. 67. (4) [1920] 2 Ch. 548.

as a result of correspondence between the lessors and the lessee, the term was extended for twelve months from June 1, 1910, and at the end of the extended term the lessee continued in possession, becoming a tenant from year to year. The question arose whether the lessee could then exercise the option to purchase. Peterson, J., held that he could not, on the ground that the option to purchase the reversion was not a term of the original tenancy which would be incorporated into the year to year tenancy under which the lessee was holding after the determination of the extended term, and that the option was exercisable only during the term of seven years granted by the lease.

In 1923 there came the decision of Russell, J., in *Rider* v. *Ford* (5), on which counsel for the tenant in the present case strongly relied. In *Rider* v. *Ford* (5) there was an agreement between the landlord and the tenant by which the tenant agreed to take the premises in question

> " . . . for three, five, or seven years at the rent of £147 per annum, and to have the option of purchasing either the freehold for £2,900, or a lease of ninety-seven years (ground rent £20) for £2,400."

It will be seen that there was an alternative either to purchase the freehold or to acquire a very long lease of the premises for ninety-seven years instead of seven years. There, as in the earlier cases to which I have referred, the tenant remained in possession, as tenant from year to year, after the term of seven years, and the question arose whether he was entitled to exercise either or both of those options. In that case the judge held, on an admission by counsel for the tenant, that the option to purchase the freehold was void as offending the rule against perpetuities. That was a wrong admission, as was pointed out by Jenkins, J., in *Hutton* v. *Watling* (6), because the proceedings were between the original landlord and the original tenant and the rule against perpetuities has nothing to do with the enforcement of a contract between the original contracting parties. If Russell, J. (5) had not held that the option to purchase the freehold was void for perpetuity, it is clear that he would have held that both the option to purchase the property and the option to take the renewed term were exercisable by the tenant notwithstanding that the original term of seven years had expired. It was argued in that case that there was a distinction between cases of renewing leases and cases of purchasing the reversion. Russell, J., referred to *Moss* v. *Barton* (7) and *Buckland* v. *Papillon* (8) and pointed out (9) that in those cases the court had held that the option to renew was exercisable so long as the relationship of landlord and tenant existed, although the original term had expired. He went on to say (9):

> " There are two options in the agreement in the present case and I cannot read into it any limit in point of time except that indicated by Lord Chelmsford in *Buckland* v. *Papillon* (10), namely, that the option exists so long as the relationship of landlord and tenant continues, notwithstanding that the original term of seven years has run out."

Both options obviously had to be exercisable within the same period. There could not be a question of different periods for the two options. The judge thought that those options could not be confined to the seven years' period and that they were exercisable so long as the relationship of landlord and tenant subsisted. He distinguished *Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury* v. *Grimble & Co.* (11), decided by Peterson, J., on the ground that there, under the express words in the original agreement, the option was exercisable only during the original term.

---

(5) [1923] All E.R. Rep. 562; [1923] 1 Ch. 541.
(6) [1947] 2 All E.R. at pp. 645, 646; [1948] Ch. at p. 36.
(7) (1866), L.R. 1 Eq. 474.
(8) (1866), L.R. 1 Eq. 477; 2 Ch. App. 67.
(9) [1923] All E.R. Rep. at p. 565; [1923] 1 Ch. at p. 545.
(10) (1866), 2 Ch. App. 67.
(11) [1920] 2 Ch. 548.

Counsel for the tenant relies, naturally, very much on *Rider* v. *Ford* (12). He says that there is no distinction in principle between options for renewal and options to purchase a freehold, and he submits that, as RUSSELL, J., refused to confine the exercise of the options in that case to the original term of seven years, so I should refuse to confine the exercise of the option in the present case to the original term and that I should hold that it is exercisable so long as the relationship of landlord and tenant subsists. But all the cases to which I have referred hitherto have been cases where the landlord could have turned the tenant out at the end of the original period, whereas this is a case where, by operation of a statute passed after the creation of the tenancy agreement, the landlord became unable to turn the tenant out and was forced to keep him on. Counsel submits that that makes no difference and he quotes in support of that submission the decision of P. O. LAWRENCE, J., in *William McIlroy, Ltd.* v. *Clements* (13). That was a case of a renewal, not a case of an option to purchase the reversion. As I understand the report, P. O. LAWRENCE, J., said, in effect, that, although the option to renew was not one of the terms of the tenancy which became applicable to a statutory tenancy by virtue of s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, nevertheless, by virtue of the Act the relationship of landlord and tenant continued between the parties and the tenant continued to have the right to renew the tenancy on the principle of *Buckland* v. *Papillon* (14), notwithstanding the fact that the landlord had not consented to his remaining in possession but wished him to go out. Counsel for the tenant says that the cases decided by RUSSELL, J., and P. O. LAWRENCE, J., taken together cover this case.

Although the cases are, up to a point, helpful, ultimately, of course, the whole question is one of construction of the particular document. The words " at any time " cannot mean precisely what they say, and the question is what is the limitation that I ought to read into them here. It seems to me prima facie most unlikely, especially in these days of Rent Acts, that a landlord would agree in advance to a tenant having the right to purchase the reversion, at a price named in the agreement, throughout the quite uncertain period during which the tenant may continue to be his tenant by holding over. That aspect of the matter was stressed by POLLOCK, M.R., in *Sherwood* v. *Tucker* (15). Counsel for the tenant says that the landlord could, at the expiration of the fixed term, have called on the tenant to elect whether he would exercise the option or not. He says that, if the tenant had refused to make up his mind the option would have lapsed. I doubt whether it would have lapsed unless the landlord had determined the new periodic tenancy, and that he could not have done in view of the Rent Acts. Again, I think that, where the option is to renew a term, it is a little easier to read the option as applying throughout the relationship of landlord and tenant, even if the original term has expired, than it is to read it as so applying in the case of an agreement to purchase the freehold. On the whole, therefore, although the question is by no means an easy one, and certainly not made easier by the authorities, I consider that, on the true construction of this agreement, the right given to the tenant to purchase the freehold was a right to purchase it at any time during the currency of the agreement.

Summons dismissed.

Solicitors: *Heald, Johnson, Garton & Co.*, agents for *A. E. Nichols, Strickland & Fletcher*, Bristol (for the plaintiff); *Candler, Stannard & Co.*, agents for *Tuckett, Williams & Kew*, Bristol (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(12) [1923] All E.R. Rep. 562; [1923] 1 Ch. 541.
(13) [1923] W.N. 81.
(14) (1866), 2 Ch. App. 67.
(15) [1924] All E.R. Rep. at p. 357; [1924] 2 Ch. at p. 445.

A

INLAND REVENUE COMMISSIONERS *v.* JACKSON.

[COURT OF APPEAL (Sellers and Pearce, L.JJ.), June 24, 1960.]

Practice—Particulars—Pleading—Traverse of negative allegation—Negative pregnant with affirmative allegation—Denial that defendant "failed to furnish any such particulars without reasonable excuse"—R.S.C., Ord. 19,
B *r.* 7, *r.* 19.

In an action for penalties for failure to furnish particulars of income, etc., to the Special Commissioners of Income Tax under s. 22 of the Finance Act, 1922, s. 42 (10) of the Finance Act, 1927, and s. 232 of the Income Tax Act, 1952, the Crown as plaintiffs pleaded: "The defendant without reasonable excuse has failed to furnish the particulars required . . . within the time pre-
C scribed". The defendant in his defence denied "that he failed to furnish any such particulars without reasonable excuse or that he is liable to any penalty, as alleged or at all".

Held: further and better particulars of the defence must be ordered, since the defendant's denial was a negative pregnant indicating that he intended to set up an affirmative case of which the Crown were entitled to
D have particulars.

Dicta of GODDARD, L.J., and of STABLE, J., in *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* ([1941] 2 All E.R. at pp. 641 and 644), as applied by HARMAN, J., in *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* ([1948] 2 All E.R. at p. 140) applied.

Appeal dismissed.

E [As to matters of which further and better particulars will be ordered, see 30 HALSBURY'S LAWS (3rd Edn.) 30, para. 63; and for cases on the subject, see DIGEST (Practice) 191, 192, *1617-1621.*]

Cases referred to:

Duke's Court Estates, Ltd. v. *Associated British Engineering, Ltd.*, [1948] 2 All E.R. 137; [1948] 1 Ch. 458; 2nd Digest Supp.
F

Pinson v. *Lloyds & National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636; [1941] 2 K.B. 72; 110 L.J.K.B. 657; 165 L.T. 360; 2nd Digest Supp.

Appeal.

The defendant appealed against an order of SALMON, J., dated Apr. 27, 1960,
G ordering the defendant to deliver further and better particulars of his defence in an action for penalties for failure to furnish particulars of income, etc., to the Special Commissioners of Income Tax under s. 22 of the Finance Act, 1922, and s. 42 (10) of the Finance Act, 1927, and s. 232 of the Income Tax Act, 1952.

L. Lewis for the defendant.

A. S. Orr for the plaintiffs.

H

SELLERS, L.J.: This is an appeal against a decision of SALMON, J., who (affirming the master) made an order requiring the defendant to give particulars of para. 2 of the amended defence. In my view, the appeal is misconceived and the learned judge came to a right conclusion on this matter. We have listened to the argument of counsel for the defendant and it seems to me that, if we were
I to grant the appeal, he would be in a greater difficulty than perhaps he has appreciated.

The action is one for penalties under s. 232 of the Income Tax Act, 1952, and under a similar provision in an earlier Finance Act because the period for which the penalties are claimed is a period of some nine years, four of them before 1952. The plaintiffs claim penalties involving £50 for each of those years. The basis of the claim is that the defendant has been required to make a return under the appropriate sections of the relevant Finance Act or Income Tax Act, and has failed to do so. The allegation is:

A

> "The defendant without reasonable excuse has failed to furnish the particulars required . . . within the time prescribed."

To that the defendant has in para. 2 of the defence specifically denied

> "that he failed to furnish any such particulars without reasonable excuse or that he is liable to any penalty, as alleged or at all."

B

Learned counsel has referred us to several authorities but I do not think that it is necessary to deal with them fully. One can simply take this case as a claim for penalties. It is not a criminal proceeding. The form of the pleading is of the usual kind and normal so far as particulars are required of the averments in the pleading. I support the learned judge entirely in thinking that, when the defendant pleads in the way which I have read in para. 2 of the defence, he is of necessity and by clear implication setting up an implied affirmative. It does not go to establish the plaintiffs' case, but operates substantially for the benefit of the defendant, who is thereby setting up an affirmative case. The plaintiffs' claim stands on its own feet and needs no support from the defendant. On these pleadings as they stand, the defendant proposes to set up that there was reasonable excuse for not giving the information required. Unless the particulars of the defence which have been asked for are given before the trial there may well be surprise, delay and undue expense.

C

D

The point argued here was considered by HARMAN, J., in *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* (1), on which the defendant relies. In that case particulars of a pleading were sought, and the learned judge made it clear why he took the line that he did. The actual decision is of no assistance to the defendant here. HARMAN, J., cited some observations of GODDARD, L.J., in *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* (2), which seem to be relevant here. HARMAN, J., says (3):

E

> "As GODDARD, L.J., said (4): 'A bare traverse is a perfectly good plea, provided that all that is thereby intended is to put the plaintiff to proof of his case. It may be, however, that concealed in a traverse there is an affirmative case, and this may well be so when the traverse is of a negative averment. If it is clear to the court, either from the nature of the case or from the admission of counsel or otherwise, that it is intended to set up an affirmative case, so that the traverse is what has been described as a pregnant negative, then it seems to me that particulars of the affirmative case ought to be delivered. Otherwise, both the opposite party and the court will be in doubt as to what issues are to be determined at the trial'."

F

G

Then there is a quotation from STABLE, J.'s judgment in *Pinson's* case (2), where he was dealing with three possible positions where there had been a traverse. As cited by HARMAN, J. (5), he says (6):

> "'Secondly, it may be a negative pregnant, which contains within the double negative an affirmative allegation;'"

H

Then STABLE, J., says about that, lower down on the page (7):

> "'If it falls under the second head, the double negative extends beyond a mere traverse, and amounts, as in the present case, to this: "If you establish a prima facie case that I sold or purchased shares for you, and that, in so doing, I acted without authority, then I intend to call evidence to establish that on each or some of the occasions there was an express authority to act as I did or an implied authority to be derived from certain

I

(1) [1948] 2 All E.R. 137; [1948] 1 Ch. 458.
(2) [1941] 2 All E.R. 636; [1941] 2 K.B. 72.
(3) [1948] 2 All E.R. at p. 140; [1948] 1 Ch. at p. 463.
(4) [1941] 2 All E.R. at p. 641; [1941] 2 K.B. at p. 80.
(5) [1948] 2 All E.R. at p. 140; [1948] 1 Ch. at p. 464.
(6) [1941] 2 All E.R. at p. 644; [1941] 2 K.B. at p. 84.
(7) [1941] 2 All E.R. at p. 645; [1941] 2 K.B. at p. 84.

facts ". That, in my judgment, is to set up an affirmative case of which particulars ought to be given, and none the less so because the affirmative case is concealed, albeit imperfectly, in a negative shell '."

It was pointed out that, if the particulars are not given, then it may preclude a defendant in those circumstances from advancing an affirmative case at the trial. I think SALMON, J.'s order was right and I would dismiss this appeal.

PEARCE, L.J.: I agree. It is clear from the pleadings that the traverse is a negative pregnant. The admissions of counsel have made it even clearer that the defendant intends to set up an affirmative case. The only object of the defendant in seeking to avoid giving these particulars is admittedly to prevent the plaintiffs' knowing before the trial what the defendant's case is and thus to give the defendant the advantage of surprise. That is an unmeritorious object and would probably lead to an inconvenient adjournment in the middle of the hearing. For the reasons that my Lord has given, I think that this is a case where particulars should be ordered, and that the learned judge was right.

Appeal dismissed.

Solicitors: *B. A. Woolf & Co.* (for the defendant); *Solicitor of Inland Revenue* (for the plaintiffs).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PARISH *v.* JUDD.

[QUEEN'S BENCH DIVISION (Edmund Davies, J.), June 22, 23, 1960.]

Nuisance—Highway—Motor vehicle—Unlighted motor vehicle on road in darkness—Vehicle being towed by lorry—Lorry and vehicle stopped at place where vehicle within light of street lamp—Vehicle not a nuisance because not a dangerous obstruction.

Road Traffic—Negligence—Unlighted motor vehicle stationary on dark night—Prima facie evidence of negligence, there being no street lighting.

The presence on a road at night of a wholly unlit vehicle in a dark place, where there is no street lighting, is prima facie evidence of negligence by the person responsible for the vehicle (see p. 37, letter A, post).

Crofts v. *Waterhouse* ((1825), 3 Bing. 319) applied.

The lighting system of the defendant's car having failed completely, through no fault of the defendant, his car was being towed along the Epping-Harlow Road by a lorry on a dark night in March. In the course of towing the car, to make sure that the defendant was all right, the lorry driver stopped at a point on the road near to a street lamp. When the lorry had stopped the defendant's car was positioned about six yards from the lamp and was close to the kerb behind the lorry. There were no lights at all on the car although there were three reflectors at the rear of the car. Both the defendant and the lorry driver said that the car was visible from a distance of one hundred yards. Owing to negligent driving the car in which the plaintiff was a passenger ran into the rear of the defendant's stationary car, and the plaintiff was injured. In an action for damages the plaintiff alleged that by having his car stationary on the highway in darkness and without rear lights the defendant was guilty of nuisance and negligence.

Held: (i) to constitute a nuisance it was necessary to show not merely that an unlighted vehicle was found at night on a road but also that the vehicle was a dangerous obstruction and on the facts the defendant's car was not a dangerous obstruction since it was sufficiently illuminated.

Maitland v. *R. T. & J. Raisbeck & Hewitt, Ltd.* ([1944] 2 All E.R. 272) applied.

(ii) the presumption of negligence arising from the presence of the defendant's car unlit on the road at night was rebutted (a) as regards place, because the car was in a place where the lamp afforded ample warning to any driver keeping a proper look-out, and (b) as regards maintenance, because on the evidence the defendant had taken the care which a reasonably prudent owner could be expected to take; accordingly the plaintiff's action failed.

[Editorial Note. The whole basis of the claim in the present case, both in negligence and in nuisance, was the existence of danger (see p. 37, letter B, post). In regard to negligence the decision should be considered with that of the Court of Appeal in *Hill-Venning* v. *Beszant* ([1950] 2 All E.R. 1151) where DENNING, L.J., in particular, emphasised the aspect of danger, citing (at p. 1153) a passage in *Henley* v. *Cameron* ([1949] L.J.R. at p. 997). Nuisance on a highway, however, is a wrongful act or omission on or near a highway whereby the public are prevented from freely, safely and conveniently passing along the highway (see *Jacobs* v. *London County Council*, [1950] 1 All E.R. 737 at p. 744 per LORD SIMONDS; cf. 19 HALSBURY'S LAWS (3rd Edn.) 270). Although the obligation arising from the law of nuisance in such a case as the present may, for practical purposes, be an obligation to take care that what is on the road is not a danger to other road users (*Ware* v. *Garston Haulage Co., Ltd.*, [1943] 2 All E.R. 558; cf. *Fisher* v. *Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458 at p. 464, citing *Morrison* v. *Sheffield Corpn.*, [1917] 2 K.B. 866), danger is not the sole criterion of nuisance on a highway; there may also be, in rather different circumstances, the factor of rendering the road less commodious for the use of others.

As to nuisance on highways by vehicles becoming stationary by accident, see 19 HALSBURY'S LAWS (3rd Edn.) 275, para. 437. As to negligence in relation to highways, see 28 HALSBURY'S LAWS (3rd Edn.) 63, para. 60; and as to the user of defective vehicles on highways, see ibid., 69, para. 69.]

Cases referred to:

Crofts v. *Waterhouse*, (1825), 3 Bing. 319; 11 Moore, C.P. 133; 4 L.J.O.S.C.P. 75; 130 E.R. 536; 8 Digest (Repl.) 76, *501*.

Maitland v. *Raisbeck & Hewitt* (*R. T. & J.*), *Ltd.*, [1944] 2 All E.R. 272; [1944] K.B. 689; 113 L.J.K.B. 549; 171 L.T. 118; 36 Digest (Repl.) 251, *26*.

Action.

In this action the plaintiff, Isobel Parish, married woman, claimed damages from the defendant, Frederick H. R. Judd, in respect of injuries she sustained when a car driven by her husband in which she was a passenger ran into the rear of the defendant's car. The accident took place at 10 p.m. on Mar. 9, 1957, on the Epping-Harlow Road, the A11, at a position which was some 250 yards beyond the brow of a hill and some feet or possibly six or seven yards from an omnibus stop and a lamp standard. Beyond the brow there was a straight stretch of road, and the road was about twenty-two feet wide. The position of the defendant's car at the time of the accident was that it was stationary, facing towards London, reasonably into its proper side of the road, a bit on the slant, with a tow rope connecting the car to the rear of an articulated lorry which was being driven by a Mr. Bunting. There were no lights on the defendant's car but there were three reflectors at the back of the car, and at the back of the lorry there were also reflectors and the lorry had good nearside and offside lights. The plaintiff's husband gave the following evidence. He was driving along the Epping-Harlow Road in the direction of Epping, in a car carrying side lights and a spot light, with a beam about thirty yards long, at a speed of twenty-five to thirty miles an hour when, coming over the brow, he saw ahead of him a black object appearing to occupy all his side of the road. He slowed down a little and put out his indicator to notify that he was going to overtake the object which, when he came within about twenty-five feet of it, he recognised to be a laden lorry; but just as he got

to the crown of the road a vehicle came in the opposite direction, from Epping, and he had to turn back to his nearside to let this vehicle pass by. As he turned to his nearside he saw for the first time, a few feet ahead of him, the defendant's car, unlighted, standing behind the lorry; he braked, skidded on the wet road, re-braked and then hit the back of the defendant's car pushing it forward into the rear of the lorry. The defendant's evidence was that he was driving along the Harlow-Epping Road, in the Epping direction, when his lights suddenly failed. He was frightened as the road was very dark but several vehicles passed him safely and then Mr. Bunting came along in his articulated lorry and offered to give him a tow. The defendant found that the whole lighting system of his car had failed and the starting mechanism was not therefore operating. Mr. Bunting suggested towing the car into a lay-by and then going on to a nearby filling station. The defendant left matters to Mr. Bunting who seemed to know the road very well, and Mr. Bunting started to tow his car. Several cars passed them safely. When they reached the lay-by they found it either full, or partly full and therefore difficult to manoeuvre the defendant's car into, and so they continued along the road until they came to a street lamp where Mr. Bunting stopped his lorry and therefore also the defendant's car. The street lamp was six or seven yards behind the defendant's car and was about ten feet in from the edge of the pavement; it showed ample light in the rear of the defendant's car and the defendant thought his car could have been seen easily up to one hundred yards away. The lorry was standing about one foot from the kerb and his, the defendant's, car was close to the kerb. The evidence of Mr. Bunting, the lorry driver, was as follows. When he first approached the defendant's car he had seen its reflectors at least one hundred yards away. He had suggested to the defendant that they made for the filling station and before starting to tow him had told the defendant that if he, Mr. Bunting, wanted to stop he would flick his tail lights. When they came to the lamp post, he had flicked his tail lights and there they stopped in order that Mr. Bunting could reassure himself that the defendant was all right. He had deliberately stopped for this purpose near the lamp because it illuminated the defendant's car which was stationed some three to four yards from the lamp post and could have been seen in the lamp's rays from one hundred yards away. When he had reassured himself about the defendant he got back into his cab, the defendant having remained in his car, and was about to drive away towing the defendant when he heard the crash.

By her statement of claim the plaintiff alleged that the accident was caused by the defendant's negligence in that he (i) had his car stationary on the highway in darkness without any rear lights, alternatively was being towed on the highway in darkness without rear lights; (ii) failed to take any or any proper steps to warn other users of the highway of the presence of his car thereon, and that he was being towed; (iii) failed to take any or any proper steps to prevent his car from being run into from the rear; (iv) failed to keep any proper look-out, and (v) failed to give any signal or indication of his presence or movements on the highway. Further or alternatively the plaintiff alleged that the defendant wrongfully obstructed the highway by having his car on it without any or sufficient lighting, whereby the car in which the plaintiff was travelling was driven into the defendant's car. The defendant denied both negligence and wrongful obstruction of the highway and contended that the lighting system of his car failed without negligence on his part, and that the accident was solely caused by the negligence of the plaintiff's husband.

J. Bolland for the plaintiff.
R. I. Kidwell for the defendant.

EDMUND DAVIES, J.: In this interesting action Mrs. Isobel Parish seeks to recover compensation from the defendant Mr. Judd in respect of the injuries which she unfortunately sustained on Mar. 9, 1957, when a vehicle driven by her husband, in which she was a passenger, came into collision with the stationary

motor car of the defendant. The scene of the collision was the Harlow-Epping Road, and the time shortly after 10 p.m. Weather conditions were that it was a dark night, in places there was mist, though the plaintiff's husband told me that visibility was not at all bad and there was no mist in the particular area of the accident. The stationary motor car of the defendant was pointing in the direction of Epping and stationary on its near-side of the road and it was unlit. The motor car driven by the plaintiff's husband was being driven from Harlow to Epping direction and it collided with the rear of the defendant's car.

It is convenient in this case for me to adopt the unusual course of first stating the law as I understand it to be. The mere fact that an unlighted vehicle is found at night on a road is not, in my judgment, sufficient to constitute a nuisance. First, in order that a nuisance may be constituted, it must be shown not merely that the vehicle was an obstruction on the road but that it was a danger on the road. Secondly, in order that, if it be a nuisance, it may be an actionable nuisance, it must be shown either that the vehicle became unlighted by reason of some fault on the part of the person responsible for the vehicle, or that, assuming that it initially became unlit without any fault on the part of the person responsible for the car, nevertheless he thereafter was guilty of some fault.

In *Maitland* v. *R. T. & J. Raisbeck & Hewitt, Ltd.* (1) LORD GREENE, M.R., said this (2):

> " Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that ipso facto and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it has become an obstruction cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine."

Assuming that the obstruction presents danger, has the plaintiff here, in the first place, established that its unlit condition was due to negligence? We have had evidence about the matter, but I pose this question to myself in this way: Suppose nothing more is available in the case than that a vehicle is found on a dark road at night in an unlit condition, does the unlit condition in itself raise a presumption of negligence or fault against the person responsible for the vehicle? One would have thought that there would be an amplitude of authorities to assist one to answer that question, but learned counsel for the plaintiff tells me that his researches have led him to no such position. I think the answer must be in the affirmative. Common sense tells one that ordinary prudence demands that people who drive vehicles at night should have lights on them. The same standards demand that if a person leaves a vehicle parked in a dark place at night the vehicle should have lights on it.

In *Crofts* v. *Waterhouse* (3) BEST, C.J., dealing with the duty of stage coach proprietors (in an action which was framed in negligence) said (4):

> " This action cannot be maintained unless negligence be proved [then he went on to list the various things that must be seen to by the stage coach proprietors]. The coachman . . . must be provided with steady horses; a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens."

(1) [1944] 2 All E.R. 272; [1944] K.B. 689.
(2) [1944] 2 All E.R. at p. 273; [1944] K.B. at p. 691.
(3) (1825), 3 Bing. 319.
(4) (1825), 3 Bing. at p. 321.

A I am surprised to be told that I am apparently holding for the first time, as far as any reported decision is concerned, that prima facie the presence on a dark road at night of a wholly unlit vehicle (and I speak, of course, in circumstances where there is no street lighting) is prima facie evidence of negligence on the part of the person responsible for the vehicle, and that if the matter stopped there that negligence would remain established.

B Applying that matter to the nuisance aspect of this case, which is framed in negligence and in nuisance, the presence on the Harlow-Epping road of this vehicle in an unlit state would without more be a sufficient compliance with the first requirement that the vehicle should have become unlit owing to the negligence of the car owner. But the whole basis of this claim, both in negligence and in nuisance, must be the existence of danger, and I have come to the conclusion C on the whole of the evidence that the plaintiff fails in limine. It is true that she being an innocent passenger does not have to show that her husband, the driver, was free of blame. She does not have to show any preponderance of blame in the defendant. It is sufficient if she can show that some aspect of the defendant's conduct contributed to this accident, even to an extremely small degree. If she could do that on balance then the defendant would be liable to make good the D whole of the damages.

Now I can turn to the facts. [HIS LORDSHIP then described the place of the accident and the position of the defendant's car, and having reviewed the evidence, particularly that of the plaintiff's husband (see p. 34, letter I, ante) said that the husband was clearly guilty of negligence in failing to keep a proper look-out and to take appropriate steps such as reducing speed long before he did. E HIS LORDSHIP having then posed the question whether the defendant's car amounted to a nuisance as presenting a dangerous obstruction, reviewed the defendant's evidence (see p. 35, letter B, ante), and continued:] Now, in what position were the defendant's car and the lorry towing his car? That is the crux of this case. The case for the plaintiff seems to be that the defendant and the lorry driver stopped in a place where there was danger presented. They stopped F in a place which imperilled the driver. They stopped in a place needlessly causing obstruction. The defendant, on the other hand, says that the street lamp was six or seven yards behind his car. The lorry driver asked him whether he was all right, but the defendant did not descend from his car. The defendant said in evidence that

> G "the lamp, which was ten feet in from the edge of the pavement, showed ample light in the rear of my car. I could have been seen easily up to one hundred yards. I presented no danger. The lorry was about a foot from the kerb and I was close to the kerb. The lorry driver having made inquiry and ascertained that I was all right [that is to say, that the towing conditions were all right] remounted the cab of his vehicle. We had been there stationary about a minute. We were just about to move off to the filling station, H which was then about one hundred yards ahead, when there was a terrific crash and I finished up tight into the kerb and against the rear of the lorry."

The defendant disputes the story of the plaintiff and of her husband that there was at any time a vehicle coming from the Epping direction. That is the description by the defendant of the lay-out at the time of the accident. It is crucial I because if he is right then no danger was really presented by the presence of that motor car albeit parked on that road at that place at that time.

Counsel for the plaintiff has quite rightly in the discharge of his duty addressed a number of observations to me as to the unlikelihood of people stopping by choice in the particular spot where the accident occurred if in point of fact they were, as Mr. Bunting (5) has said, making for the filling station about one hundred yards ahead. He said that he would not have done that, but that he would have gone

(5) The driver of the lorry towing the defendant's car.

on the extra one hundred yards to the filling station. Counsel addressed two further submissions on that. First, that this was not a selected spot and, secondly, accordingly I ought to discredit the evidence of the defendant and Mr. Bunting that they were not in a really dangerous area. [His Lordship then referred to Mr. Bunting's evidence (see p. 35, letter E, ante) and continued:] On the whole I have come to the conclusion that the evidence of the defendant and Mr. Bunting is to be preferred, and that the place where the vehicles were standing was a sufficiently illuminated place to present no danger to road users. In so far as the issue of nuisance is concerned, accordingly this action fails on the ground that there was no dangerous obstruction presented on this highway at all.

Now, what about negligence, assuming that there was some negligence on the part of the defendant in relation to his maintenance of his vehicle and assuming that there was some negligence to explain the lighting mechanism suddenly failing? That again is unconnected with this accident, for the vehicle was left at all material times in a place where the street lamp afforded an ample warning to a person who was keeping a proper look-out or, indeed, to anybody who was keeping even a casual look-out. But since the matter has been raised it is preferable that I should express my views about the matter of the car maintenance. [His Lordship said that the defendant's car was a 1937 Hillman car which he had had for five or six years. When he acquired the car the wiring was thoroughly checked, and he had serviced and maintained the car himself and had never had any wiring failures. At night, as a safeguard against fire, it was the defendant's custom to disconnect the accumulator but to the defendant's knowledge this did not involve bending the earth wire. The expert evidence was that the most likely cause of the failure in the electrical system of the defendant's car was a break of the earth wire between the battery and its earth on the cylinder head causing a break of the electric current. His Lordship continued:] Having said at the outset that the unlit condition of a vehicle on a road raises a presumption of negligence against the car owner I am satisfied in this case that that presumption would, on the evidence which I have heard from the defendant and Mr. Simmons (6), have been dispersed, that he has shown a reasonable discharge of his duty and he has acted in the manner in which a reasonably prudent owner of a motor vehicle could be expected to act, not the manner in which the most highly skilled mechanic would act. Accordingly, I see no ground for holding in this case that the initial failure of the lights can be attributed to any negligent omission or commission by the defendant.

For all these reasons, while one must have, and I certainly do have, sympathy with the plaintiff for the unfortunate injuries which she has sustained, my duty, which must be founded on the discharge by the plaintiff of the burden of proof, compels me to say that there must be judgment in this case for the defendant.

Judgment for the defendant.

Solicitors: *Amery-Parkes & Co.* (for the plaintiff); *Ponsford & Devenish, Tivendale & Munday* (for the defendant).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

(6) A consulting engineer.

COOKE *v.* COOKE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Marshall, J.), June 15, 16, 1960.]

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—Wife claiming for herself and for child—Separate subjects of complaint - Reasonable belief by husband in wife's adultery—Answer to wife's complaint of maintenance for herself but no answer to her complaint for maintenance for child—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

The parties married in 1952. In March, 1958, the husband left the wife, and a summons issued by her for maintenance was dismissed in July, 1958, on the ground that she had committed adultery with one R. At a date which was uncertain, but which appeared not to have been later than Feb. 8, 1959, the parties resumed cohabitation. On Sept. 17, 1959, the wife gave birth to a child and on Sept. 28, 1959, the husband left the wife for the second and last time because, he alleged, of her association with one B. The wife caused a further summons to be issued on her complaints that the husband had deserted her and had wilfully neglected to provide a reasonable maintenance for her and for the child. The justices found that the husband reasonably believed that the wife had committed adultery with B., and dismissed her complaint for desertion. They stated that the wife's complaint that the husband had wilfully refused to provide reasonable maintenance for her must stand or fall with her complaint for desertion and dismissed her complaint for wilful neglect; this dismissal included the claim for maintenance for the child, to which the justices did not refer in their reasons. On appeal by the wife on the ground that her claim to maintenance for the child should not have been dismissed, she did not dispute the finding that the husband reasonably believed that she had committed adultery with B. There appeared to be doubt, on such evidence as had been before the justices, whether the child was the husband's child, and further evidence than was put before the justices appeared likely to be available on this issue.

Held: (i) the case should be remitted to the justices for re-hearing of the complaint of neglect to provide reasonable maintenance for the child because, though the fact that the husband reasonably believed in the wife's adultery provided an answer to her complaints that he had deserted her and had wilfully neglected to provide reasonable maintenance for her, it did not provide an answer to the complaint (which was in law a separate complaint) that he had wilfully neglected to provide reasonable maintenance for the child.

Observations of LORD MERRIMAN, P., in *Starkie* v. *Starkie* (*No. 2*) ([1953] 2 All E.R. at p. 1523) and in *Kinnane* v. *Kinnane* ([1953] 2 All E.R. 1144) applied.

(ii) at the re-hearing the paternity of the child would be a material issue to be determined by the justices and the fact that further evidence might be adduced on that issue at the re-hearing was not a sufficient reason to prevent the case being remitted.

SEMBLE: the child should be separately represented at the re-hearing (see p. 44, letter G, post).

Appeal allowed.

[As to belief in wife's adultery as a defence to complaint of wilful neglect to maintain, see 12 HALSBURY'S LAWS (3rd Edn.) 483, para. 1079, note (r); and for cases on the subject, see 3rd DIGEST Supp.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.

For the Married Women (Maintenance) Act, 1920, s. 1, see 11 HALSBURY'S STATUTES (2nd Edn.) 863.

For the Matrimonial Causes Rules, 1957, r. 73 (7), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 257.]

Cases referred to:

Andrew v. *Andrew*, [1953] 1 W.L.R. 1453.

Chilton v. *Chilton*, [1952] 1 All E.R. 1322; [1952] P. 196; 116 J.P. 313; 3rd Digest Supp.

Corbett v. *Corbett*, [1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124; 3rd Digest Supp.

Kinnane v. *Kinnane*, [1953] 2 All E.R. 1144; [1954] P. 41; 117 J.P. 552; [1953] 3 W.L.R. 782; 3rd Digest Supp.

Starkie v. *Starkie* (*No. 2*), [1953] 2 All E.R. 1519; 118 J.P. 59; [1954] 1 W.L.R. 98; 3rd Digest Supp.

Appeal.

The wife appealed against an order of the county magistrates' court sitting at Strangeways, Manchester, dated Feb. 22, 1960.

On Oct. 1, 1959, a summons was issued in the magistrates' court against the husband alleging that complaint had been made by the wife that he had (i) on Sept. 28, 1959, deserted her and (ii) had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child whom he was legally liable to maintain, and stating that she was applying for an order under the Summary Jurisdiction (Married Women) Acts, 1895 to 1949. The justices found that the husband reasonably believed the wife to be associating immorally with another man and that the husband had good cause to leave her. They found that he was not in desertion and dismissed the complaint based on that ground. They decided that the complaint that the husband wilfully refused to maintain the wife must stand or fall with the complaint for desertion. They dismissed the second complaint, therefore, on the ground that the husband was not guilty of wilfully refusing to maintain his wife. The wife now appealed against that part of their order dismissing her complaint that the husband had wilfully neglected to provide reasonable maintenance for the child.

C. T. Reeve for the wife.

H. J. M. Tucker for the husband.

LORD MERRIMAN, P.: There were two complaints before the justices, numbered (i) and (ii), but in truth and in fact they had three complaints before them, for they ought to have been numbered (i), (ii) (a) and (ii) (b). The complaints were these: desertion, wilful neglect to provide reasonable maintenance for the wife, and wilful neglect to provide reasonable maintenance for the child whom the husband was legally liable to maintain. In form, as I say, these complaints were numbered: (i) desertion on Sept. 28, 1959, and (ii), the two charges of wilful neglect coupled with the word " and ". The whole point of the present appeal is that the complaint of wilful neglect to maintain the infant child whom the husband was legally liable to maintain has never been dealt with at all as a separate issue.

The husband's defence to both the charge of desertion and the charge of wilful neglect to maintain the wife was that he had reasonable grounds for believing that she had committed adultery, reasonable grounds induced by the wife's own conduct, not by gossip or hearsay, and it is admitted for the purposes of this appeal that that finding is unquestionable. For that reason the justices say that the husband was not in desertion and that complaint was dismissed; about that there is no appeal. The justices go on:

" The wife's further complaint (that the [husband] had wilfully refused to

A maintain her) is in our opinion related to the charge of desertion and following *Chilton* v. *Chilton* (1), must stand or fall with it. As we hold the [husband] not to be in desertion, it therefore follows that he is not guilty in these circumstances of wilfully refusing to maintain his wife, and the second complaint is therefore dismissed."

B It is plain on the face of that statement of reasons that they have never considered as a separate issue whether or not the fact that the wife has induced reasonable belief that she has committed adultery in the mind of her husband is an answer to the separate complaint of wilful refusal to provide reasonable maintenance for the child whom he is liable to maintain, and this appeal started on the footing that we ought to determine, as, clearly, we must determine, whether, on any C view of the matter, the reasonable belief issue applies to the complaint of wilful neglect to provide reasonable maintenance for the child.

It is plain now that that is not the only issue. There was a faint but definite attempt at the trial to raise the issue of the husband's paternity of the child. We have been told in the course of this case, which has been extremely well argued by counsel on both sides, that there is available a great deal more evidence, D to which I will come presently, on that issue. Therefore, in the last resort, though it is no doubt necessary for us to express an opinion about the effect of reasonable belief in adultery on the wilful neglect in respect of the child, it may turn out that that issue is academic, because the whole question of maintaining the child may fall to be decided on the basis that this child is not a " child of the marriage ", and is, therefore, not a child in respect of whom custody could be awarded to the E wife, and for the same reason is not a child in respect of whom that custody could be accompanied, under the Married Women (Maintenance) Act, 1920, s. 1, with an order for maintenance in respect of the child.

I shall try as far as possible to avoid expressing any concluded opinion about the material facts in the present case, because I have come to the conclusion that it is a case in which we must order a re-hearing. However, I wish to make this F plain: So far as we know, the directions of this court, particularly in respect of reasonable belief in adultery, about which we have said (2) that the wife ought to be informed of the substance of the case, were never complied with at all. I am not stating as a positive fact that they were not complied with, but we have no reason to suppose that they were. Counsel were not in the case below, and therefore cannot speak of their own knowledge but only, as I understand it, on G such instructions in the matter as they are able to obtain from London agents. It is of considerable importance in the present case that the directions were not complied with, because there is mention of the fact that at relevant periods the wife was involved with three men in all, of whom two are or may be particularly involved.

To make that clear I must now mention certain dates. The marriage took H place in 1952. In March, 1958, the husband left the wife for the first time. That is not the subject of the charge of desertion in the present case, but was the subject of an earlier complaint of desertion which was made in April, 1958. To that complaint the husband made a cross-complaint of adultery with a man named Rowe, and when the case came on for hearing in July, 1958, the wife's charge of desertion was dismissed, and a separation order was made in favour of I the husband on the ground of her adultery with Rowe. That separation order was not, so far as I know, the subject of any appeal, nor was the dismissal of her complaint for desertion. The result was, again so far as any evidence in the case of which I am aware shows, that the separation order stood until at a certain date, which was left hopelessly vague on the court's notes of the evidence, the husband and wife resumed cohabitation, with the implication, amongst other things, that

(1) [1952] 1 All E.R. 1322; [1952] P. 196.
(2) See *Jones* v. *Jones*, [1954] 3 All E.R. 476; approved in *Sullivan* v. *Sullivan*, [1956] 1 All E.R. 611 and explained, ibid., at p. 612, letter H.

the adultery, which must have been adultery committed before the date of the husband's cross-complaint on the ground of adultery, was condoned.

Certain documents have been put in before us. One, which was described before the justices as the " suicide note ", being a letter written by the wife for the benefit of the coroner when she apparently attempted to commit suicide unsuccessfully. This was written on Feb. 8, 1959, from the matrimonial home. From that note it is reasonable, I think, to conclude that Rowe, who had himself committed suicide, had written her a letter, which she asserts that the husband saw, justifying to her his act. We have been informed by learned counsel on instructions that Rowe's letter contained a sentence which could be interpreted as an admission on his part that he was the father of an expected child and as being some evidence against the wife, inasmuch as she had received this letter apparently without protest and, as I have said, acknowledged its having been seen by the husband in the " suicide note " of Feb. 8, 1959. I am not going to say any more about the validity of that evidence, or the use that could have been made of it for the purpose of cross-examining the wife or persuading the court that Rowe and not the husband was the father of this child. I will only add that it is also said that there is now available a witness living in a Manchester district who would speak to an admission made by the wife as to the stage that her pregnancy had reached at the time when Rowe killed himself. This, it is said, would also throw considerable light on the question of the paternity of the child.

Although I express no concluded opinion about it, we are invited to infer that Rowe had already committed suicide on some date shortly before Feb. 2, 1959, leaving this letter for the wife, which is now presumably in the possession of the coroner; that the husband, according to the wife's " suicide note ", saw Rowe's letter on Feb. 2; that the husband returned to cohabitation when Rowe was dead, and that he was back in the house again on or about Feb. 8, when the wife wrote the note to which I have already referred. As I say, I am not stating that these are facts, but merely that they are suggested as being reasonable conclusions, although inconsistent with other statements about the date when the husband and wife resumed cohabitation.

That brings me to the point about failure to particularise the reasonable belief in adultery. It is admitted that the circumstances of the wife's association with Brindley are such that the justices were justified in their finding that she had induced a reasonable belief that she was committing adultery with Brindley. Indeed, at the time of the hearing she and Brindley were living under the same roof in circumstances which were consistent with their doing so as the result of a guilty affection between them. It is plain to my mind that the question of any continuance of the adultery with Rowe was not really being pursued at all from the point of view of reasonable belief in adultery, although it is plainly suggested now that up to the time when Rowe committed suicide the adulterous association which had been found to exist in July, 1958, was still persisting. It is suggested, therefore, that as the husband and wife were, so it is said, not living together at all at that time, there is evidence from which the true inference is that Rowe was the father of the child.

The first issue to be decided concerns the effect on the complaint of wilful neglect of the child of the reasonable belief in adultery with Brindley. In my opinion there is no direct authority on the point. Some guidance, and we are invited to say that considerable guidance, is to be derived from *Starkie* v. *Starkie* (*No. 2*) (3), which was decided by myself and COLLINGWOOD, J., in this court. Without reading long citations from that judgment, the substance of the case was this. On the one hand, where there is a finding of adultery, no order can be made in respect of wilful neglect to maintain a child, since by s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, no order can be made on the complaint of a married woman if it shall be proved that she has committed an act of adultery,

(3) [1953] 2 All E.R. 1519.

with a saving proviso about condonation, connivance, and conduct conducing, to which I need not more particularly refer. Seeing that an order in respect of wilful neglect to provide reasonable maintenance for a child is an order made in favour of the wife, no such order could possibly be made if adultery had been committed. In *Starkie* v. *Starkie* (*No. 2*) (4) on the other hand, we were dealing with a case in which the wife had disabled herself from getting an order for wilful neglect to maintain herself by the fact that, as we held, the separation was consensual, and was without any agreement express or implied that the husband should nevertheless maintain her as a separated wife. We held that that did not affect the husband's liability to maintain the child, and, therefore, that he could be held to have neglected to maintain the child. It is plain that the present case falls somewhere between those two extremes. I am not going to repeat what I said in *Starkie* v. *Starkie* (*No. 2*) (5), namely, that I could imagine circumstances, for example, in which the wife had so contracted to live separate and apart as to accept the burden on herself of maintaining the child and exempting the husband, and that so long as that arrangement stood could, as I think, exonerate him from a charge of wilful neglect to provide reasonable maintenance for the child. I need not go into that sort of detail.

The present case is not directly covered by *Starkie* v. *Starkie* (*No. 2*) (5) but falls nearer to the circumstances that we were dealing with in that case than to the other extreme, where there is an actual finding of adultery. Without going into the reasoning (6) I am content to accept for the purposes of the present case, and apply to the circumstances of the present case, the conclusion at which I arrived. I said (7):

> "The justices have found that from the moment of this parting on July 20, 1953, the husband paid nothing in respect of this child. I cannot see that he has given any excuse or explanation except the suggestion that the child was not his, which has not been determined in his favour. In my opinion, therefore, the fact that the wife cannot make out a case of wilful neglect to provide reasonable maintenance for herself does not bar her from proving that there has been wilful neglect to provide reasonable maintenance for the child, and I think that the justices were entitled to find that complaint proved, and that that is the right conclusion in this case."

I am content to apply the reasoning on which that conclusion was based to the present case of reasonable belief in adultery. It was decided, as the justices realised, in *Chilton* v. *Chilton* (8), that this defence applies equally to wilful neglect to provide reasonable maintenance for the wife as it does to the complaint of desertion of a wife. I do not think that there is any reason why that should exonerate the husband in the case of maintenance of the child. I was impressed by counsel for the wife's argument that it is a condition precedent in the case of wilful neglect to provide maintenance for a child that the husband is legally liable to maintain the child. Those words are not included in connexion with a charge of wilful neglect to provide reasonable maintenance for a wife, and I think that they do mark a very considerable distinction between the case of the wife and the case of the child, although it may be academic in view of the broader issue whether this child is in truth a child of the marriage. I am prepared to hold that apart from that there is no impediment to the wife securing an order in respect of wilful neglect to maintain the child simply because she has induced in the husband a reasonable belief that she has committed adultery with Brindley, which is an answer both to her charge of desertion and to her charge of wilful neglect to maintain herself, as has been rightly held.

That brings me to this other graver matter. This issue has never been decided

---

(4) [1953] 2 All E.R. 1519.
(5) [1953] 2 All E.R. at p. 1522.
(6) [1953] 2 All E.R. at pp. 1521, 1522.
(7) [1953] 2 All E.R. at p. 1523.
(8) [1952] 1 All E.R. 1322; [1952] P. 196.

by the justices, and I do not think that it would be right for us, in the circumstances, particularly in light of the information which we have been given as to the evidence which may be available, to attempt to decide the major question whether this child is a child of the marriage. It has been suggested that we ought to deal with this case on the basis of r. 73 (7) of the Matrimonial Causes Rules, 1957, and draw any inference which the justices could have drawn. It is said that although there was a faint-hearted suggestion that the husband was not the father of the child that was never brought to a point, and on the evidence as it stands we ought to draw the only inference which could be drawn from the evidence as it was presented to the justices, namely, that everything is in order so far as this child is concerned. There is also invoked the principle on which fresh evidence is admitted in the Court of Appeal with a view to obtaining a new trial, the strictness of which was emphasised by the Court of Appeal in *Corbett* v. *Corbett* (9). I am referring particularly to the judgment of SIR RAYMOND EVERSHED, M.R., and to the approval of that case in *Andrew* v. *Andrew* (10), the point in both cases being that the rule applies in all its strictness even to matrimonial causes, and in spite of the interest which the public has in the sanctity of marriage and the obtaining of divorce only on just and proper grounds. It is right to notice, as counsel for the husband pointed out to us, that in that context great stress is laid on the existence of the office of the Queen's Proctor in connexion with divorce cases, a precaution which, of course, is not available in a case like this on an appeal from magistrates. To that extent, therefore, that particular safeguard is not in question here, and the suggestion is that we should be more careful in considering whether or not it is a case within the class of exceptions to which the Master of the Rolls drew attention.

I am inclined to think that the rule about fresh evidence is not really the governing rule in the present case. The true position is that this is a case in which the real issue has never been determined by the court below. The separate issue of neglect to provide reasonable maintenance for the child has never been dealt with at all, and, therefore, as we think that this is a case in which there ought to be a re-hearing of that issue, with such guidance as our judgments can give the justices on that occasion, it will be open to the parties to raise everything which can be raised on that issue. Plainly, if that is so, the question whether the child is a child of the marriage is one of the essential issues to be dealt with. That is the principle that we ought to apply here. We ought to send the whole case back for the issue of neglect to maintain the child to be dealt with by a fresh panel of the justices, including, amongst other things, the cardinal issue whether the child in question is a child of the marriage.

I would only add that I think that the justices should consider whether, as this is an important matter from the point of view of the child, they should take steps to ensure that the child is separately represented. In saying that, I am following the indication which PHILLIMORE, J., and I gave in a recent case (11), that if we were going to decide this issue in that case we should certainly take steps to see that the child was separately represented. I think, therefore, that we should allow the appeal, and order a re-hearing on the lines which I have suggested.

MARSHALL, J.: I agree, and I add my word of gratitude for the clear and helpful arguments of counsel on both sides.

The justices dismissed a summons issued on complaint by the wife that her husband had deserted her on Sept. 28, 1959, and also that he had been guilty of wilful neglect to provide reasonable maintenance for her and her child. The summons was issued under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, which enables a wife to seek at the hands of the justices an order for maintenance where, inter alia, the husband has been guilty of desertion or

(9) [1953] 2 All E.R. 69; [1953] P. 205. (10) [1953] 1 W.L.R. 1453.
(11) *Francis* v. *Francis*, [1959] 3 All E.R. 206 at p. 209; [1960] P. 17 at p. 26.

alternatively of wilful neglect to provide reasonable maintenance for her or her infant children. It is proper to stress the presence of the word " or " in that section, but though the summons appears to set forth only two complaints, in fact the more accurate way of expressing the actual claim made by the wife would be to set out three, namely: (i) desertion of the wife, (ii) wilful neglect to provide reasonable maintenance for the wife, and (iii) wilful neglect to provide reasonable maintenance for her infant child. The justices heard the case and dismissed all complaints in the summons, and the wife now appeals, seeking from us an order that they were wrong, in particular in dismissing the summons in so far as it alleged wilful neglect to provide reasonable maintenance for her infant child.

Counsel for the wife has put before us two main grounds of his appeal. In the first place he says that the justices were wrong to dismiss the summons for wilful neglect to provide reasonable maintenance for the child on the ground that the husband had a reasonable belief at the time he left his wife in her having committed adultery; and his second point involves the proposition that the justices, having regard to the course which this case took before them, did not consider the complaint of the wife that the husband had wilfully neglected to provide reasonable maintenance for the child.

The parties were married in April, 1952, and after six years of cohabitation, or thereabouts, in March, 1958, the husband left her. As a result the wife, in April, 1958, issued a summons against the husband alleging that he was in desertion, and the husband's reply to that summons was to issue a cross-summons alleging that the wife had committed adultery with a man named Rowe. The summonses were heard some time in July, 1958, and the justices dismissed the wife's summons and clearly upheld the allegation of the husband that the wife had committed adultery as alleged with the man Rowe. According to the evidence of the wife, about a month after that hearing the parties resumed cohabitation, but I am satisfied from the notes of the evidence, together with the contents of a letter which has been described as the " suicide note ", that the parties did not come together again until some time after the suicide of Rowe, which took place at the beginning of February, on some date which has not been made clear. It must have been before Feb. 8, 1959, which was the date of the " suicide note ".

From that date in February the parties continued to live together until Sept. 28, 1959, and during that period, namely, on Sept. 17, 1959, a child was born, which child is the basis of the third claim set out in the wife's summons. It will be seen, therefore, that it is important to keep in mind the date when the parties resumed cohabitation, in the beginning of February, 1959. If in fact the child was a full-time child the conception was in all probability before the date of the resumption of cohabitation between the husband and the wife. It is possible, however, on the basis that it was a premature child, for it to have been conceived at the very beginning of the resumption of cohabitation.

The husband finally left his wife on Sept. 28, 1959, because, as he alleged, she was then in association with another man, named Brindley. Brindley had apparently been staying, shortly before the husband left, in the matrimonial home, and it is clear that in December, 1959, in circumstances which are not as clear as they might be, the wife left the matrimonial home and went to live in another house, which was owned by Brindley. It is right to say that the wife has always contended that whilst living together in the same house there has been no question of cohabitation. The result of the husband's leaving the wife for the second time was the issue of the summons to which I have referred, on Oct. 1, 1959. The case was heard on Feb. 22, 1960, when the complaints, as I have already stated, were dismissed. The dismissal appears to have sprung from the fact that the justices were satisfied that the wife by her own conduct gave the husband a reasonable belief in her having committed adultery. That finding by the justices has not been challenged, and, indeed, having considered carefully the notes of the

evidence, in my judgment the inference drawn by the justices was completely justified.

The first point, therefore, is to consider whether the fact that the justices were satisfied that the wife by her conduct had induced the belief in her adultery was good ground for dismissing not only the complaints of desertion and of a wilful failure to provide reasonable maintenance for the wife, but also for dismissing the complaint that there had been a wilful failure to provide reasonable maintenance for the infant child. On that point I desire to say that I am in entire agreement with LORD MERRIMAN, P., and do not propose to refer again to those extracts from the judgment in *Starkie* v. *Starkie* (*No. 2*) (12).

By way of reinforcement of what has fallen from my Lord there is an extract from his judgment in *Kinnane* v. *Kinnane* (13) which, in my opinion, helps to resolve this first issue which has been raised. LORD MERRIMAN, P., said (14):

> "... any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife. Speaking generally, any of these orders, as I read the code, can only be made if it is established that one of the complaints made by the wife under the code is found to be proved. In other words, I reject the argument that an order cannot be made in favour of the wife for the maintenance of the wife unless it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that, if the only finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that is the law. It may be that the amount which a court thinks reasonable as an award in favour of a wife may depend on whether the neglect has been of the wife or of the children or both, but, in my opinion, the right to make an order is established when the justices are satisfied that any one of the complaints set out in the Act of 1895, s. 4, is proved."

On the view that I take of s. 4 wilful neglect to provide reasonable maintenance for a child is a separate complaint.

By s. 6 of the Act of 1895 the fact that the wife has committed adultery is an absolute bar, subject, of course, to matters such as condonation set out therein. I can also see good grounds for saying that where a wife consensually separates from her husband taking a child with her, with an express or an implied agreement that if the child is allowed to remain with her she does not claim any maintenance for herself or the child, such an agreement should reasonably be held to debar any claim for maintenance, whether it be for the wife or for the child.

Adultery is a statutory bar. Reasonable belief in the wife having committed adultery does not fall into the category of a statutory bar, and, indeed, I find it difficult, whether it be in reason or in justice, to understand why it should be said that that which properly may be a defence to desertion or failure to maintain a wife, namely, the misconduct of the wife, should prejudice her and cause her to have to keep the child without maintenance from the husband, the husband being in a position legally to maintain the child. Although *Starkie* v. *Starkie* (*No. 2*) (15) and *Kinnane* v. *Kinnane* (13) are not directly in point, in my judgment they are compelling authority to this court to say that in the circumstances of the present case it would not be right to uphold the decision of the justices, which held the wilful neglect to provide reasonable maintenance for the child to be justified. In those circumstances, in my judgment, the first argument advanced on behalf of the wife by her counsel is good, and in the circumstances of the present case the fact that the husband did have reasonable ground for believing that

(12) [1953] 2 All E.R. at p. 1523. (13) [1953] 2 All E.R. 1144; [1954] P. 41.
(14) [1953] 2 All E.R. at p. 1146; [1954] P. at p. 43.
(15) [1953] 2 All E.R. 1519.

A the wife had committed adultery provides no answer to her claim in so far as her claim is based on maintenance for the child.

The second point that arises poses some very difficult questions, and I have come to the conclusion that, as my Lord has already stated, the proper course for this court to take is to send this case back for a re-hearing. The reasons why I have formed that view are as follows. It is plain from the dates which I have B set out, in so far as I have dealt with the facts, that there must be a real issue about the paternity of this child. That was only half-heartedly investigated. The statement of reasons given by the justices ends with the following:

> " The wife's further complaint (that the [husband] had wilfully refused to maintain her) is in our opinion related to the charge of desertion and following *Chilton* v. *Chilton* (16), must stand or fall with it. As we hold the [husband] C not to be in desertion, it therefore follows that he is not guilty in these circumstances of wilfully refusing to maintain his wife, and the second complaint is therefore dismissed."

In my judgment it is impossible from that sentence to avoid the conclusion that the justices first considered the issue of desertion, considered whether there D was a defence to that charge, and having come to the conclusion that there was a defence to it they failed to go on to consider on its merits the question of wilful neglect to maintain, because they believed by the authority of *Chilton* v. *Chilton* (16) the other two complaints must stand or fall with the charge of desertion. I have already stated that in so far as the complaint sought maintenance for the wife in my judgment that was right, but in so far as it sought an order for maintenance of the child it was wrong. E

Faced with a situation in which it is clear that the justices failed to consider, on its merits, the real issue in this charge of wilful neglect to maintain, it would be an extremely unwise thing for this court to seek, on the evidence that is now placed before it, to give any decision on this matter. In my judgment the just and proper course is to send the case back to be re-heard by a fresh panel of justices. F At one stage it was suggested that it would be improper to do that because indications had been given to us by counsel for the husband that there is now fresh evidence available which might vitally affect the issue as to the paternity of the child in question. Counsel for the husband never asked this court for permission to call fresh evidence. No such application has been made. If it is right to return the case for re-hearing the mere fact that at the second hearing G further evidence would be available, albeit it is evidence that might reasonably have been available at the first hearing, should not, in my judgment, operate to prevent us sending it back to be re-heard. For these reasons I agree with my Lord that this appeal should be allowed, and the case returned to be re-heard, on the conditions that my Lord has set forth.

H **LORD MERRIMAN, P.:** The appeal will be allowed, and the order dismissing that part of the complaint which relates to wilful neglect to provide reasonable maintenance for the child will be set aside, and that part of the complaint will be remitted to a fresh panel of the justices for the petty sessional division to be re-heard.

Order accordingly.

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for the wife); *Blair & Seddon*, Manchester (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

---

(16) [1952] 1 All E.R. 1322; [1952] P. 196.

INLAND REVENUE COMMISSIONERS *v.* HARTON COAL CO., LTD. (In Liquidation).

[CHANCERY DIVISION (Pennycuick, J.), May 31, June 1, 3, 1960.]

Surtax—Undistributed income—Subsidiary company—Control—Control by reference to beneficial ownership of shares and control not by reference thereto contrasted—Joint ownership of share with controlling voting power—Voting rights in company whose name stands first on share register—Finance Act, 1922 (12 & 13 *Geo.* 5 *c.* 17), *s.* 21 (6)—*Finance Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8 *c.* 34), *s.* 19 (1)—*Finance Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6 *c.* 54), *s.* 14 (1).

Of the taxpayer company's shares, a management share commanding three times the number of votes of all the other shares in the company was in the joint beneficial ownership of the Schroder company and the Stephenson company, and, the name of the Schroder company being first on the taxpayer company's share register, the Schroder company was able to exercise the voting rights in respect of it under the articles of association. Five-twelfths of the other shares were held each by the Schroder group of companies and the Stephenson group of companies and two-twelfths by B.I.C., Ltd. The Schroder company was, and the Stephenson company was not, one to which s. 21 of the Finance Act, 1922, applied. Surtax directions were made on the taxpayer company under s. 21, but that section did not (by virtue of sub-s. (6)*) apply to a "subsidiary company" which was defined as being a company of which, by reason of the beneficial ownership of its shares, the control was in the hands of a company, or of two or more companies, to which s. 21 did not apply.

Held: (i) the taxpayer company was not excepted from the scope of s. 21 of the Finance Act, 1922, as being a subsidiary company exempted therefrom by s. 21 (6), because, under s. 14 (1)†, of the Finance Act, 1937, the question of control of the taxpayer company did not have to be determined by reference to the beneficial ownership of shares with the consequence that the Schroder company had, by virtue of the management share and of the entry of the Schroder company's name being first on the register, the greater part of the voting power of the taxpayer company (so that the taxpayer company fell within s. 19 (1)‡ of the Finance Act, 1936), and, as the Schroder company was one to which s. 21 of the Act of 1922 applied, the taxpayer company was excluded by s. 14 (1) of the Act of 1937 from being a "subsidiary company" within s. 21 (6) of the Act of 1922 (see p. 54, letter I, to p. 55, letter A, post); accordingly the surtax directions had been wrongly discharged.

(ii) apart, however, from s. 14 (1) of the Finance Act, 1937, the taxpayer company would have been within s. 21 (6) of the Finance Act, 1922, because the requirements of s. 21 (6) were satisfied if on any one commutation of shareholdings the control of the taxpayer company was in the hands of two or more companies to none of which s. 21 applied, and (assuming, but not deciding, that B.I.C., Ltd. was a company to which s. 21 did not apply) the control (which under s. 21 (6) had to be determined by reference to beneficial ownership of shares) was in the hands of companies to which s. 21 did not apply, namely, the Stephenson company and B.I.C., Ltd., since they together held seven-twelfths of the shares of the taxpayer company and the management share could be disregarded as it was in the joint beneficial ownership of the Stephenson company and the Schroder company (see p. 54, letter G, post).

Appeal allowed.

---

* The relevant provisions of s. 21 (6) are printed at p. 50, letter H, post.
† Section 14 (1) is set out at p. 51, letter D, post.
‡ The relevant terms of s. 19 (1) are printed at p. 51, letter B, post.

[As to subsidiary companies not subject to surtax directions, see 20 HALSBURY'S LAWS (3rd Edn.) 549, para. 1068; and for cases on the subject, see 28 DIGEST (Repl.) 358, 359, *1580-1586*.

For s. 21 (6) of the Finance Act, 1922, as substituted by s. 31 (3) of the Finance Act, 1927, s. 19 (1) of the Finance Act, 1936, and s. 14 (1) of the Finance Act, 1937, see 12 HALSBURY'S STATUTES (2nd Edn.) 239, 357 and 370; and for the corresponding provisions in s. 245 and s. 256 of the Income Tax Act, 1952, see 31 ibid., 232, 244.]

Cases referred to:

Barclays Bank, Ltd. v. *Inland Revenue Comrs.*, [1959] 3 All E.R. 140; *affd.* H.L., [1960] 2 All E.R. 817.

British American Tobacco Co., Ltd. v. *Inland Revenue Comrs.*, [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 Tax Cas. 49; 2nd Digest Supp.

Income Tax Comr. v. *Bjordal*, [1955] 1 All E.R. 401; [1955] A.C. 309; [1955] 2 W.L.R. 342; 28 Digest (Repl.) 359, *1585*.

Inland Revenue Comrs. v. *Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

Tatem Steam Navigation Co., Ltd. v. *Inland Revenue Comrs.*, [1941] 2 All E.R. 616; [1941] 2 K.B. 194; 111 L.J.K.B. 17; 165 L.T. 182; 24 Tax Cas. 57; 28 Digest (Repl.) 359, *1584*.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against surtax directions made on it by the Special Commissioners under s. 21 of the Finance Act, 1922, for the years 1948-49, 1949-50 and 1950-51. It contended that the provisions of s. 21 did not apply to it because it was a subsidiary company excluded from the operation of the section under s. 21 (6). The commissioners held that the company was a subsidiary company and discharged the directions. The Crown appealed by way of Case Stated to the High Court. The point of law for the opinion of the High Court was whether on a proper construction of s. 21 (6) of the Finance Act, 1922, as amended, the Special Commissioners were right in law in deciding that the taxpayer company was not a company to which s. 21, as amended, applied.

Sir Frank Soskice, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayer company.

Cur. adv. vult.

June 3. **PENNYCUICK, J.,** read the following decision: This is an appeal by the Commissioners of Inland Revenue against the determination of the Special Commissioners whereby they discharged directions made on the taxpayer company under s. 21 of the Finance Act, 1922, for the years 1948-49, 1949-50 and 1950-51. The sole question arising on the appeal is whether the company was during these years a subsidiary company within the meaning of s. 21.

The facts are not in dispute, and they may be shortly stated. The company carried on a colliery business until Jan. 1, 1947, and from that date until July 29, 1952, when it went into voluntary liquidation, its activities were confined to collecting interim income and interim payments and to paying off debentures. During the relevant years the issued capital of the company consisted of 963,250 A ordinary shares of 10s. each and 75,000 B ordinary shares of 10s. each. The B ordinary share numbered 1,000,001 carried a number of votes equal to three times the total number of votes of all other shares of both classes. This share is referred to in the Case Stated and hereafter as "the management share". All other shares carried one vote. The management share and one other B ordinary share were held by Schroder Nominees, Ltd. (called "Schroder" in

LONDON UNIV.

the Case Stated and hereafter) and Stephenson Clarke, Ltd. (called " Stephenson " in the Case Stated and hereafter) as joint beneficial owners, the name of Schroder being in each case first on the register. Schroder and a number of others comprising what is called the Schroder Group held 401,355 A shares and 31,249 B shares; i.e., with one of the two single shares last mentioned, 5/12ths of the issued shares of each class. Stephenson and a number of others comprising what is called the Stephenson Clarke Group held 401,355 A shares and 31,249 B shares; i.e., again with one of the single shares, 5/12ths of the issued shares of each class. British Industrial Corporation, Ltd. (called " B.I.C. " in the Case Stated and hereafter) through nominees held 160,540 A shares and 12,500 B shares; i.e., 2/12ths of the issued shares in each class. It was common ground that no distinction fell to be made between Schroder itself and the other members of the Schroder Group, or between Stephenson itself and the other members of the Stephenson Clarke Group. Schroder was admittedly a company to which s. 21 applied. Stephenson was admittedly a company to which s. 21 did not apply. It was in dispute, as will hereafter appear, whether B.I.C. was or was not a company to which s. 21 applied.

Article 78 of the company's articles of association reads as follows:

" Where there are joint registered holders of any share, any one of such persons may vote at any meeting, either personally or by proxy, in respect of such share as if he were solely entitled thereto; and if more than one of such joint holders be present at any meeting, personally or by proxy, that one of the said persons so present whose name stands first on the register in respect of such shares shall alone be entitled to vote in respect thereof."

The chairman of Stephenson was also the chairman of the company.

I now read the statutory provisions as they stood in the years under appeal. The Finance Act, 1922, s. 21 as amended:

" With a view to preventing the avoidance of the payment of supertax [now surtax] through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows:

" (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members . . .

" (6) This section shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested. For the purpose of this subsection—

" A company shall be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this section apply, or of two or more companies none of which is a company to which those provisions apply;

"A company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting

power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the year or other period for which the accounts of the company have been made up as aforesaid beneficially held by, the public (not including a company to which the provisions of this section apply) and any such shares have in the course of such year or other period been the subject of dealings on a stock exchange in the United Kingdom and the shares have been quoted in the official list of such a stock exchange."

The Finance Act, 1936, s. 19 (1):

"For the purposes of s. 21 (6) of the Finance Act, 1922, a company shall be deemed to be under the control of not more than five persons—(a) if any five or fewer persons together exercise, or are able to exercise, or are entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing words, if any five or fewer persons together possess, or are entitled to acquire, the greater part of the share capital or voting power of the company."

Then follow two alternative paragraphs, (b) and (c) which I need not read.
The Finance Act, 1937, s. 14 (1):

"Notwithstanding anything in s. 21 (6) of the Finance Act, 1922, a company which is deemed for the purposes of that subsection to be under the control of not more than five persons shall not be deemed to be a subsidiary company, unless it can be deemed to be under the control of not more than five persons only by including among the persons mentioned in paras. (a), (b) or (c) of s. 19 (1) of the Finance Act, 1936, or in s. 20 (3) of that Act, a company to which the provisions of the said s. 21 do not apply and which is not the nominee of any other person."

These provisions are now re-enacted in s. 245 and s. 256 of the Income Tax Act, 1952, where they can conveniently be looked at together.
The contentions of the parties before the commissioners were as follows:

"It was contended on behalf of the [Crown]: (i) that by virtue of its status as the first-named holder in the register of the management share of the [taxpayer company] Schroder controlled the [company]; (ii) that on a proper construction of s. 21 (6), Finance Act, 1922, as amended by s. 31 (3), Finance Act, 1927, and s. 14 (1), Finance Act, 1937, the [company] was under the control of a company (Schroder), which was a company to which the provisions of s. 21 applied and was not therefore a subsidiary company within the meaning of s. 21 (6); (iii) in the alternative, if consideration of the position of B.I.C. were necessary, then B.I.C. was a company which was under the control of not more than five persons, and which was not a subsidiary company, and was not a company in which the public was substantially interested within sub-s. (6) of s. 21, Finance Act, 1922; (iv) on that footing the [taxpayer company] was under the control of Schroder and B.I.C., both being companies to which the provisions of s. 21 applied, even if, which was denied, the management share jointly owned by Schroder and Stephenson fell to be ignored . . .

"It was contended on behalf of the [taxpayer company]: (i) that on a proper construction of s. 21 (6) as amended the company was not under the control of Schroder, because the beneficial ownership of the management share was jointly held by Schroder and Stephenson and no control could be exercised by its means unless the wills of the joint owners concurred; (ii) that B.I.C. was a company within the control of not more than five persons, but was a company in which the public were substantially interested because it was possible to find persons holding 25 per cent. of the ordinary votes who were, within the meaning of s. 21 (6) as amended, members of the

public; (iii) that B.I.C. was therefore a company to which the provisions of s. 21, Finance Act, 1922, did not apply; (iv) that the [taxpayer company] was a subsidiary company, to which the provisions of s. 21 did not apply, because the control of the [taxpayer company] was in the hands of Stephenson and B.I.C., neither of which was a company to which the provisions of s. 21 applied."

The commissioners delivered their determination in writing in the following terms:

" (1) Before we approach the main question in the appeal we have first to determine whether British Industrial Corporation, Ltd. (B.I.C.) is a company to which s. 21, Finance Act, 1922, applies. It is manifestly under the control of not more than five persons, since there are a number of combinations of shareholders whose votes added together make up more than 50 per cent. of the total votes: it is therefore true to say that ' any five or fewer persons together exercise, or are able to exercise . . . control . . . over the company's affairs . . .' (s. 19 (1) (a), Finance Act, 1936). It is, however, contended that B.I.C. is a ' company in which the public are substantially interested ' and is therefore excluded (s. 21 (6) as amended). This depends upon whether twenty-five per cent. of the voting power of the ordinary shares is in the hands of ' the public '. The case of *Tatem Steam Navigation Co., Ltd.* v. *Inland Revenue Comrs.* (1) (which is of course binding upon us) indicates in our view that ' the public ' is to be construed as all persons other than those persons or persons and their relatives and nominees who are to be taken as the ' controllers ' bringing the company within s. 21. Upon a careful examination of the list of shareholders in B.I.C. it becomes apparent that the holding of ' the public ' is not capable of exact and certain estimation; it depends upon the selection of the ' controllers '. The Crown can so select ' controllers ' that ' the public ' has less then twenty-five per cent., but the [taxpayer] company's advisers can so select ' controllers ' that ' the public ' has over twenty-five per cent. Which selection are we to prefer? It seems to us that the answer is to be found in the words of s. 21 (6): a company is entitled to claim exclusion from the application of that subsection if a certain condition is fulfilled, viz., if persons can be found holding twenty-five per cent. of the ordinary votes who are not ' controlled ', such ' controllers ' being other shareholders to a number not exceeding five whose voting power derived from all classes of shares exceeds fifty per cent. In the case of B.I.C. that condition can be fulfilled, and we consider that it is therefore entitled to be excluded from the operation of s. 21: the terms of an exemption are to be given full weight.

" (2) If, as we have found, B.I.C. is not within s. 21, then in our opinion it follows that the [taxpayer] company is a ' subsidiary ' company within s. 21 (6) as amended, since by reason of the beneficial ownership of its shares the control of it is in the hands of two companies (B.I.C. and Stephenson Clarke, Ltd.) neither of which is within s. 21. It is of course true that the Schroder Group and Stephenson Clarke, Ltd., together or the Schroder Group and B.I.C. together can also control the [taxpayer] company, and therefore the control of the company would not in that case be in the hands of two non-s. 21 companies: but for the reasons given in the last preceding paragraph we consider that circumstance immaterial: the words of an exemption are fulfilled and the exemption should be given.

" (3) It remains to notice an argument on behalf of the Crown founded on the existence of the management share held jointly by Stephenson and Schroder. It is said that Schroder is in sole control because the name of its nominee stands first and therefore he can exercise voting power on behalf of Schroder even if Stephenson disagrees. If that is so, it is said,

(1) [1941] 2 All E.R. 616; 24 Tax Cas. 57.

the [taxpayer] company cannot be a subsidiary because of the provisions of s. 14 of the Finance Act, 1937. We cannot accept this contention. Control is throughout this legislation related to beneficial ownership (it would make nonsense of it if it were otherwise); the beneficial ownership of the management share is joint, and no control can be exercised by its means unless the wills of the joint owners concur. Schroder cannot therefore in our opinion be said to control alone by means of the management share.

" (4) We therefore discharge the directions."

It will be observed that the issue is partly one of law.

I have had the advantage of full and lucid arguments by Sir Frank Soskice on behalf of the Crown and Mr. Heyworth Talbot on behalf of the company. These arguments have followed rather a different course from those presented before the commissioners, and the issue may now be stated in the form of the following three questions: (i) Was the control of the company in the hands of Stephenson and B.I.C. by reason of their beneficial ownership of shares in the company? (It is clear that the control was not in any sense in the hands of Stephenson or B.I.C. alone.) (ii) Is the company excluded from the status of a subsidiary company by s. 14 (1) of the Finance Act, 1937? (iii) Is B.I.C. a company to which s. 21 applies?

In order to rescind the directions, the company must show that question (i) should be answered in the affirmative, question (ii) in the negative and question (iii) in the negative. I will endeavour to deal with these questions in the same order.

(i) Was the control of the company in the hands of Stephenson and B.I.C. by reason of their beneficial ownership of shares in the company? This question raises three distinct points: (a) was the control of the company exclusively in the hands of Schroder for the purpose of s. 21 (6) of the Finance Act, 1922, by reason of its interest in the management share? If so, obviously the control of the company was not in the hands of Stephenson and B.I.C. It is established that the expression " control " in relation to a company means the power by the exercise of voting rights to carry a resolution at a general meeting of the company. It is also established that, in the absence of an indication to the contrary in the context in which the word occurs, the persons who possess those voting rights are to be ascertained by reference to the articles of the company and its register of members (see as to those points *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (2), *Inland Revenue Comrs.* v. *Bibby & Sons, Ltd.* (3) in the House of Lords; *Barclays Bank, Ltd.* v. *Inland Revenue Comrs.* (4) in the Court of Appeal. It appears from these cases that there is for the present purpose no relevant distinction between the expressions " control " and " controlling interest ".) It is also established, always in the absence of an indication to the contrary in the context, that, where there are joint holders of a share and the articles of the company contain a provision corresponding to art. 78 here, the first registered holder alone is to be taken into account in the ascertainment of voting rights (see *Barclays Bank, Ltd.* v. *Inland Revenue Comrs.* (5)). But in my judgment the position is radically altered by the presence in s. 21 (6) of the words " by reason of the beneficial ownership of the shares therein." The management share belonged beneficially to Schroder and Stephenson jointly, and this joint beneficial ownership gave them joint control in the sense that acting together they could by taking the appropriate steps have exercised majority voting rights. But it seems to me impossible to say that Schroder had any beneficial interest in the management share which could

(2) [1943] 1 All E.R. 13; 29 Tax Cas. 49.
(3) [1945] 1 All E.R. 667; 29 Tax Cas. 167.
(4) [1959] 3 All E.R. 140; affirmed [1960] 2 All E.R. 817, H.L. The speeches in the House of Lords were delivered on June 21, 1960, after the date of the judgment in the case now being reported.
(5) [1959] 3 All E.R. 140; *affd.*, see supra.

be said to give Schroder control to the exclusion of Stephenson. Schroder had exclusive control in the sense explained above, not by reason of its beneficial interest, but by reason of the fact that its name was first on the register of members. A

(b) Was the control of the company exclusively in the hands of Schroder and Stephenson for the purpose of s. 21 (6) of the Finance Act, 1922, by reason of their joint beneficial ownership of the management share? If so, again B obviously the control of the company was not in the hands of Stephenson and B.I.C. It is clear that as beneficial owners of the management share, Schroder and Stephenson could together have exercised their votes so as to carry a resolution at a general meeting of the company. But it is also clear that Stephenson, if it had not been in agreement with Schroder, could by taking appropriate steps as joint beneficial owner have disfranchised the management share and, C on this footing, the votes attached to the remaining ordinary shares would alone have been effective. I think, therefore, that the beneficial owners of the management share cannot be said to have had exclusive control of the company.

The point may be illustrated by a rather different example. Suppose a company with one thousand shares, six hundred of which are held by A in trust for B and C jointly, and four hundred by C beneficially: obviously B and C D together control the company by reason of the beneficial ownership of shares; but does not C also alone control by reason of the beneficial ownership of shares? It seems to me that he does.

(c) Disregarding the management share, was the control of the company in Stephenson and B.I.C. by reason of their respective beneficial ownership E of 5/12ths and 2/12ths of the ordinary shares? It is clear that Schroder and either Stephenson or B.I.C. together could have exercised their votes so as to carry a resolution at a general meeting of the company, and that the control of the company was for this reason in the hands either of Schroder and Stephenson or of Schroder and B.I.C. But it is equally clear that Stephenson and B.I.C. together could have exercised their votes so as to carry a resolution, and it F follows that, if the control of the company was in the hands of Schroder together with Stephenson or B.I.C., it must also have been in the hands of Stephenson with B.I.C. This is quite a common position; i.e., one can find a number of commutations of members who together have majority voting rights.

It seems to me that the requirements of s. 21 (6) of the Finance Act, 1922, should be treated as satisfied if on any one commutation the control of the G company is in the hands of two or more companies, to none of which s. 21 applies. Counsel for the Crown contends that the requirements of the subsection are not satisfied if on any one commutation the control is in the hands of two or more companies to one of which s. 21 does apply. I think, however, that such an intention would probably be expressed in different language and that the subsection ought not to be so construed. It follows, in my judgment, that question (i) H of the three questions stated previously (6) should be answered in the affirmative.

(ii) Is the company excluded from the status of a subsidiary company by s. 14 (1) of the Finance Act, 1937? It will be observed that this subsection is an overriding provision prefaced by the words " Notwithstanding anything in s. 21 (6) ". It is common ground that the effect of the rather contorted language of s. 14 (1) is that a company under the control of not more than five persons is I absolutely disqualified from the status of a subsidiary company unless it is only by the inclusion of a company to which s. 21 of the Finance Act, 1922, does not apply that the company can be brought within the ambit of one of the three paragraphs of s. 19 (1) of the Finance Act, 1936. Putting it another way, the disqualification operates if, taking into account only companies to which s. 21 of the Finance Act, 1922, does apply, the company comes within the ambit of

(6) See p. 53, letter C, ante.

A one of those paragraphs. There is no reference in the subsection to beneficial ownership, and such a reference cannot, I think, be implied.

Applying this provision—i.e., s. 14 (1) of the Finance Act, 1937 -in relation to para. (a) in s. 19 (1) of the Finance Act, 1936, which is the relevant paragraph, it appears to me squarely to disqualify the company here. Schroder, as the first registered holder of the management share, controls the company alone B in the ordinary sense of the word and within the express terms of the deeming provision in s. 19 (1) (a); i.e., Schroder is able to exercise control over the company's affairs and, in particular, possesses the greater part of the voting power of the company (see the cases referred to previously (7)). Schroder is a company to which s. 21 of the Finance Act, 1922, applies. The company, accordingly, falls within the ambit of para. (a) of s. 19 (1) of the Finance Act, C 1936, taking into account only a company to which s. 21 of the Act of 1922 applies and without having to include a company to which s. 21 does not apply.

Counsel for the company in a survey of the successive statutory provisions has sought to put some limitation on the scope of s. 14 (1) of the Act of 1937 in relation to s. 19 (1) of the Act of 1936; but it seems to me that s. 14 (1) contains no such limitation and that none can be implied. It is on this point that I D differ from the commissioners. The defect in their reasoning, as it seems to me, lies in the sentence in para. (3) of their determination: " Control is throughout this legislation related to beneficial ownership ". Counsel for the company has not attempted to support this proposition. This may seem a harsh and technical result, but I can find no sufficient ground on which the case can be distinguished from the decisions cited above. If this view is correct, the case E is concluded in favour of the Crown.

(iii) Is B.I.C. a company to which s. 21 of the Finance Act, 1922, applies? B.I.C. is admittedly a company under the control of not more than five persons and is not a subsidiary company; but the taxpayer company contends that B.I.C. is a company in which the public are substantially interested within the definition in s. 21 (6). It is settled that for the purpose of this definition the F expression " the public " excludes those members who control the company (see *Tatem Steam Navigation Co., Ltd.* v. *Inland Revenue Comrs.* (8), in the Court of Appeal; and *Income Tax Comr.* v. *Bjordal* (9), in the Privy Council). This is a simple matter where a single member holds a majority of the shares, but where the shareholding is widely spread there may be a large number of possible permutations of controlling members; for example, if there are nine members G holding the shares in equal proportions, every combination of five members has control. There is thus a great and obvious difficulty in deciding which members shall be treated as the controlling members and which the public.

In the case of B.I.C., on certain permutations the public held ordinary shares of the company carrying not less than twenty-five per cent. of the total voting power, and on other permutations the public held ordinary shares carrying less H than twenty-five per cent. of the total voting power. This being the position, does B.I.C. fall within the definition? I have thought it right to state this problem, but on the view which I have taken above the question does not arise and I think it would be undesirable for me to express obiter a view on what may be a point of some general importance. I therefore refrain from doing so. In the result, this appeal succeeds.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Slaughter & May* (for the taxpayer company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

---

(7) See p. 53, letter G, ante. (8) [1941] 2 All E.R. 616; 24 Tax Cas. 57.
(9) [1955] 1 All E.R. 401; [1955] A.C. 309.

G. *v.* G. (otherwise H.).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Phillimore, J.), May 10, 11, 12, 18, 1960.]

Nullity—Approbation of unconsummated marriage—Whether or not a discretionary bar—Delay.

In a suit for nullity, approbation of the marriage, that is, an act from which the inference ought to be drawn that the party has, with knowledge of the injury or grievance and that the law provides a remedy, approbated the marriage, is a bar that is not discretionary (see p. 60, letter I, to p. 61, letter A, post).

G. v. *M.* ((1885), 10 App. Cas. 171) followed.

Dictum of SACHS, J., in *Scott* v. *Scott* (*otherwise Fone*) ([1959] 1 All E.R. at p. 535) not followed.

At the time of the marriage in 1947 the husband, who was an Italian of humble circumstances, and the wife both knew that consummation of the marriage would be impossible unless the wife underwent treatment. At that time the wife's parents, who were well able to afford the cost of the operation, were well disposed towards the marriage and the wife had intimated to the husband that a minor operation would rectify the matter. The parties lived together, having such limited sexual intercourse as was possible from time to time until 1957; thereafter their relationship deteriorated rapidly and in February, 1959, the husband left the wife. Though the wife had had medical advice in 1952, and subsequently, advocating treatment, she never underwent the fairly simple operation that it involved, but invented excuses for her failure to undergo it. On petition by the husband for a decree of nullity on the ground of the wife's incapacity or wilful refusal to consummate the marriage,

Held: in all the circumstances of the case, including as one of those circumstances delay by the husband between 1952 and 1957 (during which period it would be assumed that he had knowledge of the facts and the legal possibility of obtaining annulment of the marriage), it would not be inequitable or unjust to grant a decree of nullity of marriage to the husband; accordingly there was no bar by approbation and a decree on the ground of incapacity would be granted.

[As to approbation in suit for nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 231, para. 432, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 271, *2171* and Supplements.

As to the effect of delay in suits for nullity on ground of impotence, see 12 HALSBURY'S LAWS (3rd Edn.) 231, para. 433; and for cases on the subject, see 27 DIGEST (Repl.) 416-418, *3460-3485*.]

Cases referred to:

Clifford v. *Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 27 Digest (Repl.) 417, *3462*.

G. v. *M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest (Repl.) 416, *3461*.

L. v. *L.* (*falsely called W.*), (1882), 7 P.D. 16; sub nom. *L.* v. *W.* (*falsely called L.*), 51 L.J.P. 23; 47 L.T. 132; 27 Digest (Repl.) 274, *2194*.

M. v. *M.* (*orse. B.*), [1956] 3 All E.R. 769; [1957] P. 139; [1956] 3 W.L.R. 975; 3rd Digest Supp.

Scott v. *Scott* (*otherwise Fone*), [1959] 1 All E.R. 531; [1959] P. 103; [1959] 2 W.L.R. 497.

Slater v. *Slater*, [1953] 1 All E.R. 246; [1953] P. 235; [1953] 2 W.L.R. 170; 3rd Digest Supp.

W. (*falsely called R.*) v. *R.*, (1876), 1 P.D. 405; sub nom. *Reynolds* (*otherwise Wilkins*) v. *Reynolds*, 45 L.J.P. 89; 27 Digest (Repl.) 418, *3474*.

W. v. *W.*, [1952] 1 All E.R. 858; [1952] P. 152; 3rd Digest Supp.

Petition.

The husband petitioned for a decree of nullity on the ground of the wife's incapacity or alternatively of her wilful refusal to consummate the marriage.

The parties were married in February, 1947, the husband being then twenty-six years of age and the wife thirty-four. The husband was the son of Italian peasants. The wife, who was born in England, had an English father and an Italian mother. The wife's family was wealthy and she was well-educated. The husband and wife met in England in December, 1944, while he was an Italian prisoner of war. The parties attempted to have sexual intercourse on several occasions before the marriage but the husband was never able to effect penetration owing to an impediment on the part of the wife. The wife attributed her condition to a fall on a chair which she had previously suffered and prior to the marriage had told the husband that a minor operation would rectify the matter. After the marriage the parties lived in the wife's parents' house. For the first year of the marriage the husband had no job and was, therefore, completely dependent on the wife and her parents. In 1948 the husband obtained employment with travel agents at a small salary. In 1950 his salary was increased sufficiently to enable him and the wife to move to a flat. The marriage was never consummated in spite of numerous attempts by the husband to effect penetration. In 1952 the wife told the husband that she had spoken to a Roman Catholic priest about the state of the marriage, and that the priest advised that she should consult a doctor and that if the matter could not be put right proceedings for nullity should be instituted. The wife consulted a doctor who referred her to a leading obstetric surgeon and gynaecologist, Sir John Peel. She saw Sir John Peel in August, 1952, who confirmed that sexual intercourse had not taken place but that an operation involving anaesthesia and seven to ten days in hospital would remedy her condition and render possible penetration and, possibly, conception. The operation involved stretching or dilatation of the vagina. The wife consulted Sir John Peel again on three or four occasions. In 1956 Sir John Peel performed a hysterectomy on the wife, but although she expressed willingness to have the dilatation operation to enable her to have sexual intercourse she insisted that this should not be carried out at the same time as the hysterectomy. In 1957 the incomplete sexual relations which the parties had previously been having ceased. In 1958 whilst in Italy the husband read an article in an Italian magazine which, he said, brought home to him the fact that the marriage could be annulled. In February, 1959, the husband left the matrimonial home and the parties had never resumed cohabitation.

In March, 1959, the husband presented a petition seeking a decree of nullity on the ground of the wife's incapacity or alternatively on the ground of her wilful refusal to consummate the marriage. By her answer the wife denied these allegations and pleaded that the husband had approbated the marriage so that it would be unjust and inequitable to allow him to repudiate it.

A. H. Bray for the husband.

N. C. Lloyd-Davies for the wife.

Cur. adv. vult.

May 18. **PHILLIMORE, J.:** Shorn of the technicalities of pleading, the wife's case as presented by counsel is this. She does not dispute that the marriage has never been consummated or that she has an impediment which, unless removed, renders penetration impossible. Her case is that the husband has derived substantial advantages from the marriage, and that although he must have realised her condition in the course of their sexual relationship before (or anyhow at an early stage after) the marriage he was content to live with her for some twelve years, enjoying her help as a wife and the limited sexual gratification which was all that she could provide. It is further alleged that he did not complain of the incompleteness of their sexual relationship, and that although

he must have known of his legal rights at an early stage of their married life he did not seek to avail himself of them. Finally, it is alleged that the wife was always ready to undergo a stretching operation which would probably have cured her impediment but was prevented from so doing by the fact that her husband would not co-operate with her over this; indeed, she herself said in the witness-box that she was still ready to undergo an operation, thus it is argued that her condition cannot be said to be incurable. Accordingly, the wife's case is that she is not incapable and that in any event the husband has approbated the marriage.

[His Lordship stated the facts and continued:] Apart from alleging that he must have realised her condition if not before the marriage at all events at an early stage of their married life, the wife complains that throughout the marriage her husband enjoyed a form of sexual gratification without complaint, gratification to which she submitted although deriving no pleasure herself. To this his reply is that in the early stages he was in no position to complain of anything and he always tried to effect penetration and, of course, hoped that he would be able to do so if only as a result of an operation.

She alleges that the only reason why she did not have the stretching operation was because she could get no co-operation from him, its success would be dependent on regular sexual intercourse to preserve the effect of the stretching, and of this she had no promise. Further, she says that he was never prepared to pay for her to have the operation because he did not want children. When asked to explain a letter to Sir John Peel, in which she appeared to suggest that her decisions were fully shared by her husband, she said that this was merely written so as to make Sir John think that her husband was co-operating and in fact was, to that extent, untrue.

The husband's case is that he always agreed to the operation and wished her to have it. True he was not anxious to have children since they could not afford them, but he did not object on this account. If he did not press her to have the operation it was because it was her body that was involved, but he never sought to discourage her. If he did not go with her to see Sir John or see him separately it was because he was working or was not asked to go and did not wish to increase the fees for consultation which in any event he paid. It was suggested by the wife that the husband had derived great advantages from the marriage—his job in England and naturalisation which he has obtained since they parted. In all the circumstances of the present case I do not find the allegation very impressive. It was not suggested that the employment he got was due to any action by her parents who, on the wife's own evidence, did nothing to assist this couple after they moved to a flat in 1950.

Having listened to the evidence of these two people I have no hesitation in preferring the evidence of the husband. I thought that the wife emerged from cross-examination as a ~~most untruthful woman~~ LIAR. I formed the view that the husband was a truthful man not least by his admission of some experience of sexual intercourse before he met his wife. I am satisfied that he is a hard-working man who was anxious to do his best for his wife. He is a man of limited education and intelligence and it would have been indeed strange in all the circumstances of this marriage if he had not been dominated by his wife. Although he had had sexual experience before his marriage to her I think that he had little knowledge of sexual matters. I accept that he did not complain to the wife of the incomplete nature of their sexual life, but he was in fact never satisfied with it, he told me, and I accept that he kept trying to effect penetration. He was, of course, made aware of her impediment before marriage, as he himself admits, and in 1952 was told by his wife of the possibility of annulment after her interview with the priest. I accept that he was not anxious to have children, and that seems reasonable in the light of their circumstances, but I am entirely satisfied that he agreed with his wife when she said she wanted them. His attitude in regard to the proposed operation was that he hoped that his wife

would have it but that it was not for him to urge her to do so. He agreed to it and paid the fees for her visits to Sir John Peel and did nothing at any time to discourage it. I have no doubt whatever that whether he assented to it or not the decision to defer the dilatation until after the hysterectomy notified in her letter of May 4, 1955, was her decision. He left her because their failure to have proper sexual intercourse built up over the years a tension between them which resulted in quarrels and bitterness which finally removed any happiness.

I have said that the wife is untruthful. She is a woman of education and of determined character. In all the circumstances of this marriage she wore the trousers and called the tune. Her case as put before me by counsel presented her in a somewhat unattractive light. Here was a woman of thirty-four of a good and wealthy family who, after a short acquaintance, was enjoying sexual relations with a prisoner-of-war eight years younger than herself, and then followed him to his native country. Having seen the circumstances of his family she agreed to marry him on his return to England where she was to provide the background of her family home and support—a prospect which must have seemed dazzling to him in the light of circumstances in Italy at this time. Aware of her own physical impediment she did nothing to have it put right before the marriage and has done nothing since despite advice from a succession of doctors and a distinguished priest. Her husband told me that after seeing Sir John Peel in 1952 she told him that Sir John had said that unless she had an operation her marriage would not last ten years. Despite that advice and the relatively simple nature of the operation she has not had it. She has invented a series of excuses for her failure to undergo it, alleging falsely, as I am satisfied, that her husband would not co-operate with her on this subject. Yet knowing of the wrong she has done her husband she clings to her marriage, emphasising through her counsel the benefits conferred on a man who was merely an illiterate and penniless Italian peasant. It is perhaps not surprising that she has quarrelled with her family and that no member of it has appeared in court to support her.

This is a harsh and unattractive picture. For myself I think that the truth lies deeper. The wife sustained an accident before her marriage which involved injury in the region of her private parts. It is I think probable that as she told Sir John Peel this occurred in childhood. I have little doubt that this has had some mental effect which I am not competent to assess but which has made any further interference with her private parts something from which she shrinks. I have no doubt that she is and always has been determined not to undergo this operation. Although in the early days of the marriage at any rate she was in love with her husband and has wanted to have children and to preserve her married life, and although well aware of the need for this operation if she was to do so, she has been unable to bring herself to undergo it. I think that the husband was right when he said that she only underwent the hysterectomy because she was forced to do so by the pain caused by the fibroids.

In the witness-box she said that she was prepared to have the operation if her husband would return to her, and her counsel has accordingly argued that she ought not to be found incapable of consummating this marriage since she is ready to have an operation which may cure her. In the ecclesiastical courts proof was required that incapacity was incurable by art or skill, and for many years an impediment has been treated as incurable if the party suffering it is not prepared to submit to the operation or cure necessary to remove it. Thus in 1882 in *L.* v. *L.* (*falsely called W.*) (1) where a wife was incapable but her incapacity might be cured by an operation which she refused to undergo, Sir James Hannen, P., granted the husband a decree, observing (2) that:

> "... the court cannot compel her to submit, and the man can only be expected to take all reasonable means to persuade her. This he has done, and she has distinctly refused."

(1) (1882), 7 P.D. 16. (2) (1882), 7 P.D. at p. 17.

In *M.* v. *M.* (*orse. B.*) (3), where a wife had known for some years that a dilatation operation was necessary if her marriage was to be consummated and failed to undergo it, a suggestion was made at a late stage in the trial that it should be adjourned in order that the operation might be performed. KARMINSKI, J., refused any adjournment. In the present case although the wife said that she would be prepared to undergo the operation no request for an adjournment was made. I am quite satisfied that the offer made by the wife was not genuine. She has no intention of undergoing this operation, she cannot be compelled to and she cannot bring herself to undergo it. Without it she is and must remain incapable of consummating her marriage.

This being the position I turn to consider the allegation that this husband had approbated the marriage and that there is accordingly a bar to the granting of a decree. The test to be applied is that laid down by the House of Lords in *G.* v. *M.* (4). LORD WATSON puts it as follows (5):

> ". . . in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

THE EARL OF SELBORNE, L.C., said (6):

> ". . . there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed."

Later on (6) he speaks of

> ". . . a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred."

The phrase " knowledge of the facts and the law " was explained by KARMINSKI, J., in *Slater* v. *Slater* (7) in the following words (8):

> " As JENKINS, L.J., pointed out in *W.* v. *W.* (9), a complete knowledge of the law is not required; it is an adequate knowledge. By that, if I may be bold enough to interpret the adjective, is meant a knowledge of the injury or the grievance, and the knowledge that the law provides a remedy to the injured party."

In the course of argument I was referred to the judgment of SACHS, J., in *Scott* v. *Scott* (*otherwise Fone*) (10), in the course of which he seeks to tabulate the principles to be applied in dealing with a defence of approbation. He concludes inter alia (11) " if the present facts do constitute a bar, it is a discretionary and not an absolute bar ". I think that in so stating he was founding himself on the language of BUCKNILL, L.J., in *Clifford* v. *Clifford* (12) where the learned lord justice referred (13) to the case as having " what I may call a discretionary aspect ". I confess that I do not find this easy to follow. It is, I think, the duty of the court to apply the test as laid down by the House of Lords in *G.* v. *M.* (4)

(3) [1956] 3 All E.R. 769; [1957] P. 139.
(4) (1885), 10 App. Cas. 171.
(5) (1885), 10 App. Cas. at p. 197.
(6) (1885), 10 App. Cas. at p. 186.
(7) [1953] 1 All E.R. 246; [1953] P. 235.
(8) [1953] P. at p. 241.
(9) [1952] 1 All E.R. at p. 864; [1952] P. at p. 165.
(10) [1959] 1 All E.R. 531; [1959] P. 103.
(11) [1959] 1 All E.R. at p. 535; [1959] P. at p. 108.
(12) [1948] 1 All E.R. 394; [1948] P. 187.
(13) [1948] 1 All E.R. at p. 399; [1948] P. at p. 197.

to all the circumstances of the case. If having done this the court concludes that it would be most inequitable and contrary to public policy to grant a decree I cannot think that any residual discretion remains.

Finally, counsel raised the element of delay. It is well established that mere delay does not constitute approbation. The true approach is, I think, to regard delay and the explanation for it as part of the circumstances to be considered in deciding whether or not there has been approbation. This was the approach of SIR ROBERT PHILLIMORE in the well-known case of *W.* (*falsely called R.*) v. *R.* (14).

In the present case the husband was, as he admits, told by the wife of her impediment before the marriage and of the simple operation required to remedy it. After the wife spoke to the priest in 1952 she mentioned to the husband that he had spoken of annulment. He says that he did not really appreciate the possibility of annulment until he read the article in the Italian magazine in 1958. Whilst I have no doubt that he believes that he did not know until 1958, and although I have little doubt that his knowledge of the meaning of annulment was somewhat imprecise, I am content to approach this case on the basis that he must be taken to have known the facts and the law in 1952. Is he then to be said to have approbated the marriage because he continued to live with his wife until February, 1959, and to enjoy a limited form of sexual relationship until some time in 1957? Whilst it is true that he did not complain and did not urge his wife to have the necessary operation but left the initiative to her, I am quite satisfied that he never expressed himself as satisfied with their sexual relations and showed himself at all times ready to co-operate with her when she spoke of having the operation and of having children.

The husband has done his best towards the wife according to his ability. His only fault has been that he has been too patient and has not sought to put pressure on the wife to undergo a minor operation which she has always known it was her duty and interest to undergo. Looking at all the circumstances of the present case, including the element of delay and the husband's explanation for it, I cannot find that it would be inequitable or unjust to grant a decree which will terminate this unhappy union and enable the husband if so minded to marry a woman with whom he can enjoy a normal married life. For those reasons I grant a decree on the grounds of incapacity.

Decree accordingly.

Solicitors: *Alec Woolf & Turk* (for the husband); *Candler, Stannard & Co.* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

---

(14) (1876), 1 P.D. 405.

GAGE AND ANOTHER *v.* KING.

[QUEEN'S BENCH DIVISION (Diplock, J.), June 28, 29, 1960.]

Negligence—Damages—Personal injury—Special damage—Expenses incurred by husband in respect of wife's injuries paid by husband out of joint bank account—Responsibility for motor accident apportioned as to two-thirds to husband—Which spouse entitled to recover expenses, as special damage, against defendant.

The plaintiffs, a husband and wife, were injured in a road accident when a motor car, which the husband was driving and in which the wife was a passenger, came into collision with a motor car driven by the defendant. The husband's injuries were slight, but the wife was seriously injured, and the expenses incurred in respect of her injuries included (a) doctors' fees, (b) nursing home expenses, and (c) additional domestic help. These expenses amounted to £449 8s. and (with the exception of some of the doctors' fees, which were still outstanding) they had been paid by the husband out of a bank account in the joint names of the husband and wife on which both could draw cheques. About 4½ per cent. of the total amount which went into the joint account came from the interest on investments belonging to the wife (and given to her by the husband), and the rest came from the interest on investments belonging to the husband. Both husband and wife drew on the account for housekeeping and personal expenses, and there was no evidence of any agreement between them as to the ownership of any balance standing to the credit of the account. In regard to the doctors' fees which were not yet paid, the wife's name appeared on most of the fee notes, but there was no evidence whether the covering envelope was addressed to the husband or to the wife, nor was there any evidence that the wife had made herself personally liable for the expenses incurred in respect of her injuries. In an action by the plaintiffs for damages against the defendant, it was held that the accident was caused by the negligence of the male plaintiff (the husband) as well as by the negligence of the defendant, and liability was apportioned as to two-thirds to the husband and as to one-third to the defendant.

Held: the husband alone was entitled to claim as special damage the expenses incurred in respect of the wife's injuries, because he alone had, on the facts, incurred legal liability to pay these expenses, and it was immaterial that some of them had been paid out of the joint account as during the continuance of the marriage the arrangement for the joint account was not intended to have legal consequences between the spouses; therefore, only one-third of the amount of this special damage (one-third being the proportion in which the defendant was responsible for the accident as between him and the husband) was recoverable from the defendant.

Schneider v. *Eisovitch* ([1960] 1 All E.R. 169) criticised.

[Editorial Note. On divorce, money contributed by a husband and wife to their joint bank account is, in the absence of agreement to the contrary, divisible equally between them; see *Jones* v. *Maynard* ([1951] 1 All E.R. 802). In that case VAISEY, J., said "when the money goes into the pool it is there as joint property". It seems, however, that an arrangement for a joint account may not create legal rights between the spouses until the marriage breaks up or is ended by death (see p. 64, letters I and G, post).

As to the obligation of a husband to maintain his wife, see 19 HALSBURY'S LAWS (3rd Edn.) 817, para. 1337.

As to a bank account in the joint names of husband and wife, see 19 HALSBURY'S LAWS (3rd Edn.) 833, para. 1360; and for cases on the subject, see 27 DIGEST (Repl.) 152, 153, *1107-1112*.**]**

Cases referred to:

Allen v. *Waters & Co.*, [1935] 1 K.B. 200; 104 L.J.K.B. 249; 152 L.T. 179; 99 J.P. 41; Digest Supp.

Balfour v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, *1604.*

Jones v. *Maynard*, [1951] 1 All E.R. 802; [1951] Ch. 572; 27 Digest (Repl.) 152, *1112.*

Rimmer v. *Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.

Schneider v. *Eisovitch*, [1960] 1 All E.R. 169; [1960] 2 W.L.R. 169.

Action.

In this action the plaintiffs, Henry Charles Gage and his wife Edith Annie Gage, claimed damages against the defendant, Cecil Arthur John King, for personal injuries received and loss caused by the negligent driving of a motor vehicle by the defendant. The plaintiffs were injured in a motor accident on Mar. 15, 1959, when a motor car driven by Mr. Gage and in which Mrs. Gage was a passenger came into collision with a motor car driven by the defendant. The injuries sustained by Mr. Gage, who was about seventy years old at the time, were not severe and the agreed sum in respect of special damage incurred by him was £148 14s. Mrs. Gage, who was seventy-six years old at the time, was more seriously injured, and the agreed figure of expenses incurred in respect of her injuries was £449 8s. In the original statement of claim this sum was claimed by Mr. Gage as part of his special damages, but by an amendment made with leave of HIS LORDSHIP, DIPLOCK, J., at the hearing of the action, the sum was claimed in the alternative by Mrs. Gage.

DIPLOCK, J., held that negligence on the part of the defendant was established and that there was also negligence on the part of Mr. Gage, and HIS LORDSHIP apportioned the liability as to two-thirds to Mr. Gage and as to one-third to the defendant. HIS LORDSHIP assessed the general damages to which Mr. Gage was entitled at £100 (subject to apportionment of liability) and awarded Mrs. Gage £750 as general damages.

The report is confined to the question whether Mr. Gage or Mrs. Gage was entitled to recover, as special damages, the expenses incurred in respect of Mrs. Gage's injuries.

P. M. O'Connor, Q.C., and *H. B. Grant* for the plaintiffs.

Martin Jukes, Q.C., and *P. Bennett* for the defendant.

DIPLOCK, J., stated the facts, held that the accident was due to the negligence of both the defendant and the first plaintiff, Mr. Gage, and apportioned the liability as to two-thirds to Mr. Gage and as to one-third to the defendant. After assessing Mr. Gage's general damages at £100 (subject to apportionment of liability) and Mrs. Gage's general damages at £750, HIS LORDSHIP continued: A point of some difficulty arises in respect of expenses which were incurred as a result of the injuries to Mrs. Gage. These were (a) doctors' fees, (b) nursing home fees, and (c) additional domestic help after her return home. The majority of these have been paid by Mr. Gage either by cheque drawn by him or in cash. Some of the doctors' fees are, however, still outstanding. As originally pleaded, the full amount was claimed by Mr. Gage as part of his special damage. By an amendment made with my leave at the trial, of which notice had been given by letter to the defendant a little over a month ago, these expenses are now claimed in the alternative by Mrs. Gage. The claim is that they are special damage which Mrs. Gage is entitled to recover, and to recover in full against the defendant instead of as to one-third only, as would be the case if they are special damage which Mr. Gage is entitled to recover. The claim that Mrs. Gage is entitled to these damages is based on the fact that, as respects the amounts already paid, they were paid out of a bank account in joint names on which both could draw cheques on their own signature, and, as respects the doctors' fees so far unpaid, her name, not Mr. Gage's, appears on the face of the fee notes.

Mr. and Mrs. Gage, the plaintiffs, are a happily married couple, both in their seventies: he is the younger by six or seven years, has been a successful business man and still continues in business. He is obviously the dominant partner in the union. The joint account is fed by the income from Mr. Gage's investments, and some at least of these are the profits from his present business, which amount to some £1,500 per annum. There is also paid into it the interest on the sum of £2,000 invested in a building society and belonging to Mrs. Gage. This sum was originally a gift from Mr. Gage, and the interest amounts to £70 per annum or some 4½ per cent. of the total income of the joint account. Both the plaintiffs drew on the joint account for housekeeping and personal expenses. There is no evidence of any express agreement between them as to the ownership of any balance from time to time standing to the credit of the account. Counsel for the plaintiffs contends, relying on *Jones* v. *Maynard* (1) and *Rimmer* v. *Rimmer* (2), that the effect of this in law is that the balance standing at any time to the credit of the account is owned in equal moieties by the plaintiffs, and that Mr. Gage has in fact been paid out of Mrs. Gage's moneys one half of the expenses drawn out of that account on Mr. Gage's cheques. She has lost, says counsel, at least this amount as a result of Mr. Gage's payments of the charges of the doctors, the nursing home and the domestic help which were incurred as a result of her injuries. Indeed, says counsel (and I hope that I am doing justice to this branch of his argument), if Mrs. Gage had herself drawn the cheques for these expenses, even although they were drawn on the joint account, she could have recovered the whole amount of those payments; the effect on the joint account would have been exactly the same: it cannot make any difference that the cheques were in fact drawn by Mr. Gage, and, therefore, she is entitled to recover the whole of these expenses.

I think that this argument involves a fundamental misconception of the legal position as respects a joint bank account operated on by husband and wife while the parties are still living together. As ATKIN, L.J., said in *Balfour* v. *Balfour* (3):

> " . . . it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves . . . Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences . . . The parties themselves are advocates, judges, courts, sheriff's officer and reporter."

No doubt, when a marriage breaks up by death, divorce or separation, the court must solve the problem of the destination of the balance in the account—perhaps, as in *Jones* v. *Maynard* (1), where a property has been purchased out of it. Under s. 17 of the Married Women's Property Act, 1882, the judge is, in terms, directed to make " . . . such order . . . as he thinks fit . . .". Even in an action where he has no such statutory discretion, he really has to perform a similar task. He gives effect to what he thinks that the parties, as reasonable people, would have intended if they had given their minds, which in fact they did not, to what should happen on the break-up of the marriage, and, in the absence of any other evidence of their intention, he may well come to the conclusion that, had they thought of it, they would have intended to divide it in equal shares.

What is to happen to the balance in the joint account when the marriage breaks up is, however, a very different question from that of the mutual rights of the parties in relation to the account while the marriage is still subsisting. I do not think that such an arrangement between husband and wife is meant to be attended with legal consequences as between the two spouses while the marriage is still subsisting. Mrs. Gage's right to draw on the joint account was subject to no legal limitation. It was neither increased nor diminished by the fact that Mr.

(1) [1951] 1 All E.R. 802; [1951] Ch. 572.
(2) [1952] 2 All E.R. 863; [1953] 1 Q.B. 63.
(3) [1919] 2 K.B. at p. 578.

A Gage had drawn cheques on it for the expenses of her medical treatment or nursing or for the provision of domestic help, any more than it would have been if the expenses had been incurred in respect of Mr. Gage's own injuries, and even counsel for the plaintiffs does not suggest that Mrs. Gage could have recovered as special damage sums paid out of the joint account by Mr. Gage for expenses incurred by reason of his own injury. I do not think that the fact that moneys B paid by Mr. Gage for the expenses incurred in respect of Mrs. Gage's injuries came out of the joint bank account is relevant to the question which I have to determine. Which of the spouses is entitled to recover these sums as special damage depends, in my view, on which of them incurred the legal liabilities to pay them to the persons who had rendered the services. In treating this as the crucial question, I appreciate that I am differing from a recent judgment of C PAULL, J., in *Schneider* v. *Eisovitch* (4). But it seems to me that that decision is contrary to the ratio decidendi of the Court of Appeal in *Allen* v. *Waters & Co.* (5): see 76 LAW QUARTERLY REVIEW 187.

I start with the proposition that Mrs. Gage had implied authority, which has never in fact been withdrawn or qualified, to pledge Mr. Gage's credit for necessaries supplied to her and all these expenses were in respect of necessaries. Mr. D Gage was under a legal duty to provide her with them. When a married woman living with her husband makes a contract for the supply of necessaries, prima facie she does so as agent for her husband. There is no evidence here to rebut that presumption. Indeed, there is, in fact, no evidence that she herself made the contract. Having seen the two of them, Mr. Gage, a very young seventy-one, and Mrs. Gage, if she will forgive my saying so, by no means young, seventy-seven, E I think that it is almost certain that it was Mr. Gage who made all the arrangements with the doctors, the nursing home and the domestic help. He, in fact, settled all the bills and made all the payments. In the statement of claim as originally pleaded, he claimed the full amount in respect of special damage incurred by him. As one would expect from a man of his type, he said with perfect frankness in his evidence that he would not expect his wife to repay him; he F did not even add the rider " unless she gets it out of the defendant ". She is under no legal obligation to repay him.

I think that the sole liability was incurred by him and is recoverable as special damage caused to him and not to Mrs. Gage. I cannot draw any distinction between those expenses which have already been paid by him and those medical fees, for which liability has already been incurred, which are still outstanding. G It is true that most of the fee notes bear her name, although there is no evidence whether the covering envelope was addressed to him or to her. But this in itself is not decisive to rebut the inference that he was the principal, and all the other evidence seems to me to point to the conclusion that he was. It is quite true that Mrs. Gage could have so contracted as to make herself personally liable for the medical, nursing and other expenses incurred in respect of her injuries, and, had H she done so, she could have recovered them as her special damage. She has not satisfied me that she did, and, since she has not incurred this loss in law or in fact, it cannot be said that she is any worse off because she and Mr. Gage had not the foresight and knowledge of the technicalities of the law as to contribution between joint tortfeasors to make sure that it was her credit that was pledged and not that of Mr. Gage. No doubt, the defendant or his insurers are about I £300 better off as a result, but this sort of situation will continue to arise so long as the law as to recovering contribution from a husband who is partly to blame for a wrong done to his wife remains unaltered, and I cannot feel any moral indignation that Mr. Gage is left to bear two-thirds of the expenses incurred by him as a result of an accident for which, I have held, he was two-thirds to blame.

Accordingly, the amount recoverable by Mrs. Gage is £750. The amount recoverable by Mr. Gage is the sum of £100, as general damages; the agreed

(4) [1960] 1 All E.R. 169. (5) [1935] 1 K.B. 200.

D

special damages incurred in respect of his injuries, namely, £148 14s.; and the agreed figure of expenses incurred in respect of the injuries of Mrs. Gage, which is £449 8s. These three sums, when added together, come to £698 2s., which, divided by three, comes to £232 14s. Accordingly, there will be judgment for £232 14s. for the first plaintiff, Mr. Gage, and for £750 for the second plaintiff, Mrs. Gage, and they will have the costs of the action.

Judgment for the plaintiffs.

Solicitors: *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the plaintiffs); *Gardiner & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

ROBINS *v.* ROBINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wrangham, J.), May 23, 24, 25, 1960.]

Divorce—Cruelty—Mental disorder—Unjust accusations firmly believed by respondent—Assault by respondent—Reasonable apprehension of future injury to petitioner.

The wife petitioned for divorce on the ground of cruelty. Subsequently, in September, 1959, the husband unjustly accused the wife of improperly associating with a married man and of failing properly to look after the child of the marriage, a girl aged twelve years. The husband was mentally unstable and firmly believed the accusations to be true. On May 15, 1960, a few days before the hearing of the suit, the husband slapped the wife's face in the presence of the child and seized the child by the throat; but when the wife threatened to call the police the husband repented. This assault was not such as would give rise to apprehension of future injury if the husband had been a man of ordinary mental stability. The wife relied on these acts as constituting cruelty.

Held: (i) the husband was not guilty of cruelty in respect of the accusations since by reason of his mental instability he did not know that it was wrong to make those accusations.

M'Naghten's Case ((1843), 10 Cl. & Fin. 200) applied.

(ii) the assault gave rise to a reasonable apprehension of injury in the future, having regard to the mental state of the husband, and was good ground for a finding of cruelty; therefore the wife was entitled to a decree nisi.

Astle v. *Astle* ([1939] 3 All E.R. 967) followed.

[Editorial Note. In *Morriss* v. *Marsden* ([1952] 1 All E.R. at p. 928, letters E and F) the conclusion was reached, partly in reliance on *Astle* v. *Astle*, supra, that absence of knowledge of wrongdoing was an immaterial averment in a defence to alleged tort. There is thus a divergence in principle between the application of a defence, similar to the defence established for criminal cases by *M'Naghten's Case*, supra, in divorce cases based on alleged cruelty and in cases of tort.

As to the defence to a charge of cruelty that respondent does not know that what he did was wrong, see 12 HALSBURY'S LAWS (3rd Edn.) 273, para. 521, note (l); and for cases on the subject, see 27 DIGEST (Repl.) 310, 311, *2581-2587*.

As to the considerations material when determining whether particular conduct amounts to cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 271, para. 516, text and note (k).**]**

A Cases referred to:

Astle v. *Astle*, [1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6; 27 Digest (Repl.) 310, *2584*.

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Car. & Kir. 130, n.; 14 Digest (Repl.) 60, *246*.

B **Petition.**

The wife petitioned for divorce on the grounds of cruelty and filed two supplemental petitions also charging cruelty. There was one child of the marriage, a daughter, aged twelve. The husband was not legally represented and filed an answer containing a bare denial.

C *Mrs. Esther Iwi* for the wife.

The husband appeared in person.

WRANGHAM, J., in the course of his judgment said: On Sept. 30, 1959, there occurred events which gave rise to the first supplemental petition. The wife had for some years been a friend of a neighbouring couple, a Mr. and Mrs. Garfield who had one or more children with whom the daughter of the husband D and wife was friendly. The husband objected to the association between the wife and the Garfields. He gave me the reasons why he objected to the association. They seemed to me to be reasons of no substance whatever. In particular, I can see no justification for his objecting to the wife being friendly with the Garfields at a time when he and the wife were living virtually separate lives. There might have been some ground for his objecting to a friendship with the E Garfields when he and the wife were leading the life of an ordinary husband and wife. Without dealing with the matter in detail, the quarrel led to the husband refusing to let his wife into the house, with the result that the wife, with rather more justification this time, went to the police. A police constable gave evidence, which I accept, as to what occurred. It was plain, first, that the husband had, in fact, refused to allow his wife to enter the house; secondly, that he was objecting F to her association with Mr. Garfield; and thirdly, that he was saying that his daughter was in some form of moral danger. To such an extent did he make that suggestion that the officer thought it right to point out that it would be possible for a woman police constable to see if the daughter was in need of care and protection. I do not think that the officer would have made that suggestion if it had not been made perfectly clear to him by the husband that he thought G that his daughter was in some form of moral danger. I accept that the husband did entertain the belief that the wife was improperly associating with Mr. Garfield and that the daughter was in moral danger. I accept that there was absolutely no ground whatever for either of those beliefs and that they were entertained by him not on any reasonable ground but because he was a man with a sick mind who was capable of forming those ideas, as he had formed the ideas H of persecution and conspiracy in November, 1955. It is said with justice that this is not pleaded in any answer. It could have been pleaded, in answer to the first supplemental petition, that the husband was not responsible for the way in which he behaved on this occasion owing to the operation of the M'Naghten Rules (1). At the time when the supplemental petition was served, and when the answer was filed, the husband was acting for himself, and one can understand I that it might be difficult for a husband acting for himself to plead that he was not responsible for what he did because he did not at the time understand the nature and quality of his act or that what he was doing was wrong. In those circumstances I think that I ought to give effect to my finding, whatever the state of the pleadings. I think that at that stage he did not realise that it was wrong for him to make those accusations against his wife. There were two accusations, one that she was not looking after their daughter properly, and the second that

(1) See *M'Naghten's Case* (1843), 10 Cl. & Fin. 200.

she was having an improper association with Mr. Garfield. He did not realise that it was wrong to make those accusations because he firmly believed them to be true.

The mental state of the husband at that time was further illustrated by the fact that he told the police constable that the wife's brother was spying on him (an allegation as unfounded as it was absurd) and that he proposed, if anybody interfered with his domestic matters, to summons the state, or the Crown; and, as the police constable told me, he rambled on in a way which was difficult to follow. I am satisfied that at that time the husband was mentally far from well and, indeed, in need of medical advice which it was very unfortunate that he did not receive. It was no fault of the doctor and indeed, in one way no fault of the wife, because although one might have thought that the wife was open to criticism for not having had her husband attended to medically, during the course of this time she was in the difficulty that she had promised her husband after his discharge from hospital in 1956, that she would not get a doctor to him again. I can understand her making that promise and I do not criticise her for making it. It was one of those promises which perhaps would have been better not made and one of the few promises in this world which perhaps one is entitled not to keep, but I do not criticise her in any way either for making that promise or for keeping it. I can understand her doing both. For the wife the results were unlucky.

Finally I come to May 15, 1960. On that date, only a few days before this case came to be heard, there occurred events which gave rise to the second supplemental petition. Those events were described by the wife in evidence and, indeed, by the daughter more or less on the lines on which they had been set out in the pleading. She said that the husband sent the daughter to her to say that he wanted to see her, so she went to see him upstairs. He then accused her of taking some money, quite unjustly, and when she denied it he said that he would call the police. She invited him to do that and he thereupon slapped her on the face, in the presence of their daughter, a little girl, and when the child screamed as a result, gripped the child by the throat. The wife managed to grab the child from him and said to her that they would go for the police. Thereupon the husband repented of what he had done, put his arm round her shoulders and said that he loved them both and asked her not to go for the police. So that incident came to an end except that again, with rather an excess of drama, the wife locked her bedroom door that night, arming herself with a hockey stick and the child with a tennis racquet. The husband has given no evidence to contradict the account given by the wife and the child of those events. I am not entirely surprised about that because when the child gave evidence of these events her account was as convincing as her account of the earlier incident had been unconvincing. Thus at the moment when the case was about to be heard, perhaps because it was about to be heard, the husband so far lost control of himself as to slap the wife across the face, and in her presence grab their twelve year old daughter by the throat.

It is clear that that conduct was wrong. If one is to be technical it was an assault on the wife and, indeed, in her presence on the child. There was no sort of provocation. It was not justifiable or excusable in any way. On May 15, 1960, therefore, the husband did something to the wife which was indefensible. That which he did then was in a sense so slight that it had no effect on the wife's health whatever. Merely having her face slapped, or the momentary alarm of seeing her child taken by the throat, which had no ill consequence on the child would have had no ill effect on her health at all. The wife's case, as I understand it, on the second supplemental petition was put in this way: that an unjustifiable act was committed by the husband which, although it did not affect the wife's health, did give rise to a reasonable apprehension that the wife's health might be affected in future if she continued to live with her husband. She has only lived with him for eight or nine days, or rather less than that since that event,

so that the mere fact that she did continue with him after the event is not really any reason for supposing that the event itself did not give rise to a reasonable apprehension that her health might be impaired in the future.

If this scene had occurred between a perfectly sane and rational husband and a sane and rational wife, I do not think that I would have inferred that the wife's health was likely to be impaired in the future because she had on one occasion been slapped in the face. The question, therefore, is whether I am entitled to view the quality of that act differently because the act was committed by a man who is shown by the whole history of the present case to be a man of substantial mental instability. Now in *Astle* v. *Astle* (2), a husband who had violently assaulted his wife in 1927, at a time when he was so insane as not to know the nature and quality of his acts, in 1931 uttered a threat against his wife which, had it come from a man without the previous history of insane violence in 1927, would not have been cruelty sufficient to entitle the wife to a decree. HENN COLLINS, J., held that as that threat had been uttered by a man who had in fact committed acts of violence when insane, four years before, the quality of the threat was, so to speak, thereby altered; and he held that he was entitled in the circumstances to say that there was a reasonable apprehension of danger to the wife's health in the future. As he pointed out, by implication rather than expressly, it was, as it were, unlucky for the husband that the threat acquired the gravity which it did by reason of the acts for which he was not responsible, but, nevertheless, it did. Now, as it seems to me, the same principle holds in the present case. If I hold, as I do, that the husband committed an indefensible assault on his wife on May 15, 1960, I am entitled to judge the gravity of that assault in relation to the future by the whole of the previous history of the marriage, and in particular by reference to the husband's mental illnesses. It does in a way seem unfair that an act committed by a man of mental instability should be visited by consequences which would not follow in the case of the same act committed by a man of mental stability. That is why I said at the beginning of my judgment that I was sympathetic with both sides, because on the one side I think that there is, as a result of the assault on May 15, a real reason for regarding the wife's health as endangered by continuing to live with the husband, so that it would be unfair to the wife to refuse a decree; but, on the other hand, I quite see that to the husband it would appear unfair to rely on an act which, if committed by a different kind of man, would not give rise to the inference of danger for the future. I have to make up my mind. I have decided that where there is an indefensible act, in this case an assault, which, when committed by the particular man who did it gives rise to an apprehension of injury in the future, that must be good ground for a finding of cruelty, even though such an act when committed by a different kind of man would not give rise to that inference and therefore would not be described as cruelty.

I have tried as hard as I can to explain, particularly to the husband, the reasons for my finding because I should not like him to think that I had accepted the whole story of cruelty which the wife has told me, most of which I regard as either exaggerated or untrue. On the very limited basis, however, which I am endeavouring to define, I think that I am bound to find the husband guilty of cruelty on the second supplemental petition only.

There will be a decree nisi on the second supplemental petition, custody to the wife. I am satisfied with the arrangements made for the child; she is apparently going to stay on with her mother and continue to go to school, and in any event I imagine the good advice of the wife's brother will continue to be forthcoming. I order the husband to pay half the costs in view of the fact that I have found in his favour to some extent on some parts of the case. *Decree nisi.*

Solicitor: *E. F. Iwi* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

(2) [1939] 3 All E.R. 967; [1939] P. 415.

ROSS SMITH (otherwise RADFORD) *v.* ROSS SMITH. ROSS SMITH *v.* ROSS SMITH (otherwise RADFORD).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 16, 17, 24, 1960.]

Nullity—Jurisdiction—Marriage celebrated in England—Wife, petitioner, domiciled and resident in England at time of marriage and resident in England when petition presented—Husband neither domiciled nor resident in England when petition presented—Whether English courts had jurisdiction to entertain wife's petition on ground of husband's wilful refusal or incapacity to consummate the marriage.

At the time of the presentation of a petition by the wife for nullity on the ground of wilful refusal by the husband to consummate the marriage, and alternatively on the ground of his incapacity, the husband was neither domiciled nor resident in England. The marriage had been celebrated in England in 1955.

Held: the fact that the ceremony of marriage had taken place in England did not confer jurisdiction on the English court over a petition for nullity unless the validity of the ceremony of marriage was in dispute (see p. 74, letter F, post); accordingly, the court had not jurisdiction in this suit.

Principle stated by SOMERVELL, L.J., in *Casey* v. *Casey* ([1949] 2 All E.R. at pp. 117, 118) applied.

Hill (*otherwise Petchey*) v. *Hill* ([1959] 3 All E.R. 754) not followed.

Addison (*otherwise McAllister*) v. *Addison* ([1955] N.I. 1) considered.

Per CURIAM: where a petition for nullity is based on any cause which would render the marriage void ab initio, I entertain no doubt that the court of the lex loci celebrationis has jurisdiction to try the suit (see p. 72, letter E, post).

[As to the jurisdiction of English courts in cases of voidable marriages celebrated in England, see 7 HALSBURY'S LAWS (3rd Edn.) 109, para. 195, especially notes (c) and (e) and SUPPLEMENT; and for cases on the subject, see 11 DIGEST (Repl.) 478-480, *1065-1071*, *1074-1078* and 3rd DIGEST Supp.]

Cases referred to:

Addison (*otherwise McAllister*) v. *Addison*, [1955] N.I. 1; 3rd Digest Supp.

Casey v. *Casey*, [1949] 2 All E.R. 110; [1949] P. 420; [1949] L.J.R. 1642; 11 Digest (Repl.) 479, *1076*.

Evans v. *Evans*, (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest (Repl.) 294, *2398*.

Hill (*otherwise Petchey*) v. *Hill*, [1959] 3 All E.R. 754; [1959] 3 W.L.R. 828.

Inverclyde (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; 11 Digest (Repl.) 478, *1070*.

Linke (*otherwise Van Aerde*) v. *Van Aerde*, (1894), 10 T.L.R. 426; 11 Digest (Repl.) 478, *1066*.

Ramsay-Fairfax (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax*, [1955] 2 All E.R. 709; [1956] P. 115; [1955] 3 W.L.R. 188; *affd.* C.A., [1955] 3 All E.R. 695; [1956] P. 126; [1955] 3 W.L.R. 849; 3rd Digest Supp.

Simonin v. *Mallac*, (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*.

Sottomayer v. *De Barros*, (1877), 2 P.D. 81; *on appeal*, 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 11 Digest (Repl.) 460, *945*; *re-hearing*, (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 11 Digest (Repl.) 461, *946*.

Issue.

The wife, Peggy May Ross Smith, presented, on Oct. 19, 1959, a petition for nullity on the ground of the husband's, Jack Ross Smith's, wilful refusal to consummate the marriage celebrated in England in July, 1955, alternatively, on his incapacity to consummate the same either at the date of the celebration

of the marriage or since. The husband maintained that his domicil was Scottish, and on Feb. 12, 1960, Mr. Registrar KINSLEY ordered an issue to be tried, whether the court had jurisdiction by reason either (a) of the domicil of the parties, or (b) of the place where the ceremony of marriage was celebrated, to try the wife's petition for nullity, to determine the question of the incapacity of the husband, or of the wilful refusal of the husband to consummate the marriage and to grant a decree of nullity as prayed. On Feb. 23, 1960, WRANGHAM, J., varied this order by ordering the questions to be tried as a preliminary issue by a judge alone. On Apr. 7, 1960, the husband filed an answer denying the allegations in the petition. The facts are stated in the judgment.

F. S. Laskey for the husband.
S. K. D'A. de Ferrars for the wife.

Cur. adv. vult.

June 24. **KARMINSKI, J.,** read the following judgment: On Oct. 19, 1959, the wife, Peggy May Ross Smith, presented a petition to this court praying that the marriage in fact celebrated between her and the husband on July 8, 1955, be declared null and void. Her petition is based on the grounds of wilful refusal by the husband, and in the alternative on the grounds of his incapacity to consummate. The petition further alleges that at the time of its presentation the wife was living in England and the husband in Kuwait and that both the wife and the husband were domiciled in England. The husband by his answer dated Apr. 7, 1960, denied that the marriage had never been consummated, or that he had refused so to consummate it, or was at any time incapable of consummation. The husband further alleged that he was at all times domiciled in Scotland and he asserted that at the time of the presentation of his answer he was resident in that country. On these pleadings an issue was directed to be tried to determine whether this court has jurisdiction in the suit, by reason either of the domicil of the parties or the place where the ceremony of marriage was celebrated, namely, Newcastle-upon-Tyne.

The marriage between the parties was in fact celebrated on July 8, 1955, at the register office in the district of Newcastle-upon-Tyne. On the evidence before me I have had no difficulty at all in coming to the conclusion that the domicil of the husband, who is the plaintiff in the present issue, is and always has been Scottish. The husband was born at Kilmarnock in Ayrshire; his father's domicil at the time of his birth was Scottish, and the husband's domicil of origin was also Scottish. For the most part his working life in the oil industry has required him to live in the Persian Gulf. For a relatively short period his work required him to live in England, and indeed he was so working at Newcastle when he married his wife. It is also true that for a period of about one year when he was working in Kuwait at a time when the wife and her child did not accompany him there, he leased for her a cottage in Sussex for a term of one year. I am satisfied on the evidence that he has never in fact abandoned his domicil of origin in Scotland, and has never formed any intention of so doing or of acquiring a domicil of choice in England. I find him therefore to have been at the time of the institution of this suit to be domiciled in Scotland, and indeed still to be domiciled there.

As the husband at the time the petition was presented was neither domiciled in England nor resident here, the jurisdiction of the English courts cannot be invoked on the grounds of either domicil or residence. I have no doubt that if the husband had been domiciled in England at the material time the courts of this country would have had jurisdiction to have entertained this suit. Further I have equally no doubt that the courts of this country would have had jurisdiction if the husband had been resident here at the time of the institution of this suit, notwithstanding the fact that he was then domiciled in Scotland. The point which falls for decision on this issue is whether or not in a suit for nullity based on the grounds of wilful refusal or alternatively of incapacity,

the English courts have jurisdiction to entertain this suit on the ground that the marriage was in fact celebrated in England.

Thus stated the problem sounds simple enough, and might be expected to have been fully covered by judicial authority. But on examination the problem has turned out to be far more difficult than anticipated, and the difficulties have been increased by some marked divergencies of judicial opinion. There is a long line of authority which has held that the courts of the country where the ceremony was performed have jurisdiction to determine the validity of the marriage. The authorities in support of this proposition have been recently very fully considered by COLLINGWOOD, J., in *Hill* (*otherwise Petchey*) v. *Hill* (1), and I do not therefore propose to discuss them at length (2). In *Simonin* v. *Mallac* (3) the parties were domiciled and resident in France and the ceremony of marriage was in England. By the law of their domicil certain consents were required, but were not in fact obtained. Assuming jurisdiction, SIR CRESSWELL CRESSWELL, the Judge Ordinary, said (4):

> "... the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal."

In *Sottomayer* v. *De Barros* (5) the parties were domiciled in Portugal and at the time of the institution of the suit resident there. They were in fact first cousins and so unable to intermarry by Portuguese law. No doubt was entertained either by PHILLIMORE, J. (5), or by the Court of Appeal (6) as to the jurisdiction of the English courts. In *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (7) the parties were married in England but domiciled abroad. The petition was for nullity on the grounds of bigamy, and jurisdiction was assumed by the English courts on the ground that the marriage was celebrated in this country. Where the petition for nullity is based on any cause which would render the marriage void ab initio, I entertain no doubt that the court of the lex loci celebrationis has jurisdiction to try the suit. But I have to decide whether the jurisdiction exists also in a case on the present facts, where the grounds of complaint are incapacity or wilful refusal.

On this question four recent decisions fall to be considered and it is at this point that my difficulties commence. In *Casey* v. *Casey* (8), the Court of Appeal had to consider a petition for nullity based on wilful refusal only. At the time of the filing of the petition, the parties were domiciled in Canada where the respondent husband also resided. The marriage had been celebrated in England, and the court was asked to assume jurisdiction on this ground. Both the trial judge and the Court of Appeal decided that there was no jurisdiction in the English courts. The decision of the Court of Appeal was reached on different grounds; BUCKNILL, L.J. (with whom COHEN, L.J., expressly agreed) based his decision (9) partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicil of the husband is the sole court which can dissolve a valid marriage, and that a similar rule should

---

(1) [1959] 3 All E.R. 754.

(2) These cases were, in addition to those quoted in this judgment, *Baxter* v. *Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; *Cooper* v. *Crane*, [1891] P. 369; *Dalrymple* v. *Dalrymple*, (1811), 2 Hag. Con. 54; *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; *Dickinson* v. *Dickinson* (*otherwise Phillips*), [1913] P. 198; *Easterbrook* v. *Easterbrook* (*otherwise Jervis*), [1944] 1 All E.R. 90; [1944] P. 10; *Greenstreet* (*falsely called Cumyns*) v. *Cumyns*, (1812), 2 Hag. Con. 332; *Harthan* v. *Harthan*, [1948] 2 All E.R. 639; [1949] P. 115; *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368; [1944] P. 95; *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; *Lewis* (*falsely called Hayward*) v. *Hayward*, (1866), 35 L.J.P. & M. 105; *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R. Rep. 78; [1927] A.C. 641; *Tindall* v. *Tindall*, [1953] 1 All E.R. 139; [1953] P. 63; *White* (*otherwise Bennett*) v. *White*, [1937] 1 All E.R. 708; [1937] P. 111. (3) (1860), 2 Sw. & Tr. 67. (4) (1860), 2 Sw. & Tr. at p. 75.

(5) (1877), 2 P.D. 81. (6) (1877), 3 P.D. 1. (7) (1894), 10 T.L.R. 426.

(8) [1949] 2 All E.R. 110; [1949] P. 420.

(9) [1949] 2 All E.R. at p. 117; [1949] P. at pp. 431, 432.

be applied to a marriage which is voidable on the grounds of wilful refusal. In reaching this decision BUCKNILL, L.J., was following the view formed by BATESON, J., in *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (10) where the ground for nullity was incapacity. But *Inverclyde* v. *Inverclyde* (10) has since been expressly overruled by the Court of Appeal in *Ramsay-Fairfax* (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax* (11).

SOMERVELL, L.J., however, reached his conclusion in *Casey* v. *Casey* (12) by a wholly different route, holding that where the validity of the ceremony was not attacked there seemed to be no ground in principle in giving jurisdiction to the court of the country of the ceremony. He put his view in these words (13):

> "The mere fact that the ceremony of marriage took place in a certain country does not seem to me a ground for founding jurisdiction in that country in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as affecting a marriage."

In 1955 *Casey* v. *Casey* (12) was considered in Northern Ireland by LORD MACDERMOTT, C.J., in *Addison* (*otherwise McAllister*) v. *Addison* (14). In that case the wife, who was resident in Northern Ireland, petitioned for a decree of nullity on the grounds of impotence or wilful refusal. The husband was domiciled and resident in England, but the marriage was celebrated in Northern Ireland. LORD MACDERMOTT held that the Northern Ireland courts had jurisdiction by reason of the fact that the marriage was celebrated in that country, and pronounced a decree on the grounds of incapacity. LORD MACDERMOTT held that *Inverclyde* v. *Inverclyde* (10) was wrongly decided (a view followed by our own Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (11) later the same year) and therefore refused to follow the view expressed by BUCKNILL, L.J., in *Casey* v. *Casey* (15). LORD MACDERMOTT held that the courts of the lex loci celebrationis have jurisdiction in nullity in the cases of both void and voidable marriages. He said (16):

> "Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with the nature and quality of those obligations as to be, naturally and aptly, a matter for the lex loci contractus."

Finally, he put his conclusion in these words (17):

> "There is much to be said for committing any plea that strikes at the creation of a valid marriage bond—be it one of bodily or mental or juristic incapacity or of a failure to observe the requisite formalities—to the court of the place where the bond was forged. It seems the natural forum to decide such issues and in practice it will often be that best versed in the law to be applied."

In *Ramsay-Fairfax* v. *Ramsay-Fairfax* (11) the Court of Appeal had to consider a petition for nullity based on incapacity or wilful refusal. The marriage was celebrated in Egypt, the parties were domiciled in Scotland but resident in England. It was held that the English courts had jurisdiction founded on the residence of the parties, and overruled *Inverclyde* v. *Inverclyde* (10). I need refer only to the concluding words of DENNING, L.J. (18):

> "It may be that the courts of the domicil also have jurisdiction in these nullity cases. So do the courts of the place where the marriage was celebrated. But the courts where both parties reside certainly have jurisdiction."

---

(10) [1931] P. 29. (11) [1955] 3 All E.R. 695; [1956] P. 126.
(12) [1949] 2 All E.R. 110; [1949] P. 420.
(13) [1949] 2 All E.R. at pp. 117, 118; [1949] P. at p. 433. (14) [1955] N.I. 1.
(15) [1949] 2 All E.R. at p. 117; [1949] P. at pp. 431, 432.
(16) [1955] N.I. at p. 30. (17) [1955] N.I. at p. 32.
(18) [1955] 3 All E.R. at p. 698; [1956] P. at pp. 134, 135, where the word "may" appears for "do".

Neither HODSON, L.J., nor MORRIS, L.J., expressed any view on the jurisdiction of the court of the lex loci celebrationis (19).

The last case to be considered is *Hill* (*otherwise Petchey*) v. *Hill* (20). This was a wife's petition for nullity on the grounds of incapacity. The husband was domiciled in Scotland and resident there when the suit was instituted, but the marriage had been celebrated in England. After hearing argument for the wife and for the Queen's Proctor, COLLINGWOOD, J., held that the court of the lex loci celebrationis had jurisdiction where the petition was based on incapacity but doubted whether there was such jurisdiction when the ground was wilful refusal; pointing out that while incapacity was known to the ecclesiastical courts as a ground for a decree of nullity, wilful refusal was made a ground by statute some eighty years after the first Matrimonial Causes Act, 1857 (21).

In the course of his considered judgment COLLINGWOOD, J., examined the earlier authorities (22) and distinguished *Casey* v. *Casey* (23) on the grounds that that decision should be restricted to the particular facts of that case, namely, that it was based on wilful refusal after the ceremony of marriage and distinguishing that ground from incapacity which must exist as a ground for a decree of nullity at the time when the marriage is celebrated and not come into existence as a subsequent defect. COLLINGWOOD, J., also considered *Addison* v. *Addison* (24), and accepted at any rate that part of LORD MACDERMOTT'S judgment which held that the court of the place where the marriage was celebrated had jurisdiction where the petition was based on incapacity.

Like COLLINGWOOD, J., I have been profoundly impressed by the reasoning of LORD MACDERMOTT in *Addison* v. *Addison* (25). Indeed had the matter been free from English authority, I would myself have been very ready to follow that decision. But unlike COLLINGWOOD, J., I have found myself on reflection unable to distinguish *Casey* v. *Casey* (23) though I appreciate that that case was based on wilful refusal only. In my view the tests set out by SOMERVELL, L.J., and referred to previously (26), state the English law as applicable to suits for nullity based on incapacity or wilful refusal. Though I appreciate that BUCKNILL and COHEN, L.JJ., followed quite different lines of reasoning (27), I propose to follow SOMERVELL, L.J.'s view that the mere fact that the ceremony of marriage took place in England does not confer jurisdiction on our courts unless the validity of the ceremony in effecting a marriage is disputed. Capacity to consummate the marriage is an essential part of the marriage contract, but in my view cannot be said to affect the validity of the ceremony. Wilful refusal to consummate is even more remote from the validity of the ceremony. In the result therefore I find that this court has no jurisdiction to try this suit, either on the domicil of the parties or as the court of the place where the marriage was celebrated.

I have differed in this matter from COLLINGWOOD, J., with hesitation and reluctance and with a full awareness that he may be right and I wrong. Nearly two centuries ago in *Evans* v. *Evans* (28) SIR WILLIAM SCOTT, later LORD STOWELL (the greatest of all consistorial lawyers) said:

> "If . . . I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing

(19) [1955] 3 All E.R. at p. 698; [1956] P. at p. 134. (20) [1959] 3 All E.R. 754.
(21) Viz., by s. 7 (1) (a) of the Matrimonial Causes Act, 1937, now s. 8 (1) (a) of the Matrimonial Causes Act, 1950. (22) See [1959] 3 All E.R. at pp. 757-765.
(23) [1949] 2 All E.R. 110; [1949] P. 420. (24) [1955] N.I. 1.
(25) [1955] N.I. at pp. 6-33.
(26) [1949] 2 All E.R. at pp. 117, 118; [1949] P. at p. 433.
(27) [1949] 2 All E.R. at pp. 112-117 and at p. 118 respectively; [1949] P. at pp. 424-432 and p. 434 respectively. (28) (1790), 1 Hag. Con. at p. 35.

a mode by which the parties may be relieved against the infirmities of my judgment."

Order accordingly.

Solicitors: *Gibson & Weldon*, agents for *Frederick Gowen & Stevens*, Croydon (for the husband); *Smith & Hudson* (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* H. DUNNING & CO. (1946), LTD.

[CHANCERY DIVISION (Cross, J.), July 13, 1960.]

Profits Tax—Distribution—Director-controlled company—Payments to a director for manufacture and sale of patented article under licence from the director, the patentee—Full consideration received by company—Whether payments were amounts applied by way of remuneration, loans or otherwise for the benefit of any person—Finance Act, 1947 (10 & 11 *Geo.* 6 *c.* 35), *s.* 36 (1).

A company which was director-controlled within the meaning of the profits tax legislation entered into an agreement with one of its directors (a shareholder) whereby it was granted a licence to manufacture and sell an article patented by the director and whereby the company covenanted in return to pay to the director £7 10s. per cent. of the selling price of each such article. The agreement was a genuine commercial agreement and the company got full consideration for the payments which it made. It made payments totalling £4,072 over the period of the agreement. It was charged to a higher rate of profits tax on the basis that the payments were distributions within the meaning of s. 36 (1) of the Finance Act, 1947.

Held: the profits tax was properly assessed, since the payments were amounts " applied . . . by way of remuneration, loans or otherwise, for the benefit of " the director and so were deemed to be distributions under s. 36 (1) of the Act of 1947.

Inland Revenue Comrs. v. *Chappie, Ltd.* ((1953), 34 Tax Cas. 509) applied.

Inland Revenue Comrs. v. *Lactagol, Ltd.* ((1954), 35 Tax Cas. 230) distinguished.

Appeal allowed.

[As to the meaning of distributions for profits tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 634, para. 1241; and for cases on the subject, see 28 DIGEST (Repl.) 379, *1654-1657*.

For s. 36 (1) of the Finance Act, 1947, see 12 HALSBURY'S STATUTES (2nd Edn.) 780. The section was repealed by the Finance Act, 1958, s. 40 (5), Sch. 11, Pt. 2.]

Cases referred to:

Inland Revenue Comrs. v. *Chappie, Ltd.*, (1953), 34 Tax Cas. 509; 28 Digest (Repl.) 379, *1654*.

Inland Revenue Comrs. v. *Lactagol, Ltd.*, (1954), 35 Tax Cas. 230; 28 Digest (Repl.) 379, *1655*.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against assessments to profits tax in the sums of £1,000 and £600 made on them for chargeable accounting periods from Mar. 1, 1955, to Oct. 31, 1955, and Nov. 1, 1955, to Feb. 29, 1956, respectively. The question for determination was whether the sum of £4,072 paid by the company, a director-controlled company,

to Mr. William Hawke, a director and holder of one £1 share out of one thousand issued shares, under an agreement of Dec. 31, 1954, was deemed to be a distribution within the meaning of s. 36 (1) (c) of the Finance Act, 1947. The payments were payments of " commission " on sales of articles patented by Mr. Hawke, the commission being at the rate of £7 10s. per cent. of the selling price of each article manufactured and sold by the company under licence from Mr. Hawke. The company contended that the payments were not amounts applied for his benefit within s. 36 (1) (c). The Crown contended that they were amounts so applied and were therefore deemed to be a distribution to him under the section.

Sir Lynn Ungoed-Thomas, Q.C., and *A. S. Orr* for the Crown.

P. J. Brennan for the taxpayer company.

CROSS, J.: This case concerns the profits tax liability of the taxpayer company, H. Dunning & Co. (1946), Ltd., for two chargeable accounting periods, Mar. 1, 1955, to Oct. 31, 1955, and Nov. 1, 1955, to Feb. 29, 1956. The question arises in this way. The company was incorporated in 1946, and carries on the business of light engineering. It is director-controlled, within the meaning of the profits tax legislation. A Mr. Hawke has been a director of the company since its incorporation, though he is not a whole-time director, and he has been at all material times a member of the company holding one £1 share out of the one thousand issued shares. In 1951 Mr. Hawke invented a special type of " cable gland " for engineering purposes and obtained patent protection for this invention some time in 1952. On Dec. 31, 1954, he entered into an agreement with the company whereby he granted to the company a licence for a period of years to manufacture and to sell the patented article, and the company covenanted during the continuance of the licence to pay him a commission of £7 10s. per cent. of the selling price of each patented article. There was provision for the termination of the agreement before the expiry of the period, and it was in fact terminated in September, 1955.

It is found in the Case that that was a perfectly genuine commercial agreement under which the company got full consideration for the payments which they had to make to Mr. Hawke. The total of the payments which were made under the agreement for the period from Mar. 1, 1955, to its termination in September, 1955, was £4,072, and the whole question at issue is whether or not these payments were " distributions " by the company within the meaning of s. 36 of the Finance Act, 1947. If they were distributions, then (on the assumption which hitherto has been made that they would not be deductible for the purpose of ascertaining the gross relevant distribution for the purpose of s. 35) the amount of profits tax payable by the company for the accounting periods in question would be larger than it would be if the payments were not distributions. Section 36 (1) is in these terms:

> " Subject to the provisions of the next succeeding subsection, wherever— (a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or (b) assets are distributed in kind to any person; or (c) where the trade or business is carried on by a body corporate the directors whereof have a controlling interest therein [which is the case here] an amount is applied, whether by way of remuneration, loans or otherwise, for the benefit of any person, there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets. Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

That proviso certainly seems to suggest that, if it were not there, a sum applied by the company in repaying a loan would be a distribution. I do not think that I need read sub-s. (2), but sub-s. (3) contains special provisions in regard to loans, to this effect:

A " Where—(a) a loan has been treated as part of the gross relevant distributions to proprietors for a chargeable accounting period; and (b) as a result, the amount of tax payable for that period has been increased . . .",

then, if the loan is repaid, the net (1) relevant distributions to the proprietors are to be treated as reduced by the amount corresponding to the increase caused by
B treating the loan as a distribution.

The question which I have to decide is whether these payments were amounts applied by the company for the benefit of Mr. Hawke " by way of remuneration, loans or otherwise ". They were certainly not " remuneration ", or " loans "; but do they come under the head " or otherwise "? They were, as I have said, payments made under a commercial agreement for full consideration given by
C Mr. Hawke to the company in the form of a grant to the company of a licence to exploit his patent. If the words had been simply " an amount is applied for the benefit of any person ", I should have thought it very doubtful whether this subsection would have covered payments, whether of capital or income, under an ordinary commercial agreement. According to the ordinary use of the English language, a payment for which one has given full consideration is not an amount
D applied for one's benefit by the payer. The words are not, however, simply " an amount is applied for the benefit of any person "; there are the additional words " whether by way of remuneration, loans or otherwise ". In *Inland Revenue Comrs.* v. *Chappie, Ltd.* (2) the Court of Appeal had to consider the case of loans made by a company to one of its members, an associated company, on what were found to be ordinary commercial terms, and the court, affirming the
E decision of Danckwerts, J., held that such a loan was a distribution within the meaning of this section.

It has been argued by counsel for the company in this case that that decision turned simply on the special provisions made in regard to loans. The section, of course, refers to loans expressly, and there is in sub-s. (3) a provision for adjusting the matter if and when the loan is repaid. In the case of loans, there-
F fore, it is particularly difficult to avoid the conclusion that they count as distributions even if they are made on commercial terms; but I do not regard the decision in *Inland Revenue Comrs.* v. *Chappie, Ltd.* (2) as throwing no light on the construction of the rest of this subsection. The members of the Court of Appeal, as I read their judgments, definitely rejected the idea that there had to be an element of bounty in a payment in order to bring it into the scope of the section.
G It is true that they were dealing with loans, but they were construing the section as a whole. The section expressly refers to remuneration as well as loans. Remuneration does not normally contain any element of bounty, yet the subsection says that all payments by way of remuneration are to be treated as distributions. It is, therefore, very difficult to say that what falls under the heading " or otherwise " as opposed to what falls under the heading " remuner-
H ation " or " loans " must contain an element of bounty.

Then it is said: " If the subsection is read as widely as that, any payment made by a company, whether it be an income or a capital payment, and whether there is consideration for it or not, will be a distribution. If the company buys a motor car from a member for a proper price, even that will be a distribution." It appears to me that the members of the Court of Appeal in *Inland Revenue*
I *Comrs.* v. *Chappie, Ltd.* (2) were aware that that might be the result of their decision. That is shown by what was said by counsel and Jenkins, L.J., at the end of the case (3). But, of course, it is true to say that the decision itself related only to loans.

The section was considered again a little later by Harman, J., in *Inland Revenue Comrs.* v. *Lactagol, Ltd.* (4). There the company had made a lump sum

(1) Net was substituted retroactively for gross, the word originally appearing, by the Finance Act, 1948, s. 70. (2) 34 Tax Cas. 509. (3) 34 Tax Cas. at p. 527.
(4) 35 Tax Cas. 230.

payment to a director-member, Mr. Adams, in consideration of a covenant that after his term of service with the company ceased he would not compete with the company. So for a lump sum payment the company got the benefit of a capital asset in the form of Mr. Adams' covenant. HARMAN, J., was impressed, as anybody must be, with the absurdity of treating such a payment—a capital payment for a capital asset under a genuine commercial transaction—as being an amount applied for the benefit of the payee. He was not prepared to accept the view that in *Inland Revenue Comrs.* v. *Chappie, Ltd.* (5) the Court of Appeal had decided that all payments were distributions. He thought that a line must be drawn somewhere, and influenced, I think, by the fact that this Act taxes profits, he drew the line at payments of capital for capital assets. Whether it is really logical to draw any line or to draw it there it is not for me to say. If I were faced with a similar case to that which was before HARMAN, J., I should follow his decision; but the case before me is not one of a payment of capital for a capital asset, it is one of recurring payments of income. I do not therefore think that decision of HARMAN, J., covers this case, and I feel myself at liberty to reach the conclusion at which, but for his decision, I would have arrived without hesitation in view of the decision of the Court of Appeal in *Inland Revenue Comrs.* v. *Chappie, Ltd.* (5).

I should have said that the commissioners decided this case in favour of the taxpayer on the ground that *Inland Revenue Comrs.* v. *Chappie, Ltd.* (5) dealt only with loans, and that this case was covered by *Inland Revenue Comrs.* v. *Lactagol, Ltd.* (6). For the reasons which I have tried to give, I think that their decision was wrong, and therefore I shall allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Amelan & Roth,* Manchester (for the taxpayer company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

---

(5) 34 Tax Cas. 509.

(6) 35 Tax Cas. 230.

CHING GARAGE, LTD. *v.* CHINGFORD CORPORATION.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), June 30, July 1, 4, 1960.]

Highway—Access—Proposed erection of raised paving on access to garage—Refuge in the nature of a footway—Refuge in highway but not in carriageway—Highway authority's statutory powers—Highways Act, 1959 (7 & 8 *Eliz.* 2 *c.* 25), *s.* 67 (1), (2), (3), *s.* 68 (1), *s.* 85 (1), (3).

In 1932 the owners of a garage, set back on the south-west corner of an intersection of two highways, carried out works of access to the north-south highway in accordance with permission granted under s. 18 of the Public Health Acts Amendment Act, 1907. The works comprised both the construction of a thirty-foot wide way (double that width at the carriageway of the highway) giving access across the verge and footpath of the highway to the carriageway and the construction of a way of similar width (much wider at the carriageway) also across the verge and footpath to the curve of the road at the corner. The highway authority proposed to erect for the safety of pedestrians crossing the highway a pear-shaped island structure, which was called a street refuge, twenty feet long, fifteen feet wide at its widest, and four inches deep, in the centre of the access way at the corner, leaving two wide means of access to the garage on either side. This structure would be in the position where formerly the footpath ran; it would not be on the carriageway. The highway authority had not invoked their powers under the town and country planning legislation, but relied on their powers of constructing places of refuge under s. 68*, and footways and raised pavings under s. 67*, of the Highways Act, 1959. Of these enactments s. 67 alone gave a right to compensation.

Held: (i) the highway authority had power to erect the structure under s. 67 of the Act of 1959, because—

(a) it was a " raised paving " " in a highway " comprising a carriageway for " safeguarding persons using the highway " within sub-s. (2) and discharged the authority's duty to provide a footway under sub-s. (1), and

(b) it was an alteration of the footway over which the access had been made in 1932 within sub-s. (3), and

(c) section 85 (sub-s. (3) (d)* of which might prohibit putting up a structure which might obstruct a means of access formed before July 1, 1948) did not apply, since it was directed to means of access to the highway, not to the carriageway, and the proposed structure would not prevent access to the highway, and

(d) the fact that the proposed structure had been called a street refuge did not prevent its being a footway or an altered footway within s. 67 (1) and (3), and the highway authority were not confined to s. 68.

(ii) there was no power to erect the structure under s. 68, since that section authorised the provision of a place of refuge only in the public carriageway, and the proposed structure was to be erected in the footway over which the access had been constructed in 1932.

Judgment of LORD PARKER, C.J. ([1959] 3 All E.R. 175) reversed on provisions of the Highways Act, 1959, coming into operation after the date of his judgment.

[As to statutory powers of highway authorities affecting access, etc., of adjoining owners, see 19 HALSBURY'S LAWS (3rd Edn.) 80, 81, paras. 122, 123; and for cases on adjoining owners' right of access, see 26 DIGEST (Repl.) 347-353, *639-677*.

For the Highways Act, 1959, s. 67 and s. 68, see 39 HALSBURY'S STATUTES (2nd Edn.) 487, 489.]

---

* Section 68 (1), s. 67, and s. 85 (3) (d), are printed at p. 81, letter G, p. 82, letter F, and p. 83, letter C, post.

Appeal.

The defendants, Chingford Corporation, appealed against a judgment of LORD PARKER, C.J., given on July 10, 1959, and reported [1959] 3 All E.R. 175, making a declaration that the defendants were not entitled by virtue of powers under s. 149 of the Public Health Act, 1875, or s. 45 of the Road Traffic Act, 1956, to obstruct, interfere with or otherwise limit the use of the means of access of the plaintiffs to their garage, Ching Garage, at the junction of Sewardstone Road and Lea Valley Road, Chingford, as constructed, formed and laid out. The grounds of appeal were that the learned Lord Chief Justice misdirected himself in holding (i) that the works proposed by the defendants would interfere with the rights of the plaintiffs as a landowner at common law; and (ii) that they were not authorised by s. 45 of the Road Traffic Act, 1956, or by s. 149 of the Public Health Act, 1875. These enactments having been repealed, the defendants were allowed to substitute, on appeal, s. 67 and s. 68 of the Highways Act, 1959.

C. E. Scholefield, Q.C., and *G. J. Ponsonby* for the defendants.
G. D. Squibb, Q.C., and *D. P. Kerrigan* for the plaintiffs.

SELLERS, L.J.: This is an appeal by the defendants, Chingford Corporation, against the judgment of LORD PARKER, C.J., making a declaration that the defendants were not, by virtue of the powers they relied on,

> "entitled to obstruct, interfere with or otherwise limit the use of the means of access enjoyed with the plaintiffs' premises known as the Ching Garage at the junction of Sewardstone Road and Lea Valley Road, Chingford, as constructed, formed and laid out."

The facts were put before the court by an agreed written statement and by an agreed plan. It appears that the plaintiffs or their predecessors had erected in 1932 a garage at the junction of Sewardstone Road and Lea Valley Road on the south-west corner as shown on the plan. The garage with its surrounding land was set back somewhat from the carriageways of the two roads at irregular distances and for the greater part at distances varying from about thirty feet to fifty feet. The land intervening between the plaintiffs' boundary and the carriageway was part of the highway and formed the footpath of the highway as distinct from the carriageway. The plaintiffs or their predecessors had applied under s. 18 of the Public Health Acts Amendment Act, 1907, to carry out works of access and permission had been granted in 1932. The work was carried out providing two ways, one to the south between B and C on the plan some thirty feet wide on the plaintiffs' land and more than double that width at the carriageway, and another to the north between D and E, also about thirty feet wide, where the plaintiffs got access to the highway and a much greater width where it abutted on the curve of the junction. The defendants wished to erect the structure Y shown on the plan about the centre of the curve at the junction adjacent to the carriageway for the safety of pedestrians, not only for those crossing the roadway which is across Lea Valley Road but, as I see it, also for those moving east and west on the southerly side of the Lea Valley Road across the mouth of the access for vehicles to the plaintiffs' garage. The structure the defendants propose to make (and this information was given by counsel, but it is also in part to be derived from the plan) is to be about twenty feet long, somewhat pear-shaped, and about fifteen feet at its greatest width. It would all be raised at the height of its kerb, four inches, and adjoining the carriageway would be a footpath similar to the footpath at each side of this entrance to the garage, i.e., the area coloured pink on the plan, with a verge at the back. It would be some fifteen feet from the garage, i.e., the plaintiffs' boundary, at its nearest point and so would not prevent access to the highway from any point on the plaintiffs' premises. There would be two wide means of access from the garage to the carriageway on each side. All that is clearly seen on the plan.

The structure proposed would appear to be of great advantage to pedestrians and to my mind of no apparent disadvantage to those using the garage or the plaintiffs themselves. However, it would take up part of the surface laid down in 1932, of which the plaintiffs or their predecessors paid the cost of laying, and would be a small island in the mouth of this wide exit on to the road junction. It is accepted that the defendants cannot do what they propose to do unless they have statutory powers which permit it with or without compensation. Their efforts to establish adequate powers have been subject to various changes and, to avoid confusion, I will endeavour to state them. Of the numerous statutory powers set out in para. 6 of the defence, only s. 149 of the Public Health Act, 1875, with the assistance of s. 18 (c) of the Public Health Acts Amendment Act, 1907, and s. 55 of the Road Traffic Act, 1930, and s. 45 of the Road Traffic Act, 1956, were raised at the trial. As I read his judgment, the learned Lord Chief Justice would have found in favour of the defendants under s. 55 of the Road Traffic Act, 1930, but before his judgment to that effect was concluded it was discovered that the section had been amended (1) and could no longer be relied on for this purpose. The learned judge found against the defendants on the other powers on which they relied. Between that judgment and the hearing in this court both those statutes which were finally considered by the learned judge were repealed and they were in part substituted and indeed were replaced by provisions in the Highways Act, 1959. We therefore gave leave for the defence to be amended accordingly.

The question now is whether the defendants have power to do what they propose to do, not under those various enactments on which they have previously relied, but under two sections of the Highways Act, 1959, and they pleaded it in this way: "under s. 67 or alternatively under s. 68 of that Act". So pleaded, their claim is a reversal of their previous claims, for it seems they have throughout contended they could do this work without compensation. It has further never been in dispute, at least perhaps right up to the last moment, that, if the defendants were to proceed under their statutory powers arising out of the town and country planning legislation, they could succeed in what they wish to do but with the obligation to pay that compensation which would be appropriate under that legislation. Whilst it has been recognised that the power to do what they wish to do is not to be found in the town and country planning legislation directly, I understand counsel for the plaintiffs to recognise that, if properly invoked, power can be found to do it once the town and country planning legislation is brought into force.

Section 68, with which I will deal first although it is the basis of the second submission made on behalf of the defendants, reads as follows (sub-s. (1)):

> "A highway authority may, in relation to a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, construct and maintain works in that carriageway for providing places of refuge for the protection of pedestrians crossing the carriageway."

If that section applies, then there appears to be no provision for compensation. This road junction does comprise a made-up carriageway, Lea Valley Road and Sewardstone Road, the other road intersecting in so far as it forms part of the junction. Does that carriageway include the access to the plaintiffs' premises constructed in 1932? That access is certainly made up and as serviceable for the use of vehicles as the carriageway on the road, but it is also part of the highway, for that consists of the carriageway plus the footpath from one side to the other. But the area in question (and it is defined on the plan within the letters D, E, F, Y and G) was originally a footpath for the use of the public at

(1) Section 55 of the Act of 1930 was amended, so as to delete the reference to places of refuge, by the Road Traffic Act, 1956; it was subsequently repealed in toto by the Highways Act, 1959.

large with the right of access to the garage in the plaintiffs as occupiers of the abutting garage. "Carriageway" is defined in this way in s. 295 (1), the definition section, of the Act of 1959: A

> "'Carriageway' means a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles."

B

I do not find that it has been shown that the public have a right of way for the passage of vehicles over this access. The only contention, I think, advanced in support of that was to be found in the Act of 1907 in the section under which this access was made up at the expense of the plaintiffs in 1932, i.e., s. 18, already referred to. Section 18 (c) provided (2):

> "After the completion of the works the new means of access may be used, subject to the conditions which, in pursuance of any provisions of the law relating to highways, attach to the use for the like purpose of any carriageway forming part of a highway repairable by the inhabitants at large."

C

I accept the argument of counsel for the plaintiffs that that subsection did not give the public any right; it related solely to the rights of user by the occupiers who have constructed the means of access. That was a right given to the plaintiffs which I apprehend that they can exercise to include themselves, their customers and their friends. It may be somewhat odd that this area, which has so many of the attributes of a carriageway and which as a matter of safety requires a place of refuge for pedestrians in like manner to the undisputed carriageway, should not fall within the ambit of s. 68, but I think that the public have the right to use it as a footway only subject to the rights of the plaintiffs to move vehicles in and out across it and the public have not the right of user as a carriageway under s. 68. Therefore, in my view the defendants fail under s. 68.

D

E

Turning to s. 67, the first three subsections seem to me material in this case and I shall read them:

F

> "(1) It shall be the duty of a highway authority to provide, in or by the side of a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision thereof necessary or desirable for the safety or accommodation of pedestrians; and a highway authority may light any footway provided by them under this subsection.
>
> "(2) A highway authority may provide and maintain in a highway maintainable at the public expense by them, being a highway which consists of or comprises a carriageway, such raised paving, pillars, walls, rails or fences as they think necessary for the purpose of safeguarding persons using the highway.
>
> "(3) The powers conferred by the foregoing provisions of this section to provide any works shall include power to alter or remove them."

G

H

Subsection (1) therefore imposes a duty on the defendants (and I emphasise "duty") to provide a proper and sufficient footway for the safety or accommodation of pedestrians where there is a made-up carriageway and they think it is necessary and desirable to make such provision. In this case, as I have already said, there is a made-up carriageway. Subsection (2) covers just what they propose to do here. This can be done at any time. What they propose to do in order to carry out their duty under sub-s. (1) is to raise some paving over the area which I have previously described which will form eventually the island which has been described on the plan as Y. It falls also under sub-s. (3), because this work would be an alteration of the condition which has prevailed

I

(2) Section 18 was repealed by the Highways Act, 1959, s. 312 and Sch. 25; cf. Sch. 24, para. 10.

since 1932 and, if I understand the facts aright, a restoration to a condition of footpath with verge behind it which existed prior to the work which the defendants had undertaken with permission. Subsection (6) makes this provision:

> "A highway authority or council shall pay compensation to any person who has sustained damage by reason of the execution by them of works under sub-s. (2) of this section."

Counsel for the plaintiffs referred the court to s. 85 of the same Act and submitted that that section indicated that the obstruction which was proposed to be put up could not be put up because it was exempted expressly by the terms of this section. Section 85 reads as follows:

> "(1) Subject to the provisions of this section, a highway authority may erect and maintain fences or posts for the purpose of preventing access to—(a) a highway maintainable at the public expense by them . . .
>
> "(3) The powers conferred by this section shall not be exercised so as to . . . (d) obstruct any means of access which was constructed, formed or laid out before July 1, 1948, unless it was constructed, formed or laid out in contravention of restrictions in force under s. 1 or s. 2 of the Restriction of Ribbon Development Act, 1935."

Counsel read as part of his argument in association with that provision, sub-s. (3) (c):

> "shall not be exercised so as to—(c) obstruct any means of access for the construction, formation or laying out of which planning permission has been granted under Part 3 of the Town and Country Planning Act, 1947."

I think that that argument must be rejected. Section 85 is not applicable here. It is dealing with the prevention of access to the highway and what is proposed here in no way prevents access to the highway, nor indeed to the carriageway, except by one direct line and the slightest diversion would give access thereto. As I understand it, this section is concerned, not with access to the carriageway, but with access to the highway, and, as I have already pointed out, between the points D and E [shown on the plan] there is complete, unfettered and unrestricted access to the highway which includes both footpath and carriageway, and there is a distance of at least fifteen feet before one comes from the boundary line of the plaintiffs' property to this proposed island which has been referred to as a street refuge.

That brings me to the other argument and perhaps the main argument of counsel for the plaintiffs. He has submitted that, if what is proposed is a refuge, then it must be erected under what is now s. 68 or not at all. That in my view is a very narrow and unsustainable contention. Quite why the defendants chose to refer to it as a street refuge I do not know. I think that the argument rather indicated that there was something sinister about it, because there was an effort to avoid compensation. A footpath is in one sense a refuge and the present Act does not make any reference to a street refuge. In s. 68 it says that in appropriate circumstances there may be constructed works in a carriageway for providing places of refuge for the protection of pedestrians crossing the carriageway. Its purpose is for the safety of pedestrians, to define their area from the carriageway. In my view what the defendants propose to do is amply covered by s. 67. It is the provision of a footway, indeed the restoration of a footway and an alteration back to what it was before, and, whether it is called a street refuge or not, it has the characteristics of one. As it happens there is a wide mouth across this means of access, and an island footpath would resemble in many ways what would be described as a refuge if it was out in the highway. As I see it, the plaintiffs' right of access to the highway still remains intact. Their access to the carriageway is subject only to the slightest diversions of the direct line from any point of the made-up way between D and E. On the

other hand, if the structure does cause any interference with their rights, then the statute, I think, impliedly authorises interference with those rights in the public interest and in this case provides for compensation if any damage has been sustained, and I do not repeat the extract to that effect (3) which was taken by the Lord Chief Justice from the standard work, PRATT & MACKENZIE'S LAW OF HIGHWAYS (19th Edn.).

In my judgment s. 67 defeats the plaintiffs' contention and I would allow the appeal and enter judgment for the defendants. I do not propose to consider further whether the view I have taken of s. 67 of this latest Act of 1959 means that I would have allowed the appeal if s. 149 of the Public Health Act, 1875, had been in force. I do not feel in all the circumstances that the defendants should have the costs of their defence here or below in any event. They failed on the major issue of compensation, which I am inclined to think has been the real point in issue between the parties and throughout the powers on which they relied were ill-defined, although I recognise that the Highways Act, 1959, only came into operation after the trial and the defendants cannot be blamed for that. The matters referred to by DEVLIN, L.J., at the conclusion of the argument are equally to be taken into consideration on the question of costs, for this does seem to me a case, having regard to the proximity of the Act of 1959 coming into force, where it might well have been put before the learned Lord Chief Justice that no declaration as a matter of discretion should have been granted even on the view which he held of the rights or the lack of rights of the defendants. For these reasons I would allow the appeal but allow it without costs either here or below.

PEARCE, L.J.: I agree with what my Lord has said. The proposed construction is intended to be put on a part of the highway that is admittedly the footway and not the carriageway. For that part of the highway does not come within the definition of "carriageway" in s. 295 (1) of the Highways Act, 1959. Section 68 of that Act deals with such constructions in the carriageway under the name of "places of refuge for the protection of pedestrians". No compensation is payable under that section, presumably because it was anticipated that under it there would be no interference with a private owner but only an interference with the public in their capacity as users of the carriageway.

Section 67 deals with the provision of a proper and sufficient footway with power to alter. It provides for compensation if any person sustains damage thereby. By common law the plaintiffs have a right of access to the highway but the proposed construction would not interfere with that right since access to the highway is at the line A to F. Although that common law right includes a right of access to the carriageway, it does not, as I think, include a right to cross the footway at every place in a direct line from the place where they emerge on to the highway to the place where they debouch on to the carriageway. Even when this construction is built, the plaintiffs will still have a clear and convenient means of access to the carriageway. The construction will to some extent diminish that means of access. In so far as this damages them, they are entitled to damages. The right of compensation under s. 67 shows that Parliament anticipated that, in providing proper and sufficient footway for pedestrians, the authority might cause damage to some adjoining owner.

The plaintiffs' particular means of access that was constituted in 1932 does not, I think, give them any special vested rights. Once a highway always a highway. The plaintiffs seek to rely on the fact that s. 85 specifically preserves the means of access of such persons as the plaintiffs who obtained their permitted means of access to the carriageway prior to 1948. But that section is directed to the fencing off of the highway to prevent access to it. It is concerned with the

(3) See [1959] 3 All E.R. at p. 177.

prevention of access to the highway and not access to the carriageway. It provides no compensation. It is therefore reasonable, when the authority are setting out to fence off persons from the highway without compensation, that they should be compelled to respect the rights of persons who had for some time used a permitted lawful means of access constructed for the purpose. Section 67, however, is directed to quite another purpose. It is directed to the safety or accommodation of pedestrians as its objective, and the authority are entitled to provide raised paving as they may think necessary for the purpose of safeguarding persons using the highway. If the accomplishment of that objective entails damage to adjoining owners, the authority must pay compensation. I see no reason why under that section the defendants should not put this isolated raised piece of paving on the footway for the safety of pedestrians. For, in spite of the fact that for the convenience of the plaintiffs this wide area has been constructed and used since 1932 as a carriageway approach, it is still the footway.

DEVLIN, L.J.: I agree with the judgments which my Lords have delivered for the reasons which they have given.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *C. G. Dennis* (for the defendants); *Hillearys* (for the plaintiffs).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

Re TINKER'S SETTLEMENT.

[CHANCERY DIVISION (Russell, J.), July 14, 15, 1960.]

Settlement—Accumulation—Accrual of son's share to daughter's settled share on his death under thirty—Arrangement to (1) expunge trust for accumulation and (2) confer interest in son's share on his children if he died under thirty—Arrangement (2) to avoid need for proceedings for rectification—Approval of (1) granted and (2) withheld—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Case referred to:

Constantinidi v. *Ralli*, [1935] Ch. 427; 104 L.J.Ch. 249; 152 L.T. 489; 40 Digest (Repl.) 584, *889*.

Adjourned Summons.

This summons was an application by Derek Tinker, settlor and a trustee of a settlement dated Apr. 4, 1951, by originating summons dated Aug. 31, 1959, for (1) an order under s. 1 of the Variation of Trusts Act, 1958, approving, on behalf of all unborn persons interested in the trust funds comprised in the settlement, an arrangement for the variation of the trusts of the settlement by expunging certain trusts for the accumulation of income and substituting certain new trusts; and (2) an order under s. 1 of the Act of 1958 approving on behalf of the same persons, alternatively an order under the general jurisdiction of the court approving by way of compromise on behalf of those persons, a further variation of the trusts of the settlement. The respondents to the summons were the settlor's son and daughter who were beneficially interested under the trusts of the settlement.

By the settlement the income of the son's share (which was one half of the settled fund) was subject to a trust for accumulation until the settlor's death or until the son attained thirty years of age whichever first happened. If the

son attained thirty he would become absolutely entitled to his share, but if he died before attaining that age his share would accrue to the daughter's share. The income of the daughter's share (which was the other half of the settled fund) was subject to a similar trust for accumulation, and if the daughter attained thirty years of age the income would be payable to her during life and from and after her death (whether before or after attaining the age of thirty) the capital would be held on trust for her children as she might by deed or will appoint and in default of appointment for her children in equal shares who being sons should attain twenty-one or being daughters should attain that age or marry. If no child of the daughter attained a vested interest, the daughter's share would accrue to the son's share. The settlor's son was born on Jan. 7, 1935, and the daughter was born on May 30, 1938; both were unmarried. The settlor was fifty-two years of age in May, 1959. The object of the proposed arrangement of which approval was asked under para. (1) of the summons was to terminate the trusts for accumulation of the income of the son's share and the daughter's share, as they might give rise to a liability for estate duty on the settlor's death. The purpose of the proposed arrangement for which approval was sought under para. (2) of the summons was different, and hereafter appears.

A prior settlement, dated June 28, 1945 (hereinafter called "the 1945 settlement"), by which a comparatively small amount of property had been settled by the settlor, provided that the son and daughter should not take the income of their shares until they attained the age of twenty-five and their shares were settled with remainder to their children. It appeared from an affidavit of the settlor that when the 1951 settlement was under consideration the settlor had given instructions that he wanted the new settlement to be "along the lines of" the 1945 settlement except that the son was not to have the capital of his share until he was thirty and that the daughter was not to have the income of her share until she was thirty. The 1951 settlement was apparently executed shortly before a company meeting on Apr. 5, 1951, and was not then explained to the settlor who had not previously considered a draft. The 1951 settlement in fact departed very materially from the lines of the 1945 settlement and the settlor deposed that he had not appreciated that under the settlement, in the event of the son dying before attaining thirty years of age and leaving a child or children, his share would go over to the daughter's share and the son's child or children would take no interest, and the settlor deposed that he would not have executed the settlement if he had understood that that was the effect of the trusts. The proposed arrangement of which approval was sought under para. (2) of the summons was intended to secure that, in the event of the son dying under thirty years of age leaving a child or children who should attain twenty-one or being female attain that age or marry, a half of his share should go to such child or children instead of the whole share accruing to the daughter's share. It was contended that this would be fair and reasonable and would avoid proceedings for rectification, which, if successful, would result in the daughter and her children not taking any interest in the son's share if he died under the age of thirty leaving issue.

B. L. Bathurst, Q.C., and *H. Hillaby* for the applicant, settlor and tenant for life.

D. S. Chetwood for the son of the settlor and a trustee.

B. J. H. Clauson for the daughter of the settlor.

G. B. H. Dillon for the wife of the settlor, and a trustee.

RUSSELL, J.: I am prepared to approve under s. 1 of the Variation of Trusts Act, 1958, an arrangement by which the trusts of the settlement of Apr. 4, 1951, are altered so as to put an end to the accumulation period, that is, to approve the arrangement of which approval is sought under para. (1) of the summons. The accumulation period must necessarily relate to the death of the

A settlor when the trusts might become extinct and give rise to a liability for estate duty. I have no doubt that in the case of the son's half it will mean that income which would probably have accumulated in the next four and a half years with additional benefit to capital will not now do so, and, in the case of the daughter's half, income which would probably have accumulated for the next nine years will not now do so. Nevertheless, weighing the risks one against the B other, it must be for the benefit of the next generation, for whom I am now concerned, that the trust for accumulation should be ended.

I am, however, also asked under para. (2) of the summons to approve an arrangement to cover a defect in the settlement. The son is given by the settlement the capital of his half absolutely on attaining thirty, and it is provided that if he die under thirty his half goes over to his sister's half, which is settled on C her for life with the remainder to her children; and the defect, it will be observed, is that if he has children himself in the next four and a half years (before he is thirty) and then dies under thirty no part of his half will go for the benefit of his children, but it will all go over to his sister's half. There is some evidence, in the form of an affidavit by the settlor, to suggest that there is a possible claim for rectification of the settlement, so as to procure that the son's half in the event D shall go to his own children. I do not think that I need rehearse the details of it, but it is quite clear that, before I sanction this arrangement, which involves half of the son's share being given, in the event mentioned, to his children and not accruing to the daughter's half, I must be satisfied that the arrangement is beneficial to the unborn children of the daughter. It seems to me that it is one of the weakest claims for rectification that I have seen, perhaps only rivalled by that in E *Constantinidi* v. *Ralli* (1) which was referred to in argument, and I cannot bring myself to think that I would be benefiting the daughter's children if I gave away half of that which will come to the daughter's share, if the son dies under thirty.

Counsel for the applicant has argued that this is a sensible and fair thing to do because somebody has blundered—somebody has forgotten about the son's children—and it would seem very hard that this half of this substantial settlement F should go away from his children to his sister and her children. In a broad sense, so the argument runs, it would be beneficial to the sister's children as members of the family viewed as a whole that something which was reasonable and fair should be done. I cannot apply the jurisdiction under the Variation of Trusts Act, 1958, in that broad way. Although it may very well be that one can throw that kind of consideration into the scale beside a financial benefit which has G already been established, yet one cannot regard that sort of consideration as a benefit in itself. I would myself be only too pleased if I were able to approve this proposed arrangement, but, having regard to the type of claim for rectification which is adumbrated, I do not find myself able to approve such a compromise or arrangement or variation under the Act of 1958 as is sought under para. (2) of the summons.

H His Lordship *made the order sought by para.* (1) *of the summons but declined to make the order asked by para.* (2) *of the summons.*

Solicitors: *Stafford Clark & Co.*, agents for *Simpson, Curtis & Co.*, Leeds (for all parties).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

---

(1) [1935] Ch. 427.

A

A. E. FARR, LTD. *v.* MINISTRY OF TRANSPORT.

[CHANCERY DIVISION (Buckley, J.), May 26, 27, June 22, 1960.]

Building Contract—Road construction—Reference of dispute to arbitration—Refusal by engineer to certify for payment for particular excavation before completion of the works—Whether dispute was one as to the withholding by the engineer of any certificate—Institution of Civil Engineers' General Conditions of Contract (4th Edn.), cl. 66.

B

By a contract dated Sept. 9, 1958, the plaintiff agreed with the defendant to carry out civil engineering works connected with the construction of an underpass on the London-Fishguard Trunk Road. The contract incorporated, inter alia, the Institution of Civil Engineers' General Conditions of Contract (4th Edn.). Clause 66 thereof provided that any dispute or difference which arose between the parties should be settled by the engineer appointed under the contract and if either party were dissatisfied with his decision such party might require the dispute to be referred to an arbitrator—"Such reference except as to the withholding by the engineer of any certificate or the withholding of any portion of the retention money under cl. 60 hereof to which the contractor claims to be entitled or as to the exercise of the engineer's power to give a certificate under cl. 63 (1) hereof shall not be opened until after the completion or alleged completion of the works unless with the written consent of the employer and the contractor". To enable a retaining wall to be built a trench was dug along the line of the wall of a width sufficient to contain the wall and to allow working space. Excavation for the structure was to be paid for (under cl. 16) on the basis of cubic capacity of the structure but ". . . any additional excavation which may be required for working space, etc. will be paid for under separate items", the measurement being by the area of the sides of the additional excavation. The plaintiff claimed to be paid during the currency of the contract for excavating working space, and the engineer rejected the claim, intimating that it could be submitted after completion of the works. The plaintiff gave notice requiring the claim to be referred to arbitration under cl. 66.

C

D

E

F

Held: the reference claimed by the plaintiff was "as to the withholding by the engineer of any certificate" within the exception in cl. 66 (and therefore should not be postponed until after completion of the works) because, on the true construction of the contract—

G

(i) the words "under cl. 60 thereof" in the exception in cl. 66 of the general conditions did not qualify the prior words "the withholding by the engineer of any certificate", which latter words were accordingly unrestricted by their context (see p. 95, letter E, post), and

(ii) any dispute or difference which related to something in consequence of which a certificate that in one view ought to have been given was refused was a dispute or difference as to the withholding of that certificate (see p. 96, letter D, post).

H

[As to a provision in an arbitration clause that the reference should not be opened until after completion of the works, see 3 HALSBURY'S LAWS (3rd Edn.) 520, para. 1034, text and note (t).]

I

Adjourned Summons.

This was an application by the plaintiff, A. E. Farr, Ltd., against the defendant, the Ministry of Transport, by originating summons dated Jan. 28, 1960, to determine whether, on the true construction of cl. 66 of the Institution of Civil Engineers' General Conditions of Contract (4th Edn.) (for use in connexion with works of engineering construction) which was incorporated in a contract made on Sept. 9, 1958, between the plaintiff and defendant, a dispute between the

A plaintiff on the one hand and the Ministry of Transport and the engineer appointed under the contract on the other hand was a dispute as to the withholding by the engineer of a certificate within cl. 66. The dispute was as to the failure of the engineer to certify for payment by the defendant for work done by the plaintiff in respect of which the plaintiff alleged it was entitled to receive certificates and payment. The relevant words of cl. 66 to be construed were:

B

> "Such reference [to arbitration] except as to the withholding by the engineer of any certificate . . . shall not be opened until after the completion or alleged completion of the works unless with the written consent of the employer and the contractor."

The plaintiff claimed a declaration that the question be answered in the affirmative and that accordingly the reference of the dispute to arbitration might be C opened before the completion or alleged completion of the works the subject of the contract without the consent of the defendant.

The contract incorporated the plaintiff's tender, some drawings, the I.C.E. General Conditions of Contract and the specification and bill of quantities relating to the works. The works, the subject of the contract, consisted of a dual D carriageway, vehicular underpass including approaches, pedestrian subways, ground level slip roads together with ancillary works on the London-Fishguard Trunk Road. The approaches to the underpass were to be flanked by retaining walls which it was necessary to build before the core of the excavation was extracted. To enable the walls to be built a trench was dug along the line of each retaining wall of a width to contain the space to be occupied by the wall itself and E sufficient working space on at least one side for the builders.

On Oct. 3, 1958, the plaintiff wrote to the engineer claiming to be paid for the excavation of working space in the trenching for the retaining walls. On Nov. 7, 1958, the engineer replied that as no separate item was included on the bill of quantities for working space required for excavation, some additional item should be negotiated. No agreement was reached how this item should be calculated. F On Jan. 5, 1959, the engineer informed the plaintiff that if it did not accept his proposal the matter would be submitted as a claim after the completion of the contract. On May 21, 1959, the plaintiff stated that it wanted the matter to be submitted to arbitration and asked the engineer for his decision, in conformity with cl. 66. On July 17, 1959, the plaintiff propounded its claim and quantified it in respect of work done to June 30, 1959. The engineer rejected this claim. G On Nov. 19, 1959, the plaintiff gave notice to the defendant of its dissatisfaction with the engineer's decision and that it required the claim to be referred to arbitration in accordance with cl. 66, which provided:

> "If any dispute or difference of any kind whatsoever shall arise between the employer or the engineer and the contractor in connexion with or arising out of the contract or the carrying out of the works (whether during the H progress of the works or after their completion and whether before or after the determination abandonment or breach of the contract) it shall be referred to and settled by the engineer who shall state his decision in writing and give notice of the same to the employer and the contractor. Such decision in respect of every matter so referred shall be final and binding upon the employer and the contractor until the completion of the work and shall I forthwith be given effect to by the contractor who shall proceed with the works with all due diligence whether notice of dissatisfaction is given by him or by the employer as hereinafter provided or not. If the engineer shall fail to give such decision for a period of three calendar months after being requested to do so or if either the employer or the contractor be dissatisfied with any such decision of the engineer then and in any such case either the employer or the contractor may within three calendar months after receiving notice of such decision or within three calendar months after the expiration of the said period of three months (as the case may be) require that the

matter shall be referred to an arbitrator to be agreed upon between the parties or failing agreement to be nominated on the application of either party by the president for the time being of the Institution of Civil Engineers and any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1950, or the Arbitration (Scotland) Act, 1894, as the case may be or any statutory re-enactment or amendment thereof for the time being in force. Such arbitrator shall have full power to open up review and revise any decision opinion direction certificate or valuation of the engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties. Such reference except as to the withholding by the engineer of any certificate or the withholding of any portion of the retention money under cl. 60 hereof to which the contractor claims to be entitled or as to the exercise of the engineer's power to give a certificate under cl. 63 (1) hereof shall not be opened until after the completion or alleged completion of the works unless with the written consent of the employer and the contractor. Provided always: (i) that the giving of a certificate of completion under cl. 48 hereof shall not be a condition precedent to the opening of any such reference; (ii) that no decision given by the engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator on any matter whatsoever relevant to the dispute or difference so referred to the arbitrator as aforesaid."

The tender contained clauses described as General Directions of which the following were relevant:

" 1. These general directions describe the method of measurement which will be pursued in respect of certain items also the particulars of what is to be included in the rates set down for the various items and are applicable to each and every portion of this bill of quantities.

" 4. The quantities set down against the items in this bill of quantities are an estimate of how much of each kind of work is included in the contract and are given for the convenience of forming a common basis for tenders, and they are not to be taken as a guarantee that the total quantities scheduled will be carried out or required.

" 5. The quantities shall therefore not be considered as representing the final measurements, it being the intention of the contract (except where otherwise specifically stated) that all works embraced therein shall be measured up on completion by the engineer or his authorised representative and paid for at the prices and rates entered in the bill of quantities by the contractor.

" 6. Each item in the bill of quantities is to be priced or if any items are left unpriced the contractor is to indicate that the value of the work described thereunder is elsewhere allowed for. No tender will be considered complete unless and until these requirements have been fulfilled.

" 7. The price or rate set down against each item is to be considered as the full inclusive price or rate of the finished work described in each item and is also to cover the cost of every description of temporary works executed or used in connexion therewith except those in respect of which specific provision is made by way of separate items."

Clause 6 of the General Conditions provided:

" The several documents forming the contract are to be taken as mutually explanatory of one another and in case of ambiguities or discrepancies the same shall be explained and adjusted by the engineer who shall thereupon issue to the contractor instructions directing in what manner the work is to

be carried out. Provided always that if in the opinion of the engineer compliance with any such instructions shall involve the contractor in any expense which by reason of any such ambiguity or discrepancy the contractor did not and had reason not to anticipate the engineer shall certify and the employer shall pay such additional sum as may be reasonable to cover such expense."

Clause 12 (1) provided:

"The contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the works and of the rates and prices stated in the priced bill of quantities and the schedule of rates and prices (if any) which rates and prices shall (except in so far as it is hereinafter otherwise provided) cover all his obligations under the contract and all matters and things necessary for the proper completion and maintenance of the works."

Clause 13 provided:

"Save in so far as it is legally or physically impossible the contractor shall execute complete and maintain the works in strict accordance with the contract to the satisfaction of the engineer and shall comply with and adhere strictly to the engineer's instructions and directions on any matter (whether mentioned in the contract or not). The contractor shall take instructions and directions only from the engineer or (subject to the limitations referred to in cl. 2 hereof) from the engineer's representative."

Under the heading "Earthworks" cl. 16 provided:

"The measurement of excavation in pit or trench for the structure shall, unless otherwise stated, be the net plan area of the permanent work multiplied by the depth measured from the mean ground level at the top of the pit or trench down to the authorised bottom; any additional excavation which may be required for working space, etc. will be paid for under separate items, the measurement being the sum of the areas of the sides of the excavation based on the outline of the net plan area. Rates for working space shall be inclusive of all consequent refilling. In all other cases the measurement of excavated material shall be the volume of the said material in the ground before being excavated."

Clause 46 provided, inter alia, as follows:

"The whole of the materials plant and labour to be provided by the contractor under cl. 5 hereof and the mode manner and speed of execution and maintenance of the works are to be of a kind and conducted in a manner approved of by the engineer."

Clause 48 provided:

"As soon as in the opinion of the engineer the works shall have been substantially completed and shall have satisfactorily passed any final test that may be prescribed by the contract the engineer shall on receiving a written undertaking by the contractor to finish any outstanding work during the period of maintenance issue a certificate of completion in respect of the works and the period of maintenance of the works shall commence from the date of such certificate."

Provision was then made for completion certificates relating to parts of the works.

Clause 49 (3) provided:

"All such work shall be carried out by the contractor at his own expense if the necessity thereof shall in the opinion of the engineer be due to the use of materials or workmanship not in accordance with the contract or to neglect or failure on the part of the contractor to comply with any obligation expressed or implied on the contractor's part under the contract. If in the opinion of the engineer such necessity shall be due to any other cause the value of such work shall be ascertained and paid for as if it were additional work."

Clause 50 contained provisions of an ancillary nature requiring the contractor to search for the cause of any defect. Clause 51 enabled the engineer to order variations in the form, quantity or quality of the works and provided that the value (if any) of such variations should be taken into account in ascertaining the contract price.

Clause 52 (1) was as follows:

" The engineer shall determine the amount (if any) to be added to or deducted from the sum named in the tender in respect of any extra or additional work done or work omitted by his order. All such work shall be valued at the rates set out in the contract if in the opinion of the engineer the same shall be applicable. If the contract shall not contain any rates applicable to the extra or additional work then reasonable prices shall be fixed by the engineer."

Clause 52 (4) provided:

" The contractor shall send to the engineer once in every month an account giving full and detailed particulars of all claims for any additional expense to which the contractor may consider himself entitled and of all extra or additional work ordered by the engineer which he has executed during the preceding month and no claim for payment for any such work will be considered which has not been included in such particulars. Provided always that the engineer shall be entitled to authorise payment to be made for any such work notwithstanding the contractor's failure to comply with this condition if the contractor has at the earliest practicable opportunity notified the engineer that he intends to make a claim for such work."

Clause 55 and cl. 56 under the heading of " Measurement " provided:

" 55. The quantities set out in the bill of quantities are the estimated quantities of the work but they are not to be taken as the actual and correct quantities of the works to be executed by the contractor in fulfilment of his obligations under the contract.

" 56. The engineer shall except as otherwise stated ascertain and determine by admeasurement the value in accordance with the contract of work done in accordance with the contract."

Clause 57 dealt with the method of measurement to be employed. Clause 60 provided:

"(1) The contractor shall submit to the engineer after the end of each month a statement showing the estimated contract value of the permanent work executed up to the end of the month (if such value shall justify the issue of an interim certificate) and the contractor will be paid monthly on the certificate of the engineer the amount due to him on account of the estimated contract value of the permanent work executed up to the end of the previous month together with such amount (if any) as the engineer may consider proper on account of materials for permanent work delivered by the contractor on the site and in addition such amount as the engineer may consider fair and reasonable for any temporary works or constructional plant for which separate amounts are provided in the bill of quantities subject to a retention of the percentage named in the tender until the amount retained shall reach the ' limit of retention money ' named in the tender (hereinafter called ' the retention money '). Provided always that no interim certificate shall be issued for a less sum than that named in the tender at one time.

" (2) One half of the retention money shall become due and shall be paid to the contractor when the engineer shall certify in writing that the works have been substantially completed and the other half shall be paid to the contractor fourteen days after the expiration of the period of maintenance notwithstanding that at such time there may be outstanding claims by the

contractor against the employer. Provided always that if at such time there shall remain to be executed by the contractor any works ordered during such period pursuant to cl. 49 and cl. 50 hereof the employer shall be entitled to withhold payment until the completion of such works of so much of the second half of the retention money as shall in the opinion of the engineer represent the cost of the works so remaining to be executed. Provided further that in the event of different maintenance periods having become applicable to different parts of the works pursuant to cl. 48 hereof the expression ' expiration of the period of maintenance ' shall for the purposes of this sub-clause be deemed to mean the expiration of the latest of such periods.

" (3) Payment upon each of the engineer's certificates shall be made by the employer within the number of days named in the tender after such certificate has been delivered to the employer and in the event of failure by the employer to comply with the provisions of this sub-clause or to pay the retention money or any part thereof at the times prescribed by sub-cl. (2) of this clause he shall pay to the contractor interest at the rate of five per cent. per annum upon all overdue payments from the date on which the same should have been made.

" (4) The engineer may by any certificate make any correction or modification in any previous certificate which shall have been issued by him and shall have power to withhold any certificate if the works or any part thereof are not being carried out to his satisfaction."

Clause 61 and cl. 62 were in the following terms:

" 61. No certificate other than the maintenance certificate referred to in cl. 62 hereof shall be deemed to constitute approval of any work or other matter in respect of which it is issued or shall be taken as an admission of the due performance of the contract or any part thereof or of the accuracy of any claim or demand made by the contractor or of additional or varied work having been ordered by the engineer nor shall any other certificate conclude or prejudice any of the powers of the engineer.

" 62. (1) The contract shall not be considered as completed until a maintenance certificate shall have been signed by the engineer and delivered to the employer stating that the works have been completed and maintained to his satisfaction. The maintenance certificate shall be given by the engineer fourteen days after the expiration of the period of maintenance or as soon thereafter as any works ordered during such period pursuant to cl. 49 and cl. 50 hereof shall have been completed to the satisfaction of the engineer and full effect shall be given to this clause notwithstanding any previous entry on the works or the taking possession working or using thereof or any part thereof by the employer. Provided always that the issue of the maintenance certificate shall not be a condition precedent to payment to the contractor of the second half of the retention money in accordance with cl. 60 hereof.

" (2) The employer shall not be liable to the contractor for any matter or thing arising out of or in connexion with the contract or the execution of the works unless the contractor shall have made a claim in writing in respect thereof before the giving of the maintenance certificate under this clause.

" (3) Notwithstanding the issue of the maintenance certificate the contractor and (subject to sub-cl. (2) of this clause) the employer shall remain liable for the fulfilment of any obligation incurred under the provisions of the contract prior to the issue of the maintenance certificate which remains unperformed at the time such certificate is issued and for the purposes of determining the nature and extent of any such obligation the contract shall be deemed to remain in force between the parties hereto."

Clause 63 entitled the employer to forfeit the contract in certain events including the event of the engineer certifying that the contractor had abandoned the contract or been guilty of certain defaults in carrying it out and to require the engineer in the event of the contract being forfeited to certify the amount, if any, which the contractor had earned and the cost to which the employer had been put in completing the works and the amount of any damages to which the employer was entitled. Clause 65 provided for the engineer certifying certain amounts in the event of an outbreak of war during the currency of the contract for the purpose of adjusting the rights of the parties in the altered circumstances.

The item relating to retaining walls was as follows:

> "Item 38: Description: Excavate in trench for retaining walls to six inches above formation level to depth not exceeding ten feet. Unit—cubic yard. Amount—5,850. Rate or price—6s."

There were similar items numbered 39, 40, and 41 for excavation to a depth exceeding ten feet but not exceeding twenty feet, exceeding twenty feet but not exceeding thirty feet, and exceeding thirty feet, but not exceeding forty feet. There was no item relating to excavation working space.

R. D. Stewart-Brown, Q.C., and *J. S. Daniel* for the plaintiff.

E. Blanshard Stamp for the defendant.

Cur. adv. vult.

June 22. **BUCKLEY, J.**, read the following judgment in which, after stating the facts and reading the clauses of the general conditions hereinbefore set out, he continued as follows: On behalf of the plaintiff counsel contends that in cl. 66 the words " withholding by the engineer of any certificate " mean the withholding of any certificate which in accordance with the contract the engineer ought in the circumstances to have given. His contention involves that if for any reason the contractor at any time contends that the engineer has under-certified (it may be as a result of misinterpreting the contract or as a result of undermeasuring the work or of some other cause) a difference will have arisen as to the withholding by the engineer of the certificate which he ought to have given and such difference would be referable to arbitration before the completion of the works. The good faith of the engineer in giving his certificate is, according to this submission, irrelevant.

It would require very clear language to make me accept this contention in relation to a bona fide difference of opinion between the engineer and the contractor about measurements. The reason why the monthly payments are to be made on the engineer's certificates is to enable the engineer to say how far the contractor's claims are justified, and, if only as a matter of convenience, one would not expect certificates given in good faith to be open to question, particularly having regard to the wide and arbitrary powers conferred on the engineer by other provisions of the contract. The alternative view would open the door to constant references to arbitration during the currency of the contract. Interim certificates of this kind are not final and conclusive determinations of rights, as cl. 60 (4) makes clear, and for this reason also are not likely to have been intended to be the subject-matter of arbitration while the contract is running. This dispute is not, however, about measurements. The engineer has refused to include certain claims in his certificate and may be said, pro tanto, to have withheld a certificate.

There has been some debate before me whether in cl. 66 the words " under cl. 60 hereof " qualify (a) " the retention money " only or (b) " the withholding of any portion of the retention money " only or (c) " the withholding by the engineer of any certificate " in addition to (b).

Counsel for the defendant has contended in favour of (c). He says that " under cl. 60 " means pursuant to or in accordance with cl. 60 and that this is inappropriate to construction (a), which treats the words " under cl. 60 " as being

A equivalent to " referred to in cl. 60 ". He points out that in cl. 60 there are references both to withholding a certificate (cl. 60 (4)) and to withholding a portion of the retention money (cl. 60 (2)) and that these are the only places where there are any provisions for withholding a certificate or any retention money. On the other hand, counsel for the plaintiff points out that cl. 60 (2) only refers to a withholding of payment of part of the second half of the retention B money and so must refer to a period later than fourteen days after the end of the period of maintenance, that is, after the end of twelve and a half months from the date of the certificate of completion. This, he says, makes clear that the words of exception in cl. 66 cannot relate back to cl. 60 (2) because proviso (i) to cl. 66 says that the giving of a certificate of completion shall not be a condition precedent to arbitration. Moreover, the giving of a certificate of completion pre- C supposes that the works have then been substantially completed and that the contractor has undertaken to finish any outstanding work during the period of maintenance. Consequently the works ought to be, and presumably would probably be, entirely completed before the date of payment of the second half of the retention money arrived; so that it would only be in an exceptional case, and one in which the contractor was in default under his undertaking to complete D outstanding work, that a dispute about withholding any retention money under cl. 60 (2) would arise until after the actual completion of the works. These seem to me to be strong arguments for not adopting construction (b) and a fortiori for not adopting construction (c). I prefer construction (a). Although " the retention money under cl. 60 " may not be artistic language, it does not do a violence to it to construe it as meaning either " the retention money referred E to in cl. 60 " or " the retention money retained under cl. 60 ".

I therefore conclude that the words " under cl. 60 " do not qualify the words " the withholding by the engineer of any certificate " and that the latter words are unrestricted by their context. They are apt to apply, for instance, to a withholding of a certificate under cl. 42 or to a withholding of a monthly certificate under cl. 60 if the circumstances are or may be such that the engineer should F have given the certificate.

I turn therefore to consider whether the dispute in the present case is a dispute as to the withholding of a certificate within the construction which I have put on cl. 60. Counsel for the defendant says that it is not because the dispute is primarily about the true interpretation of the provisions of the contract relating to payments for trenching. The engineer has certified in full, in G accordance with the prices stated in the bill of quantities, for all trenching that the plaintiff claims to have done. In these circumstances, says counsel for the defendant, there has been no withholding of any certificate, although there is a dispute whether in giving his certificate the engineer has properly construed the contract. In other words, he says that the words of exception in cl. 66 say nothing about disputes which relate to the alleged incorrectness of a certificate. H Moreover, he says, even if the engineer can be said to have withheld a certificate in respect of the excavation of working space, the dispute is still not as to such withholding, but whether under the contract the defendant is liable to pay anything for this excavation. The withholding of the certificate is said to be merely incidental to the subject-matter of the dispute.

I have indicated that I should be disinclined to conclude that if the engineer, I acting in good faith and on proper principles, were to consider that the contractor was not entitled to a certificate to which the latter claimed to be entitled, or to a certificate for the whole amount so claimed, the engineer by acting on that view could be said to be withholding a certificate. In such a case when refusing a certificate, or giving a certificate only for a lesser sum, he would be discharging his proper function under the contract and could not (at any rate when certifying for a lesser sum) be described as withholding anything. But suppose that the engineer, being satisfied that the contractor is entitled to a

certificate for, say, a sum of £20,000 claimed by the contractor, for some inadmissible reason (as, for instance, that he knows the employer to be in financial difficulties) refuses a certificate altogether or refuses to certify for more than £15,000: he would in the one case manifestly be withholding a certificate, and in the other he would be withholding his certificate in respect of £5,000 worth of certifiable work. Or suppose that the engineer, acting in good faith but in accordance with mistaken principles, because he has misdirected himself about the law, refuses a certificate altogether or refuses to certify more than £15,000 of a proper claim to £20,000; he would again in the one case be withholding a certificate, and in the other be withholding a certificate in respect of £5,000 worth of certifiable work. Counsel for the defendant would contend that in such case the dispute between the employer, represented by the engineer, and the contractor would not be a dispute as to the withholding of a certificate, but a dispute on the question of principle, the engineer's mistaken view of which having resulted in the certificate being withheld. But the important aspect of the engineer's view of the question of principle is that for the time being by reason of the consequent withholding of the certificate the employer has not to pay and the contractor will not receive so much money. In my judgment, any dispute or difference which relates to something in consequence of which a certificate has been refused, which on one view ought to have been given, is a dispute or difference as to the withholding of that certificate.

Whether the certificate has or has not been rightly withheld is a matter to be arbitrated. It cannot be a question for me in the present case whether the plaintiff's view as to its right to payment on interim certificates for excavation of working space is correct or not. Counsel for the plaintiff contends that under the contract it should be paid for this work on monthly certificates over and above what it is entitled to be paid on a cubic capacity basis for excavation of the space required for the actual structure. The engineer has refused to certify for this work. This is the subject-matter of the dispute or difference. Rightly or wrongly he has withheld a certificate as far as the excavation of working space is concerned. This has given rise to what is, in my judgment, a dispute or difference as to the withholding by the engineer of a certificate. The fact that in the event the engineer may be held rightly to have withheld the certificate does not make it any less such a dispute. Only if it were clear that the contractor's view could not be upheld, could there be said to be no genuine dispute about the withholding of the certificate. I could not take that view in this case.

For these reasons I conclude that on the true construction of cl. 66 of the General Conditions the dispute in question is a dispute as to the withholding by the engineer of a certificate or certificates within the meaning of that clause, and I will declare accordingly, and I will declare that the reference of that dispute to arbitration may be opened without the consent of the Minister before the completion of the works which are the subject-matter of the contract.

Declaration accordingly.

Solicitors: *Henry Boustred & Sons* (for the plaintiff); *Treasury Solicitor* (for the defendant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* VERNAZZA.

[House of Lords (Viscount Simonds, Lord Reid, Lord Keith of Avonholm, Lord Denning and Lord Morris of Borth-y-Gest), June 20, July 21, 1960.]

Statute—Retrospective operation—Pending proceedings—Alteration of law after judgment and before appeal—Duty of Court of Appeal—Vested substantive right not to be interfered with—Distinction for matters of procedure—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5 *c.* 49), *s.* 27 (1) *—Supreme Court of Judicature (Amendment) Act*, 1959 (7 & 8 *Eliz.* 2 *c.* 39), *s.* 1 (1)—*R.S.C., Ord.* 58, *r.* 9 (3).

Court of Appeal—Jurisdiction—Alteration of law pending appeal—Amending statute conferring jurisdiction on High Court—Whether Court of Appeal had on appeal the like jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5 *c.* 49), *s.* 27 (1)—*Supreme Court of Judicature (Amendment) Act*, 1959 (7 & 8 *Eliz.* 2 *c.* 39), *s.* 1 (1)—*R.S.C., Ord.* 58, *r.* 9 (3).

The power conferred by the Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1)*, on the High Court to make an order that a vexatious litigant shall not continue any legal proceedings instituted by him before the date of the order empowers that court to make such an order notwithstanding that the proceedings were instituted before the passing of the Act, for the Act cannot be regarded as depriving the litigant of any substantive or vested right, but is procedural in nature.

Quilter v. *Mapleson* ((1882), 9 Q.B.D. 672) considered.

On an appeal against an order, made by the High Court before the passing of the Act of 1959, restraining a vexatious litigant from instituting proceedings without leave, the Court of Appeal had jurisdiction under that Act to vary the order so as also to restrain the litigant from continuing without leave proceedings instituted before the passing of the Act, because the High Court had such jurisdiction at the date of the appeal and the Court of Appeal had, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1)†, and R.S.C., Ord. 58, r. 9 (3)‡, the like jurisdiction, notwithstanding that the new jurisdiction was in terms conferred by the Act of 1959 on the High Court.

Decision of the Court of Appeal (sub nom. *Re Vernazza*, [1960] 1 All E.R. 183) reversed in part.

[As to change of law during proceedings; see 30 Halsbury's Laws (3rd Edn.) 470, para. 886; and for cases on the subject, see Digest (Practice) 784, 785, *3474-3478*.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27, see 5 Halsbury's Statutes (2nd Edn.) 355, and for the Supreme Court of Judicature (Amendment) Act, 1959, s. 1, see 39 Halsbury's Statutes (2nd Edn.) 1141.]

Cases referred to:

Colonial Sugar Refining Co. v. *Irving*, [1905] A.C. 369; 74 L.J.P.C. 77; 92 L.T. 738; 8 Digest (Repl.) 810, *625*.

Debtor, Re, Ex p. Debtor (*No. 490 of 1935*), [1936] Ch. 237; 105 L.J.Ch. 129; 154 L.T. 44; Digest Supp.

Gardner v. *Lucas*, (1878), 3 App. Cas. 582; 42 Digest 697, *1139*.

New Brunswick Ry. Co. v. *British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

* The relevant terms of the subsection are printed at p. 98, letter G, post.
† The subsection, so far as relevant, is printed at p. 99, letter A, post.
‡ The terms of r. 9 (3) are printed at p. 99, letter C, post.

E

Quilter v. *Mapleson*, (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 42 Digest 696, *1111*. A

Stovin v. *Fairbrass*, (1919), 88 L.J.K.B. 1004; 121 L.T. 172; 83 J.P. 241; 42 Digest 707, *1241*.

Willis v. *Beauchamp* (*Earl*), (1886), 11 P.D. 59; 55 L.J.P. 17; 54 L.T. 185; 23 Digest (Repl.) 292, *3588*.

B

Appeal.

Appeal by the Attorney-General from an order of the Court of Appeal (ORMEROD, WILLMER and HARMAN, L.JJ.), dated Dec. 2, 1959, and reported sub nom. *Re Vernazza*, [1960] 1 All E.R. 183, affirming an order of the Queen's Bench Divisional Court (LORD PARKER, C.J., DONOVAN and SALMON, JJ.), dated Apr. 9, 1959, and reported [1959] 2 All E.R. 200, and dismissing a cross-notice by the Attorney-General from that order. The facts are stated in the opinion of VISCOUNT SIMONDS. C

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *J. R. Cumming-Bruce* for the appellant.

Arthur Bagnall for the respondent.

Their Lordships took time for consideration. D

July 21. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on Apr. 9, 1959, on the application of Her Majesty's Attorney-General the High Court made an order that the respondent, Anthony Vernazza, should be prohibited from instituting proceedings in the High Court or in any other court unless he obtained the leave of the E High Court or a judge thereof, and satisfied the court or judge that such legal proceeding was not an abuse of the process of the court and that there was a prima facie ground for such proceeding. Such an order could, under the terms of the statute authorising it (viz., s. 51 of the Supreme Court of Judicature (Consolidation) Act, 1925) be made only on the footing that the court was satisfied that he had habitually and persistently and without any reasonable ground F instituted vexatious legal proceedings. There could be no doubt that the order was amply justified. On May 14, 1959, there came into operation an Act (1) amending the Act of 1925, to which I have referred, by providing that, after the words "in any court" in sub-s. (1) of s. 51, there should be inserted the words

> "and that any legal proceedings instituted by him in any court before G the making of the order shall not be continued by him without such leave."

The single question for your Lordships' decision is whether, in the circumstances that I shall now state, it was competent for the Court of Appeal to vary the order of the High Court by adding an order that any legal proceedings instituted by the respondent in any court before the making of the order of Apr. 9 should not be continued by him unless he obtained the leave of the court or a judge thereof H and otherwise satisfied the condition of the statute. On May 21, 1959, the respondent gave notice of appeal against the order of Apr. 9, 1959. The Attorney-General, having obtained leave to that end, on Oct. 29, 1959, served on the respondent a notice of contention whereby he gave notice that he would move to vary the order in the manner that I have indicated. The appeal and notice of contention came before the Court of Appeal on Dec. 2, 1959, and both were I dismissed. No further question arises on the appeal, but the Attorney-General has, by your Lordships' leave, appealed from the dismissal of his notice.

It is conceded that the order for which the Attorney-General asked was proper to be made by the Court of Appeal if it was competent for that court to make it. I will, therefore, remind your Lordships of the relevant statutory provisions and Rules of the Supreme Court. They are as follows:—Section

(1) The Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1).

27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides (so far as is material) as follows:

> " Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court . . ."

Order 58 of the Rules of the Supreme Court provides (so far as is material) as follows:

> " Rule 3 (1) An appeal to the Court of Appeal shall be by way of re-hearing . . .
>
> " Rule 9 (3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

In these circumstances, two questions seem to arise, (i) whether the High Court could itself now make an order in the terms prayed by the Attorney-General, (ii) whether the Court of Appeal and, therefore, this House could make such an order. On the first point, I am clearly of opinion that the High Court had the necessary power. If I correctly understood learned counsel for the respondent, the argument to the contrary was not seriously maintained. By the amending Act, a new power was given to the court to enable it to deal with proceedings of which it was seised. The object was both to prevent an abuse of its process and to relieve possible victims of vexatious litigation. I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic in any degree, it is of a procedural nature and, as I think, amply covered by the authority of *Quilter* v. *Mapleson* (2). *Re Debtor, Ex p. Debtor* (*No. 490 of 1935*) (3) and *Colonial Sugar Refining Co.* v. *Irving* (4) are distinguishable. I do not find the former case in all respects easy to understand, but in both cases the distinction is drawn between enactments which provide new remedies and those which affect substantive rights. An enactment which enables the court to deny to a vexatious litigant the power further to prosecute proceedings without leave appears to me to fall within the former category. It would, I think, be wrong to say that a man was deprived of a vested or substantive right, if it was still left open to him to prosecute any claim which was not an abuse of process and for which there was a prima facie case.

On the second question, which arises on the assumption that the High Court could itself make the necessary order, it appears to me that the Court of Appeal, being entitled and bound to apply the law in force at the time of the appeal, was enabled, if it thought fit, to accede to the application of the Attorney-General. The concluding words of r. 9 (3) are wide. The power is to make such further or other order as the case may require. It would, I think, be too narrow a view to say that the case did not refer to all the existing facts and the law then applicable. I am, therefore, of opinion that the Court of Appeal could, and should, have varied the order of the High Court by adding thereto the order that any legal proceedings instituted by the respondent in any court before the making of that order shall not be continued by him unless he obtains the leave of the High Court or a judge thereof and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court and that there is a prima facie ground for such proceeding.

My noble and learned friend, **LORD KEITH OF AVONHOLM**, who is

(2) (1882), 9 Q.B.D. 672. (3) [1936] Ch. 237. (4) [1905] A.C. 369.

unable to be here today, asks me to say that he concurs in the opinion that I have given. A

LORD REID: My Lords, I agree.

LORD DENNING: My Lords, the respondent, Mr. Vernazza, is a vexatious litigant. He so vexed others by his litigation that, on Feb. 19, 1959, the Attorney-General applied to the High Court for an order under the Supreme Court of Judicature (Consolidation) Act, 1925, to prohibit him *instituting* proceedings without the leave of the High Court; and on Apr. 9, 1959, the High Court made an order as asked. At that date the High Court had no authority to prohibit him from *continuing* proceedings which he had already started. But on May 14, 1959, a new Act was passed (5) which enabled the court not only to prohibit the *institution* of new proceedings without leave, but also to prohibit the *continuance* of existing proceedings without leave. A week later, on May 21, 1959, the respondent appealed to the Court of Appeal against the original order made against him. On Dec. 2, 1959, his appeal was dismissed. So the order stands prohibiting him from *instituting* new proceedings. But the Attorney-General, by a cross-notice, sought from the Court of Appeal a further order under the new Act prohibiting him from *continuing* his existing proceedings. They refused to make this further order considering they had no power to do so. The Attorney-General appeals to your Lordships' House against this refusal. In order to determine this question, it is necessary, as counsel for the respondent very properly observed, to distinguish between, on the one hand, the proceedings which the respondent himself instituted against other litigants before the Attorney-General took action against him; and, on the other hand, the proceedings which the Attorney-General has taken against the respondent to have him condemned as a vexatious litigant. B C D E

Let me consider first the proceedings which the respondent himself has already instituted against other litigants. If the effect of the new Act is to prevent him from continuing those proceedings to their ultimate conclusion, then it may be said to be a " retrospective " Act, at any rate in the sense in which LORD BLACKBURN once had occasion to use the word " retrospective ". But whether this is a proper use of the word " retrospective " or not, it is of little moment; because the principles to be applied are not in doubt. If the new Act affects the respondent's substantive rights, it will not be held to apply to proceedings which have already commenced, unless a clear intention to that effect is manifested: see *Colonial Sugar Refining Co.* v. *Irving* (6). But if the new Act affects matters of procedure only, then, prima facie, it applies to all actions, pending as well as future; for, as LORD BLACKBURN said: F G

> " Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be ",

see *Gardner* v. *Lucas* (7). The Court of Appeal seem to have thought that the new Act affects the respondent's substantive right to carry on his pending proceedings; and that it ought not to be given a retrospective operation. I cannot, I am afraid, share this view. The new Act does not prevent the respondent from continuing proceedings which it is proper for him to carry on. It only prevents him from continuing proceedings which are an abuse of the process of the court. If the proceedings are not an abuse and he has prima facie grounds for them, then he will be given leave to continue them. This is no interference with a substantive right. The courts of this country have an inherent power to H I

> " prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive ",

(5) The Supreme Court of Judicature (Amendment) Act, 1959; see s. 1 (1).
(6) [1905] A.C. 369. (7) (1878), 3 App. Cas. at p. 603.

A see *Willis* v. *Earl Beauchamp* (8), by BOWEN, L.J.; and when the courts of this country exercise this power, they are not depriving a man of a vested right. They are only exercising a control over their own procedure. No man, let alone a vexatious litigant, has a vested right to bring or continue proceedings which are an abuse of the process of the court.

Even if the new Act did affect substantive rights, however, I think there are B clear words in this Act which show that Parliament intended it to be retrospective. The Act empowers the High Court to make an order

> " that any legal proceedings instituted by him in any court *before the making of the order* shall not be continued by him without such leave."

That Act was passed on May 14, 1959. Suppose the court made an order on the C next day, May 15, 1959, following the very words of the statute, as Parliament clearly contemplated that it might. That order would clearly prohibit the continuance of proceedings already begun before the Act. Else it would have no effect. Just as during the war Acts were passed so as to enable penalties to be increased even after the offence was committed (9), so, here, this Act of 1959 was passed so as to prevent proceedings being continued which had already begun. D To this extent the Act is retrospective. If the Attorney-General had made a fresh application to the High Court after May 14, 1959, he could undoubtedly have obtained an order prohibiting the respondent from continuing his pending litigation without the leave of the court.

But what about the Court of Appeal? The new Act was passed after the judgment of the High Court and before the hearing in the Court of Appeal. E Can the Court of Appeal take the new Act into account and make an order under it or must it leave the Attorney-General to make a fresh application to the High Court? It is, of course, clear that, in the ordinary way, the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings: F see *Re Debtor, Ex p. Debtor* (*No. 490 of 1935*) (10), *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (11). But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only; for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance: G see *Quilter* v. *Mapleson* (12) and *Stovin* v. *Fairbrass* (13). Those decisions seem to me to show that the Court of Appeal can give effect to a retrospective Act passed in the interval since the case was at first instance, no matter whether it deals with vested rights or with procedure only; for, as HARMAN, L.J., pointed out (14), the retrospective Act in *Quilter* v. *Mapleson* (12) affected the vested right of the landlord to recover possession. And the retrospective Act in *Stovin* H v. *Fairbrass* (13) affected the vested right of the statutory tenant to remain in possession.

Applying this principle, the Act of 1959 was, as I have said, retrospective. So the Court of Appeal could give effect to it. And they should, I think, have done so. When the respondent appealed to the Court of Appeal, seeking a finding that he was not a vexatious litigant and asking that no order should be made I against him, he thereby opened up the case for a re-hearing; and, by so doing, he let in the rule of court which authorises the Court of Appeal to make such order as the case may require. And the case required certainly this, that, if he were found by the Court of Appeal to be a vexatious litigant, he should be prohibited

---

(8) (1886), 11 P. D. at p. 63.

(9) See *Director of Public Prosecutions* v. *Lamb*, [1941] 2 All E.R. 499; *Buckman* v. *Button*, [1943] 2 All E.R. 82.

(10) [1936] Ch. 237.

(11) [1938] 4 All E.R. 747; [1939] A.C. 1.

(12) (1882), 9 Q.B.D. 672.

(13) (1919), 88 L.J.K.B. 1004.

(14) [1960] 1 All E.R. at p. 192.

then and there from continuing his pending litigation unless he obtained the leave of the court. It would be a work of supererogation to require the Attorney-General to go back to the High Court for an order when the Court of Appeal had seisin of the whole case and could make the order themselves.

I would, therefore, allow the appeal. There should be added to the order of the Divisional Court a further order prohibiting the respondent from continuing his pending litigation without leave.

LORD MORRIS OF BORTH-Y-GEST: My Lords, by a notice of motion dated Feb. 19, 1959, the Attorney-General gave notice that he would apply to the Divisional Court of the Queen's Bench Division of the High Court of Justice for an order pursuant to s. 51 of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by the respondent, Mr. Vernazza, in any court without the leave of the High Court or a judge thereof. The application was based on the allegation that the respondent had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. The application was heard on Apr. 9, 1959. It was successful and an order was made as asked. The respondent had, however, some pending proceedings which he had already instituted. The order of the court did not affect those proceedings. The High Court was not then endowed with power to make an order which could affect such proceedings even if there had been an application for any such order. The effect of s. 51 as it then stood and as its wording showed was that, if the Attorney-General made application under the section and if the High Court was satisfied that a person had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, then the High Court might, after hearing the person or giving him an opportunity of being heard, make an order that no legal proceedings should be instituted by such person without leave. By the Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1), s. 51 was amended and a new power was given. It was given to the High Court. It was a power to make an order that any legal proceedings instituted in any court before the making of the order should not be continued without leave. After May 14, 1959, the High Court could have been asked to make such an order against the respondent. In view of their decision of Apr. 9, 1959, there is no reason to think that if they had been asked they would not have made a further order against the respondent.

In argument before your Lordships, consideration was given to the question whether the amendment to s. 51 which is effected by the Supreme Court of Judicature (Amendment) Act, 1959, is retrospective. The word " retrospective " in this connexion is, perhaps, not wholly apt. By the amendment a new power is given to the High Court, which, after May 14, 1959, it could exercise. It was a power which it did not previously possess. In the exercise of it, an order could be made which would operate on " any legal proceedings instituted . . . before the making of the order ". The reference to " any legal proceedings " instituted before the making of an order is in wide terms. The words cover any legal proceedings instituted at any time previous to the making of a restraining order. The words cover legal proceedings instituted before the passing of the Act of 1959.

From the order of the Divisional Court of Apr. 9, the respondent, on May 21, appealed to the Court of Appeal. He was entitled to appeal. His appeal, which was fully heard on Dec. 2, failed. Previously, on Oct. 29, 1959, a respondent's notice under R.S.C., Ord. 58, r. 6, had been served on behalf of the Attorney-General. Notice was given that, on the hearing of the appeal, it would be contended that the order of the Divisional Court should be varied by adding to it another order, viz., that any legal proceedings instituted by the respondent before the making of the order of Apr. 9 should not be continued by him without leave.

It is to be observed that the power which is given by s. 51 is given to the High Court. The Court of Appeal has, generally speaking, no original jurisdiction

A though by statute original jurisdiction could be conferred. A question arises, therefore, whether the Court of Appeal, on the hearing of the respondent's appeal, could vary the order of the Divisional Court of the High Court by adding to it an order that any legal proceedings already instituted by the respondent before Apr. 9, 1959, should not be continued without leave. It can be said that the High Court have never directed their minds to the question whether any such B order should be made. They were not previously asked to do so for the compelling reason that, at the time of the hearing of the application to the High Court, there was no power to make any such order. The following question is, therefore, raised. After the respondent had appealed to the Court of Appeal against the order made against him, was the Attorney-General under obligation, if he desired to apply for the extended order made possible by the Act of 1959, to revert to C the Divisional Court and there make a new application, or could he invite the Court of Appeal, if they upheld the order of the High Court, to vary it by adding to it in manner above-mentioned? On the facts of this case, it would be unfortunate if the former course was necessitated and was the only permissible course, for it is expressly conceded that, if the Court of Appeal had power to make the desired variation in the order of the Divisional Court, then, on the merits, D it would have been proper for them so to do. The Court of Appeal has jurisdiction (see s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925) to hear and determine appeals from any judgment or order of the High Court and

> "for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, E authority and jurisdiction of the High Court."

It is provided by R.S.C., Ord. 58, r. 3 (1), of the Rules of the Supreme Court that an appeal to the Court of Appeal shall be by way of re-hearing, and by r. 9 (3) it is provided that:

> "The Court of Appeal shall have power to draw inferences of fact and to F give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

The powers of the Court of Appeal were considered in *Quilter* v. *Mapleson* (15). The claim there made was for possession of premises under a proviso of re-entry for breaches of covenant. The plaintiff obtained judgment for possession but with a stay. The defendant appealed. Before the appeal came on for hearing, the Conveyancing and Law of Property Act, 1881, came into operation. It had been passed after judgment was obtained. Under that Act it was provided (16) that, where a lessor was proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, a lessee might in the lessor's action, or in any action brought by himself, apply to the High Court for relief and that the High Court could grant relief on such terms as in all the circumstances seemed proper. The provision was expressed H to apply to leases made either before or after the commencement of the Act. It was held that, as (because there was a stay) possession had not been obtained, the Court of Appeal could grant relief to the lessee on terms. JESSEL, M.R., in his judgment said (17):

> "On an appeal strictly so called, such a judgment can only be given as I ought to have been given at the original hearing; but on a re-hearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance."

BOWEN, L.J., in his judgment said (18):

> "The only remaining question is, whether the Court of Appeal can give

(15) (1882), 9 Q.B.D. 672.
(16) By s. 14 (2). See now the Law of Property Act, 1925, s. 146 (2).
(17) (1882), 9 Q.B.D. at p. 676. (18) (1882), 9 Q.B.D. at p. 678.

relief where a judgment had been obtained by the landlord before the Act came into operation. I think we should be misreading the judicature rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of Appeal cannot decide according to the existing state of the law. I think that such is not the true construction of the rules (19), for Ord. 58, r. 5, does not merely enable the Court of Appeal to make any order which ought to have been made by the court below, but to make such further or other order as the case may require."

Accordingly, in that case, as the plaintiff had not obtained the possession which he claimed, it was held in the Court of Appeal that justice required that, on terms, relief from the delivery up of possession should be given.

The present case is not precisely analogous, for in *Quilter* v. *Mapleson* (20) the Court of Appeal took something away from a successful plaintiff whose case or whose claim was in no way altered. In the present case, it can be said that a successful applicant is in the Court of Appeal asking to be given more than he previously had and more than he had previously asked for. But the reasoning in *Quilter* v. *Mapleson* (20) is of assistance in determining the present case. Applying what was said by JESSEL, M.R., it has to be considered what order ought to have been made by the Divisional Court if the matter had come before them on Dec. 2, 1959 (the date of the re-hearing in the Court of Appeal). I entertain little doubt that the Divisional Court would on that date if necessary have allowed an amendment of the original application and would have made an order in the extended terms that the law then authorised. The real substance of the matter before the Divisional Court would have been whether it was shown that the respondent had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. If that were shown, then the extended procedural power of the court which was made available by the Act of 1959 as a remedial and protective measure against the prosecution of vexatious litigation would properly have been employed. The decision of the Divisional Court of Apr. 9 as to the merits of the matter was upheld in the Court of Appeal. In your Lordships' House, it is not in controversy that an order in extended form is, on the merits of the matter, amply warranted. I, therefore, conclude that the order which, in the Court of Appeal, " the case " required was that the order of Apr. 9 should be varied in the manner desired.

Accordingly, I would allow the appeal.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the appellant); *Official Solicitor* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(19) The reference is to the earlier rules; see now R.S.C., Ord. 58, r. 9 (3) and p. 99, letters C and H, ante.

(20) (1882), 9 Q.B.D. 672.

ORMAN *v.* SAVILLE SPORTSWEAR, LTD.

[Queen's Bench Division (Pilcher, J.), February 29, March 1, 2, 1960.]

Master and Servant—Wages—Illness—Bonus—Where contract silent and no implied term to contrary, remuneration remains payable during employee's absence through sickness—Production manager at skirt factory—Remuneration under contract of service comprising salary of £30 *per week plus bonus of* 2d. *per skirt manufactured—Manager entitled to bonus as well as salary during absence through sickness.*

Where the written terms of a contract of service are silent as to the employee's right to be paid while absent from work due to sickness, the employer remains liable, until the contract is determined by proper notice, to remunerate the employee while so absent, unless a condition to the contrary can be inferred from all the facts and the evidence; and, if the employer seeks to establish such an implied term, the onus of so doing is on him (see p. 111, letter G, post).

Marrison v. *Bell* ([1939] 1 All E.R. 745), *Petrie* v. *MacFisheries, Ltd.* ([1939] 4 All E.R. 281) and *O'Grady* v. *M. Saper, Ltd.* ([1940] 3 All E.R. 527) applied.

The plaintiff entered the employment of the defendants, who were skirt manufacturers, as production manager at their factory as from Jan. 10, 1955, on the terms of a letter which, so far as material, stated " . . . at a salary of £30 per week with an addition of 2d. per skirt bonus on all skirts manufactured ". The plaintiff had initially been offered only the basic salary of £30 weekly and the additional bonus had been arranged as he had not agreed to enter the employment for the salary alone. Nothing was expressly agreed as to the plaintiff's right to be paid either salary or bonus during absence from work due to illness. His aggregate weekly earnings, comprising salary and bonus, amounted to about £50. On Nov. 12, 1956, the plaintiff fell ill with coronary thrombosis and remained absent from work until Jan. 19, 1957, when he informed the defendants that he was fit enough to return to work. On Jan. 29, 1957, the defendants terminated the plaintiff's contract of service. During the plaintiff's absence from work and until his contract was terminated the defendants continued to pay him his basic salary of £30 per week as, so they contended, an act of grace. The plaintiff claimed payment of the amount of bonus computed at the rate stated in the contract of service for the period of his absence from work through sickness until his contract was terminated, which amount was £250 6s. 2d.

Held: no term regarding payment during illness could properly be implied in the plaintiff's contract of service in the present case, and therefore he was entitled to remuneration in accordance with the contract for the period from Nov. 12, 1956 to Jan. 29, 1957; that remuneration consisted, in the circumstances of the present case, of both his basic salary and the bonus, and accordingly he was entitled to recover the £250 6s. 2d.

Dicta of Scrutton, L.J., in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) ([1918] 1 K.B. at p. 605) applied.

[As to recovery of remuneration by a servant when he is temporarily incapacitated through illness, see 25 Halsbury's Laws (3rd Edn.) 477, para. 917.]

Cases referred to:

Cuckson v. *Stones*, (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 23 L.T.O.S. 242; 120 E.R. 902; 34 Digest 71, *483.*

Marrison v. *Bell*, [1939] 1 All E.R. 745; [1939] 2 K.B. 187; 108 L.J.K.B. 481; 160 L.T. 276; 103 J.P. 135; Digest Supp.

Niblett v. *Midland Ry. Co.*, (1907), 96 L.T. 462; 34 Digest 86, *639.*

O'Grady v. *M. Saper, Ltd.*, [1940] 3 All E.R. 527; [1940] 2 K.B. 469; 109 L.J.K.B. 785; 163 L.T. 165; 2nd Digest Supp.

Petrie v. *MacFisheries, Ltd.*, [1939] 4 All E.R. 281; [1940] 1 K.B. 258; 109 L.J.K.B. 263; 161 L.T. 408; 104 J.P. 40; 2nd Digest Supp.

Reigate v. *Union Manufacturing Co.* (*Ramsbottom*), [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest (Repl.) 686, *5278*.

Warburton v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93; 12 Digest (Repl.) 426, *3277*.

Warren v. *Whittingham*, (1902), 18 T.L.R. 508; 34 Digest 86, *634*.

Action.

In this action the plaintiff, Lewis Orman, claimed from the defendants, Saville Sportswear, Ltd., £250 6s. 2d., being the amount of bonus which the plaintiff would have earned, in his employment with the defendants, for the period Nov. 6, 1956 to Jan. 29, 1957, but during which period the plaintiff was absent from work because of sickness. The plaintiff also claimed damages for wrongful dismissal. In 1954 the defendants, who were skirt manufacturers, advertised for a production manager for their factory at Little Portland Street, London, W.1. The plaintiff answered the advertisement and on Nov. 20, 1954, was interviewed by a Mr. Saville, the defendants' managing director. At that interview Mr. Saville offered the plaintiff a salary of £30 a week but no concluded agreement was reached. The plaintiff was not satisfied with the offered salary and wrote asking to see Mr. Saville again, whereupon Mr. Saville wrote to the plaintiff, in effect, inviting the plaintiff to come and see him again when he, Mr. Saville, might be able to make the plaintiff a better offer. Accordingly the plaintiff had a second interview with Mr. Saville following which Mr. Saville wrote the plaintiff the following letter, dated Dec. 1, 1954:

> "Further to our interview on Monday, we confirm that we are agreeable to engage you as production manager of our factory situated at 21, Little Portland Street, London, W.1. at a salary of £30 per week with an addition of 2d. per skirt bonus on all skirts manufactured at the factory, commencing Monday, Jan. 10, 1955. We shall be glad to have your confirmation to this letter and we feel sure that a pleasant relationship will develop to our mutual advantage."

The plaintiff replied to that letter on the following day as follows:

> "I thank you for your letter dated 1st inst., in which you give me the position stated and confirm that I am pleased to accept this, to commence on Jan. 10, 1955."

These two letters formed the written contract of service between the plaintiff and the defendants. On Nov. 12, 1956, while still in the defendants' employment as production manager, the plaintiff fell sick and became unfit for work as a result of an illness which proved to be coronary thrombosis. By Jan. 19, 1957, about seven weeks later, the plaintiff was ready to return to work but he then discovered that the defendants had employed some one else as production manager at their factory and, as the plaintiff was unwilling to return to a more junior position with the defendants, he did not then go back to work. On Jan. 29, 1957, the defendants terminated the plaintiff's employment.

During the plaintiff's absence from work through sickness and until the termination of his contract of service on Jan. 29, 1957, the defendants continued to pay him his basic salary of £30 a week, as they contended, as an act of grace but they did not pay him the bonus of 2d. a skirt. In the present action the defendants contended that under the contract of service they were under no liability to pay the plaintiff this bonus during his absence from work through sickness.

N. C. Bridge for the plaintiff.

C. L. Hawser, Q.C., and *M. Levene* for the defendants.

PILCHER, J., having stated the facts, continued: The defendants' original contention was that they were not liable in law to pay the plaintiff anything at all, whilst he was away sick. They have now paid his basic salary, but have not paid him the bonus which is represented by the agreed sum of £250 odd. The only point that I have to determine is whether, having regard to the terms of the plaintiff's contract of service, in all the circumstances of the case it is possible or proper to imply a further term into this written contract—namely, that the plaintiff is entitled in law to recover this sum of £250 6s. 2d., which represents the bonus which he would have earned if he had continued to work for the ten weeks or so that he was away sick and until his contract was terminated.

On behalf of the plaintiff it was contended as a matter of law by counsel that the facts of this case and the evidence in the case did not permit of the implication or the introduction of any implied term. He referred me to the well-known case of *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1). That was a case which concerned a contract made by a company for a fixed period to pay an agent certain commission. The company went into liquidation, and the question was whether or no, although the company had gone into liquidation, the agent was entitled to claim damages by way of commission after the company ceased to exist. I need not go into the facts any more than that, because I cite the case only for the well-known passage in SCRUTTON, L.J.'s judgment which deals with the implication of terms into written contracts. He says this (2):

> " The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, ' What will happen in such a case ', they would both have replied, ' Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

Then the learned lord justice goes on (2):

> " As I understand, it is suggested that the contract is only to remain in force so long as the company carry on their business. Is that a necessary implication? If this matter had been mooted at the time when the contract was being negotiated, I expect that the parties would at once have disagreed as to what the position was. Unless we are satisfied that it is an implication which must necessarily have been in the minds of both parties, we cannot imply a term which they have not expressed . . ."

Accordingly, the Court of Appeal refused to imply a term in that case, because there was no certainty that, if the attention of the parties had been drawn to it when the contract had been made, they would have been in agreement as to what the term was to be.

Counsel on behalf of the plaintiff set out the following proposition which he submitted was accurate in law. Where the contract contains no express term, and no unexpressed terms can properly be implied as to the remuneration during periods of illness, the presumption is that the contractual remuneration remains payable until the contract of service is determined. Counsel further submitted that on the facts and evidence this case did not permit of the implication of any term in regard to payment during absence due to sickness, and that the plaintiff was accordingly entitled as a matter of law to recover during the period of his absence the whole of this remuneration consisting of basic salary and bonus.

In support of that proposition, counsel for the plaintiff referred me to a line of cases on this topic dealing with wages during periods of illness, starting with

(1) [1918] 1 K.B. 592. (2) [1918] 1 K.B. at p. 605.

Marrison v. *Bell* (3). I will not read the headnote (4) in that case because it has been subject to a certain amount of criticism. It was a case in which a fruit salesman, who had been employed at £3 10s. a week for a long period by the defendant, and before that by the defendant's father, was stricken with rheumatism. He was away for several months. When he returned, he was given a week's wages in lieu of notice, so that his contract of service continued throughout the period of his absence due to sickness. The real point in this case was that the greengrocer's assistant had received national health insurance benefits during his period of sickness. The county court judge held that, having regard to that fact and other matters, he was not entitled to recover wages whilst he was absent from work due to sickness, but the county court judge's finding was reversed by the Court of Appeal. I refer to *Marrison* v. *Bell* (3) only because of certain passages in the judgment of SCOTT, L.J., which are binding on me, and which if they do not completely state the law on the subject, at any rate afford a basis for it. In allowing the appeal, SCOTT, L.J., said (5):

> " A long series of decisions has been given in our courts, making it quite clear that the common law of this country does not recognise any such rule in contracts of service as is suggested by the county court judge. On the contrary, those cases say, in my opinion quite clearly, that, under a contract of service, irrespective of the question of the length of notice provided by that contract, wages continue, through sickness and incapacity from sickness to do the work contracted for, until the contract is terminated by a notice by the employer in accordance with the terms of the contract."

The learned lord justice went on to refer to a number of cases, starting with *Cuckson* v. *Stones* (6) and *Warren* v. *Whittingham* (7), both of which were cases in which the employee had been engaged for a period of years and was none the less held entitled to receive his contractual salary during the period of illness so long as the contract was subsisting.

SCOTT, L.J. (8), then referred to *Niblett* v. *Midland Ry. Co.* (9) and said that the headnote in that case stated that:

> ". . . the plaintiff was a railway employee, who, upon entering the company's service '. . . signed an undertaking to abide by the rules of the company. One of these rules required him to join the railway company's friendly society, which was independent of the company, but to the funds of which the company contributed. By the rules of the society a member was entitled to sick pay during illness, but not if he was receiving wages from the company. The plaintiff became ill in February, 1905, and received sick pay until September, when he received notice terminating his employment.' It was held that he was not entitled to his wages during the period of his illness, on the ground that, having regard to the rules which had to be signed by an employee as a term of his contract of service, the rules must be read into the contract of service, and that, when so read in, they necessarily involved the implication of a term of the contract of service to the correlative effect of the rules of the society . . ."

It was there said that if it were impossible to say that the rules were part of the contract, they were to be read into the contract and, consequently, governed the position of the parties. So there was no necessity there to imply a term except that, having agreed to be bound by the rules, the plaintiff was so bound and must accept whatever the rules provide.

Then SCOTT, L.J., referred (10) to *Warburton* v. *Co-operative Wholesale Society, Ltd.* (11) and cited the headnote of that case:

(3) [1939] 1 All E.R. 745; [1939] 2 K.B. 187. (4) Viz., [1939] 2 K.B. 187.
(5) [1939] 1 All E.R. at p. 748; [1939] 2 K.B. at p. 198. (6) (1858), 1 E. & E. 248.
(7) (1902), 18 T.L.R. 508. (8) [1939] 1 All E.R. at p. 749; [1939] 2 K.B. at p. 199.
(9) (1907), 96 L.T. 462. (10) [1939] 1 All E.R. at p. 750; [1939] 2 K.B. at p. 201.
(11) [1917] 1 K.B. 663.

A " ' The fact that a workman stays away from work and receives compensation from his employers during temporary incapacity for work resulting from injury received by him during the course of his employment does not of itself terminate the employment, even though the contract of employment is merely at will.' "

B The learned lord justice then continued (12):

" This is one of the cases mentioned by the county court judge in his judgment, and no doubt he had that decision in mind when he held that the contract of employment was not terminated by the plaintiff's illness. In that case, where the workman was suing for wages, LORD COZENS-HARDY, M.R., said (13): ' It has been long settled that a contract of service is not terminC ated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence.' "

Those are the only passages from which I wish to cite in *Marrison* v. *Bell* (14). The next case to which I was referred was *Petrie* v. *MacFisheries, Ltd.* (15). That was a case of a smoker packer in the fish smoking department of the defendants' who was absent from his work owing to illness. I need not trouble a great D deal with the facts of the case, but there it was proved that the defendants had put up a notice in the plaintiff's work place. The plaintiff said that he had never seen it, but he had knowledge of the arrangement referred to in the notice and he had on two previous occasions in 1933 and 1936 been absent from work by reason of illness and had accepted half pay in accordance with the terms of the notice. When he was taken ill again in July, 1938, he took his half pay for five weeks and E did not return to work until January, and then he later commenced an action asking for full wages during the period of illness. I refer to that case only because of the passage from the judgment of DU PARCQ, L.J., which I think is helpful. He says this (16):

" I quite see, looking again at *Marrison* v. *Bell* (14), and looking at *Warburton* v. *Co-operative Wholesale Society, Ltd.* (17), which was there cited, that, F if a reader of the report confines his attention to one sentence, and reads it divorced from its context and without relation to the subject-matter, he may come to a wrong conclusion as to what *Marrison* v. *Bell* (14) decided. It is quite true that *Marrison* v. *Bell* (14) adopted and approved the observations of LORD COZENS-HARDY, M.R., in the *Warburton* case (17), which, when they were spoken by LORD COZENS-HARDY, M.R., were, I think, merely dicta, G and not binding upon the court. A single sentence was cited by SCOTT, L.J., from the judgment of LORD COZENS-HARDY, M.R., in *Warburton's* case (13): ' It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence . . .'. In citing that, SCOTT, L.J., pointed out what was perfectly true—namely, that H the words were unlimited and unqualified. It was quite right, if I may say so, to point out in *Marrison* v. *Bell* (14) that no qualification was introduced by LORD COZENS-HARDY, M.R., because, so far as *Marrison* v. *Bell* (14) was concerned, it was material to notice that no such qualification was introduced or suggested as would have prevented those words from applying to the particular facts of the case in *Marrison* v. *Bell* (14). I venture to say, with I great respect, that LORD COZENS-HARDY, M.R., said nothing inaccurate in that statement so long as it is read by somebody who does not expect to find in a short sentence a complete statement of the whole law. LORD COZENS-HARDY, M.R., was stating a general proposition which, for myself,

(12) [1939] 1 All E.R. at p. 751; [1939] 2 K.B. at p. 201.
(13) [1917] 1 K.B. at p. 665.
(14) [1939] 1 All E.R. 745; [1939] 2 K.B. 187.
(15) [1939] 4 All E.R. 281; [1940] 1 K.B. 258.
(16) [1939] 4 All E.R. at p. 287; [1940] 1 K.B. at p. 264. (17) [1917] 1 K.B. 663.

I believe to be accurate—namely, if one has a weekly hiring of the servant, without more, and with nothing in the terms of it, whether they are expressed or implied, to suggest that during temporary absence through illness he is not to be paid, then one may assume that he is to be paid, and that it was the intention of the parties that he should be paid."

Those words seem to me to be important. It is true that the learned lord justice goes on in the following sentence (18):

"I only hope that, in saying that, I have not said something which, again taken from its context, may lend colour to arguments which I certainly do not intend my words to support."

On the following page (19) the learned lord justice says this:

"The first thing to remember is that one must find out what the contract is. It is quite plain to anybody that LORD COZENS-HARDY, M.R., did not mean that every contract of service, whatever terms were contained in it, must result in a liability to pay a workman during the time when he is ill. The terms in the contract may be express or they may be implied. One may have a custom."

And so on. Then in the same case, ATKINSON, J., sitting in the Court of Appeal, said this at the conclusion of his judgment (20):

"In my opinion, SCOTT, L.J. (21), has not said anything inconsistent with that submission."

That is a submission which is referred to in the preceding paragraph. The learned judge goes on (20):

"It must be remembered that that passage followed a reference to what the county court judge had said. He had said: 'When off sick, in the absence of any express contract, no wages due.' I think that the court meant that the truer view was just the other way round, and that, where there is nothing in the contract, expressed or implied, to the contrary, the consideration for wages is not the actual doing of the work contracted for, but the readiness and willingness, if of ability, to do the work. If that view is right, the county court judge should have asked himself the comparatively simple question whether or not the terms upon which the plaintiff was employed in 1938 excluded the right to wages if, through illness, no work was done."

It is to that, so it seems to me, I have to apply my mind.

There is one other case to which I ought to refer, which is *O'Grady* v. *M. Saper, Ltd.* (22). I do not think that it is a very helpful case because the decision was one which could hardly have been other than what it was, and it was no doubt because of the unfortunate wording of the headnote in *Marrison* v. *Bell* (23) that the county court judge decided the case in the way he did. It was the case of a commissionaire who was receiving £3 a week and had been absent sick on a number of occasions. He had never been paid during the period of his sickness, and the defendants contended that the plaintiff was employed on the basis of pay when he was working, and when he ceased to work, through ill-health or for any other reason, he received no pay. The plaintiff, in substance, admitted that he never expected to be paid when he was not working, but he had seen what appears to have been a garbled report of *Marrison* v. *Bell* (24) in a popular paper which led him to go to his solicitors and start proceedings. No doubt he was delighted when he succeeded before the learned county court judge, and equally

(18) [1939] 4 All E.R. at p. 287; [1940] 1 K.B. at p. 265.
(19) [1939] 4 All E.R. at p. 288; [1940] 1 K.B. at p. 266.
(20) [1939] 4 All E.R. at p. 291; [1940] 1 K.B. at p. 270.
(21) Viz., in *Marrison* v. *Bell*, [1939] 1 All E.R. 745.
(22) [1940] 3 All E.R. 527; [1940] 2 K.B. 469.
(23) [1939] 2 K.B. 187.
(24) [1939] 1 All E R 745; [1939] 2 K.B. 187.

A disgusted when the defendants' appeal was allowed by the Court of Appeal. There was no question, however, that both parties knew, by the time when the plaintiff started his action, that the defendants never intended to pay during the period of sickness. The plaintiff knew that they did not intend to pay. That was clearly a case in which it was proper to imply a term which was well known to both parties, to which they would have both assented if it had been raised when B the contract was made. MACKINNON, L.J., in his judgment in that case, having criticised the headnote in *Marrison* v. *Bell* (25), said this (26):

> " The sort of contract which is involved is usually concluded orally by people who really do not think out, and still more do not express, any terms. The whole difficulty in such a case is to ascertain what in truth the terms of the contract were. Where the terms are not expressed, it may be that one C has to ascertain them as a matter of implication. In any case, it is a matter based upon the evidence in the case. What were the terms of the employment? Was it agreed that the man should be paid when he was ready and willing to work, or that he should be paid only when he was actually working? In this case, as it seems to me, there was abundant evidence that the terms, not expressed, but no doubt implied, upon which this man was employed D were that he should not be paid wages whilst he was sick."

Then the learned lord justice gave some further reasons for arriving at that conclusion, and went on (27):

> " ' If somebody had raised the question when they were originally making the bargain, what would they both have said about it?' In this case, what E they would both have said about it is best proved—and I think is conclusively proved—by what the parties did when the event arose. When the event arose and the employee was away ill, he was not paid. He acquiesced in that and, as he said, did not think that he ought to have his wages. He did not expect to get them . . . I come without hesitation to the conclusion that the terms of the contract between these parties was that the employee should be F paid, not during the period when he was ready and willing to work, but only during such period as he did work."

Having considered all these cases and the careful argument addressed to me by counsel, it seems to me that they establish the following proposition. Where the written terms of the contract of service are silent as to what is to happen in G regard to the employee's right to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court, in construing the written contract, will not accept any implied term which will not pass the test laid down by SCRUTTON, H L.J., in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (28), to which I have referred earlier in this judgment.

In my view, it is clear from the evidence in this case that if the matter had been mooted when the contract of service was made between the plaintiff and Mr. Saville, the situation envisaged by SCRUTTON, L.J., in the *Reigate* case (28), namely, that the plaintiff and Mr. Saville would at once have disagreed, would I have obtained. I am accordingly of the opinion that in this contract no implied term in regard to payment during the period of illness can properly be introduced at all. It follows, therefore, that on the authorities the defendants remain liable to pay the plaintiff from the time when he ceased work until the contract of service was determined.

---

(25) [1939] 2 K.B. 187. (26) [1940] 3 All E.R. at p. 529; [1940] 2 K.B. at p. 473.
(27) [1940] 3 All E.R. at p. 529; [1940] 2 K.B. at p. 474.
(28) [1918] 1 K.B. at p. 605.

As I have said earlier in this judgment, the defendants paid the plaintiff for the material period what I call his basic salary of £30 a week. All I have to determine is whether he is entitled to the £250 6s. 2d. which represents the appropriate amount of bonus during the period which he was away. Mr. Saville (29), who was for my purposes the defendant company, was at first insistent that the defendants had only paid the plaintiff his basic salary as an act of grace. But eventually he conceded that he recognised that the defendants were liable to pay the plaintiff both basic salary and bonus, but he limited his understanding of the matter to there being a legal liability to pay that for seven days. He agreed he was anxious to retain the plaintiff's services, and might have been prepared to pay him his basic salary for a longer period as an act of grace. This was clearly not the view which the plaintiff formed in regard to his rights, although he admitted that, when he entered into the contract of service, he had not the matter of payment during periods of sickness in his mind at all.

I propose to read one or two short passages from the plaintiff's and Mr. Saville's evidence. The plaintiff said:

> " I never thought about the question of illness at all when I took the job on. I always had good health, so I cannot tell you now what I might have had in mind as I never considered the matter at all."

That seems to me to be exactly what one would expect, and I accept that entirely from the plaintiff. Mr. Saville said this:

> " Although I had the point about payment during illness in mind at my interview with the plaintiff, I never broached it to him. I should consider the plaintiff legally entitled to his salary and his bonus if he were away for two or three days owing to illness. I would also have paid him his salary and bonus if he had been away a week. I agree that when we were making the contract neither the plaintiff nor I would have thought for a moment that the plaintiff was not entitled to salary and bonus if absent from work through illness for a week. If I broached the matter at our interview, I should have proposed that in the event of absence due to illness the plaintiff should be entitled to salary and bonus for one week only. I might quite easily have gone on paying him longer as an act of grace. Although I had the question of pay during illness in mind, I did not mention it to the plaintiff, as I thought I could dismiss the plaintiff on a week's notice. When the plaintiff fell ill, I thought I was entitled to give him a week's notice. He was, however, a very good man, and I wanted to keep him on the hook."

I think that was my expression, and not Mr. Saville's. Then we discussed the matter of the payment being as an act of grace, and so on, and I do not think that I need trouble about that. I rather doubt whether he had the matter so cut and dried in his mind when he was interviewing the plaintiff as he now feels that he did. I am satisfied that if he thought, nothing having been said about it, that this was the type of contract under which an employee could be given seven days' notice, he was wrong. The plaintiff here was earning, in total, something in the neighbourhood of £2,500 a year and had a very important and responsible job. Mr. Saville was wrong in what he thought, but that does not matter, except in so far as it may have influenced him in the length of time which he was prepared to pay the plaintiff while he was sick.

There are two letters in the correspondence to which I ought now to refer. On Jan. 19, 1957, the plaintiff was recovered from his illness—so he thought, and so he said. I am sure he said it honestly. He was invited round to Mr. Saville's office, and when he got there he was very upset, and why he was upset is set out in this letter.

> " Having now recovered from my illness, and upon calling at your request at your office this morning to discuss my return to the factory as factory

(29) The defendants' managing director.

A manager (as hitherto) I am amazed to find that during my enforced absence through illness, I have been replaced in my position by another, and that the conditions under which I would be permitted to return to the factory would be such as to be most degrading in respect of the position I held at the time I became ill. In the circumstances I must advise you that it is impossible for me to return to the factory under such conditions as this would place me B junior to a newcomer, and consequently I must advise that if this is your final word, then this letter be taken as my formal three months' notice of resignation, terminating my association with the company on Apr. 19 this year. Should you so desire, I shall be pleased to work out these three months at the factory in my original capacity or failing this I am prepared to terminate all association with the company forthwith and upon receipt of C salary in lieu of such notice up to above mentioned date. In closing I would remind you that holiday pay up to Apr. 19, this year will become due."

I will not trouble about that. On Jan. 23, 1957, Mr. Saville replied as follows:

"I am in receipt of your letter of the 19th instant. I do not propose to enter into a correspondence with you regarding either your past employ- D ment or your return to employment, except to say that none of your complaints have any foundation whatsoever, and you well know that to be so. The terms of your employment with us were such that only one week's notice of termination on either side was required. You have no right to give notice of termination to take effect on Apr. 19, next, and I do not accept your letter as any notice of that kind. I accept your letter as one week's notice, E and enclose herewith cheque value £60 2s."

That is made up of a number of items, the first of which is one week's pay to Jan. 22, 1957 "as an act of grace." That, so far as I know—because I accept what the plaintiff says—is the first intimation the plaintiff ever had that this weekly payment was being made as an act of grace to him.

I should also mention this. The plaintiff who had, at any rate during the earlier F part of his illness, been a very sick man, had accepted the £30 thinking, no doubt, that he was entitled to it, but had not suggested that he ought to have anything more by way of bonus. The plaintiff explained that in this fashion. He said: "I was ill. In the past I have very often only collected my bonus every couple of months. I had the material from which to calculate it, and the fact that I did not mention it does not mean that I did not think that I was entitled to it." If G that be material, I accept what he says. The plaintiff then put the matter in the hands of solicitors, and on Jan. 25, 1957, they wrote a long letter setting out the plaintiff's case. In that letter they said: "The calculation you have made in your letter of the 23rd instant is only upon the basic salary and does not take into account the bonus." If I may say so, the plaintiff's solicitors were quickly on to the point, whether or not it had been in the plaintiff's mind before that.

H I am satisfied in this case on the authorities that when the written contract is silent as to payment during absence through sickness, the employer must continue to pay his employee unless he, the employer, can satisfy the court that it is a case in which a term negativing the employee's right to remuneration can properly be implied, such an implied term being one which would satisfy the test laid down by SCRUTTON, L.J., in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (30). I On the admitted facts and the evidence in this case, it is reasonably clear that if the matter had been mooted when the contract was made, the plaintiff and Mr. Saville would at once have been in disagreement. It follows that no term can be implied and the defendants remain liable to pay the plaintiff until the contract of service is terminated. They paid his basic salary and, as I have already said, I am doubtful whether Mr. Saville really applied his mind to whether those payments were made as an act of grace or not. I am satisfied that the plaintiff,

(30) [1918] 1 K.B. at p. 605.

being a very sick man, did not apply his mind to the question whether he was entitled to bonus, at any rate until he went to see his solicitor. No doubt he hoped that he would get it, but he had not made any formal claim. These matters are not of any great importance once the legal rights of the parties are ascertained.

It was argued by junior counsel for the defendants rather attractively that a very clear distinction must be drawn between the plaintiff's legal right to his basic salary and his legal right to bonus. Counsel put it in this way. He said that the consideration for payment of the basic wage may be willingness or readiness to work, but the consideration of payment of bonus must be the work itself. He continued by saying that it might be that Mr. Saville realised that he was legally bound to pay the plaintiff his basic salary, but never dreamed that he might be legally bound to pay the bonus. Then he added, "The plaintiff did not apparently think that he was entitled to any bonus." Counsel argued that the bonus was an incentive to production and, consequently, if one was unable to work it was wrong that the bonus should be included in the wage one was entitled to recover whilst sick.

On the other hand, it was argued by counsel for the plaintiff that one could not differentiate between basic salary and bonus, and that what the plaintiff was entitled to recover was the remuneration which he had been receiving. Without going into the matter in any detail, the plaintiff's remuneration here was his basic salary and his bonus which, at the material time, was worth about £20 a week to him. That bonus depended on the number of garments sold, and that in turn depended on work which, in broad measure, was the work which had been done by the plaintiff over the preceding months in organising the equipment and the production from the new factory.

This is a very difficult point to determine, and it is the only point which I have to determine in the case; but it is impossible to understand it without having had the background. I put myself this question. It was at first mooted that the plaintiff should work for the defendants for a basic salary simpliciter, and it was then arranged that his remuneration should consist of salary plus bonus. I suppose it might well have been that Mr. Saville might have said to the plaintiff: "I know you are a good man. If you work well you will do extremely well out of this. I will give you a nominal salary and add larger bonuses", so that the plaintiff's remuneration really consisted of his bonus, and his salary would have been a matter of less importance.

Having given the matter the best attention that I can, and bearing in mind the argument of counsel for the defendants, I have come to the conclusion that what I have to consider here is what was the plaintiff's remuneration. His remuneration was somewhere in the neighbourhood of £50 a week. That was salary plus bonus, and the bonus ingredient is represented by the agreed sum of £250 6s. 2d. The realities of the situation, in my view, demand that the plaintiff should be paid during the absence due to sickness the full remuneration which he would have received so long as his contract of service subsisted. The result, therefore, is that in my view the plaintiff is entitled to recover the agreed sum of £250 6s. 2d.

Judgment for the plaintiff.

Solicitors: *Arnold & Co.* (for the plaintiff); *Osmond, Bard & Westbrook* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

MILLER *v.* MILLER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), May 30, 1960.]

Divorce—Maintenance—Wife—Registration of order in magistrates' court—Variation of rate of payments—Matters to be considered—Appeal to judge in chambers—Maintenance Orders Act, 1958 (6 & 7 *Eliz.* 2 *c.* 39), *s.* 4 (2) (*a*), *s.* 4 (7)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 61.

Magistrates—Husband and wife—Maintenance—Registration of High Court order—Variation by magistrates of rate of payments—Matters to be considered—Appeal to judge in chambers—Maintenance Orders Act, 1958 (6 & 7 *Eliz.* 2 *c.* 39), *s.* 4 (2) (*a*), *s.* 4 (7)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 61.

Where a maintenance order made in the High Court has been registered in a magistrates' court pursuant to the Maintenance Orders Act, 1958, s. 2, the discretion of the magistrates' court under s. 4 (2) (a) to vary the rate of payments under the order must be exercised on the principles that would be followed by the High Court, viz., regard must be had to all the circumstances of the case including any increase or decrease in the means of either of the parties to the marriage (see Matrimonial Causes Act, 1950, s. 28 (3), and p. 117, letters G and H, post).

On appeal under s. 4 (7) of the Act of 1958 from the decision of the magistrates' court of registration in such a case, the judge in chambers, by analogy with the Matrimonial Causes Rules, 1957, r. 61 (see p. 119, letter D, post), should approach the exercise of his discretionary jurisdiction to vary the rate of payments unfettered by any previous exercise of the like discretion by the court of registration, but giving to the previous exercise of discretion the weight that it deserves (see p. 118, letters G to I, and p. 119, letter B, post).

Evans v. *Bartlam* ([1937] 2 All E.R. at p. 648) applied.

In an undefended suit the wife obtained a decree of divorce on the ground of the husband's cruelty and was granted custody of the three children, who were born in 1943, 1945 and 1947. The registrar awarded the wife maintenance at the rate of £400 a year for herself and £104 a year for each child, less tax. The order for maintenance was registered under the Maintenance Orders Act, 1958, s. 2, in a magistrates' court. The husband applied to the magistrates' court for variation of the rate of payments substantially on the ground that the wife cohabited with one R., a married man. Change in the financial resources of the parties was not put forward as a ground for variation, but the wife's financial position had improved to the extent that she was now living rent-free (a saving of £2 15s. weekly, that being the amount formerly taken into consideration for rent) in a house owned by R. and that she accompanied him on holidays. The justices reduced the wife's rate of payments to £26 a year and gave as one of the reasons that it would be morally indefensible to expect the husband to maintain his ex-wife for the benefit of another man with whom she appeared to be living quite openly. On appeal by the wife,

Held: the fact that the wife was living openly in adultery was not of itself a ground for reducing the wife's rate of payments to a nominal amount, and in all the circumstances the proper order was to reduce the wife's rate of payment for her maintenance to £200 a year less tax.

Appeal allowed.

[Editorial Note. Emphasis is laid on the distinction between the jurisdiction to " vary any rate of payments " under s. 4 (2) (a) of the Maintenance Orders Act, 1958, and the jurisdiction to " vary or discharge " a maintenance order under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended; see p. 117, letter B, post.

As to registration of maintenance orders, see SUPPLEMENT to 12 HALSBURY'S LAWS (3rd Edn.) para. 880 A.

As to matters to be considered on applications for variation of maintenance orders, see 12 HALSBURY'S LAWS (3rd Edn.) 445, para. 1001; and for cases on the subject, see 27 DIGEST (Repl.) 623-625, *5823-5840*.

For the Matrimonial Causes Act, 1950, s. 28, see 29 HALSBURY'S STATUTES (2nd Edn.) 414.

For the Magistrates' Courts Act, 1952, s. 43, s. 53, see 32 HALSBURY'S STATUTES (2nd Edn.) 456, 463.

For the Maintenance Orders Act, 1958, s. 4, see 38 HALSBURY'S STATUTES (2nd Edn.) 458.

For the Matrimonial Causes Rules, 1957, s. 61, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 250.]

Cases referred to:

Bellenden (*formerly Satterthwaite*) v. *Satterthwaite*, [1948] 1 All E.R. 343; 27 Digest (Repl.) 624, *5835*.

Cooper v. *Cooper*, [1936] 2 All E.R. 542; 27 Digest (Repl.) 540, *4886*.

Evans v. *Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom. Bartlam* v. *Evans*, 157 L.T. 311; Digest Supp.

Perkins v. *Perkins*, [1938] 3 All E.R. 116; [1938] P. 210; 107 L.J.P. 115; 27 Digest (Repl.) 624, *5833*.

Wood v. *Wood*, [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 27 Digest (Repl.) 625, *5846*.

Summons adjourned into open court.

This was an appeal by the wife against an order of the Cullompton magistrates' court, Devon, dated Mar. 21, 1960, whereby the justices varied a maintenance order made by Mr. Registrar LIGERTWOOD, the Taunton District Registrar. The appeal was by summons to the judge in chambers and was adjourned into court for judgment.

R. F. G. Ormrod, Q.C., and *H. E. L. McCreery* for the wife.

N. J. Skelhorn, Q.C., and *J. H. Inskip* for the husband.

Cur. adv. vult.

May 30. **MARSHALL, J.,** read the following judgment: The appeal is brought under the terms of s. 4 of the Maintenance Orders Act, 1958. It is the first appeal of its kind to be heard and raises important points as to the principles which should govern the exercise by justices of the jurisdiction assigned to them by the Act.

Section 2 of the Act enables certain maintenance orders made by the High Court or a county court to be registered in a magistrates' court, and for certain maintenance orders made in a magistrates' court to be registered in the High Court. When an order is registered in accordance with the terms of s. 2, s. 3 (1), enacts that such registered order (whether registered in the High Court or the magistrates' court)

> " shall be enforceable in all respects as if it had been made by the court of registration and as if that court had had jurisdiction to make it . . ."

Section 4 gives power to magistrates' courts to vary the " rate of payments " under High Court or county court orders registered with them, but is silent on, and makes no provision for, the variation by the High Court of the rate of payments under magistrates' orders registered with it. By s. 4 (2) (a):

> " the court of registration may exercise the same jurisdiction to vary any rate of payments specified by a registered order . . . as is exercisable, apart from this subsection, by the original court."

By s. 4 (2) (b) the jurisdiction to vary a " rate of payments " when once an order is registered, and remains registered, can only be exercised by the court of registration or any other magistrates' court to which the jurisdiction conferred by s. 4 (2) (a) is extended by rules of court. There are two limitations to the jurisdiction conferred under this section on the court of registration: (i) If, at

A the time of the application to vary, one of the parties to the order is not present in England, the justices have no power to vary: s. 4 (2) (a). (ii) They have no power to increase the rate of payments beyond £5 per week (1) although they can reduce a greater rate of payments under the order, as registered, to a figure in excess of £5: s. 4 (3). If it is felt to be appropriate, by reason of these stated limitations or for any other reasons, the court must remit the application to the B original court who must then deal with it as if the order had not been registered (s. 4 (4)).

It is important to note that the power thus exercisable by the court of registration is confined to a power to vary the "rate of payments". It does not extend to a power to vary any other term embodied in the order. It has no power to revoke an order. If it is desired to vary any provision of the registered order C other than the rate of payments and if one of the parties at the time of the application is out of England the appropriate court to which application should be made is the court making the original order: s. 4 (5). The right of appeal under s. 4 is given by sub-s. (7) which is in the following terms:

> "Where a magistrates' court, in exercise of the jurisdiction conferred by sub-s. (2) of this section, varies or refuses to vary a registered order, an appeal D from the variation or refusal shall lie to the High Court; and so much of s. 63 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as requires an appeal from any court to the High Court to be heard and determined by a divisional court shall not apply to appeals under this subsection."

Section 5 sets out the terms under which the registration of any order may be E cancelled. On the facts of this case it is not necessary to make any detailed examination of its terms.

The course that this case took before the justices shows that it is necessary to stress the fact that the jurisdiction conferred on them under s. 4 of the Maintenance Orders Act, 1958, is a different jurisdiction from that which they exercise under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended. F Under the latter section their power is fundamentally different. It is wider. It is not confined merely to a variation of the rate of payments. It extends to a power to discharge an order altogether or to vary any of its terms. Subject to certain provisos it enjoins the justices to discharge an order made in favour of a wife on proof of her adultery.

Under s. 4 (2) (a) of the Maintenance Orders Act, 1958, they are to

G > "exercise the same jurisdiction to vary any rate of payments . . . as is exercisable . . . by the original court."

They must, therefore, act on the same principles and considerations as the High Court has to follow in exercising the same jurisdiction and which is governed by s. 19 to s. 29 of the Matrimonial Causes Act, 1950, and has often been explained in a number of decided cases. As the justices' jurisdiction is confined to a power H to vary the "rate of payments" particular attention should be called to s. 28 of the Matrimonial Causes Act, 1950, which deals with the High Court's powers to vary and discharge orders for alimony and maintenance, sub-s. (3) of which is in the following terms:

> "In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease I in the means of either of the parties to the marriage."

It is neither possible nor advisable to set out all the "circumstances" which have moved the High Court or should move it to vary maintenance orders. These are many and sometimes they are unusual and unexpected. Always the relative financial resources and the capacity and opportunity to earn of the parties must be taken into account. In the absence of a dum sola et casta clause a marriage of

(1) In the case of payments for the maintenance of a child the maximum is 30s. a week; Maintenance Orders Act, 1958, s. 4 (3) (b).

itself does not provide a ground for reducing a maintenance order; although it is a factor which must be taken into account when a court considers whether the fortune of a wife has increased thereby because the second husband is in the nature of a pecuniary asset to her. Also the re-marriage of a husband should be considered in the context of whether it has thereby decreased his resources (*Wood* v. *Wood* (2); *Perkins* v. *Perkins* (3); *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite* (4)). The conduct of the parties is another circumstance that falls to be considered. If a man so disregards his own duties to his wife as to drive her from home without any fault on her part and thereby to cause her to seek a divorce he should, consistent with his means, be called on to make some contribution towards maintaining her in reasonable comfort having regard to her age, health and position in society. If the wife by her conduct has contributed to the breakdown this also should be taken into account.

The mere fact that the wife after obtaining a maintenance order has had sexual intercourse with a single man, or committed adultery with a married man, does not of itself entitle a court to vary it by reducing it to a nominal figure. Such conduct should be taken into account and primarily be considered in the light of the difference which it makes in the relative financial position of the parties. If a divorced wife, who has re-married and has acquired from her second husband a right to be maintained, is still entitled to some support from her first husband, it follows that a divorced wife who lives with another man without going through a second ceremony of marriage and who, accordingly, acquires no such right to maintenance from that man, is not necessarily disentitled to maintenance from her husband without again considering the relative financial position of the parties. Where the maintenance order is in favour of a woman who is given the custody of the children, her obligation to the children might well make it necessary or advisable in the interests of the children to maintain a separate establishment in which they can be reasonably brought up. This is another circumstance to be kept in view. These are circumstances which often arise in these cases. There are many others—the overriding consideration to be borne in mind is that in considering such matters the justices are exercising a discretionary jurisdiction and their duty is to exercise it judicially according to the evidence and thereby to arrive at a decision that is reasonable and just between the parties.

I now have to consider the submissions made to me by counsel concerning my position and duty in considering this appeal. It was submitted to me by counsel for the wife that my position in this case is no different from that of any judge in chambers considering under the Matrimonial Causes Rules, 1957, r. 61, an appeal from an order for maintenance made by a registrar of the Divorce Division under the provisions of r. 51 and r. 52 of the Rules of 1957. In *Evans* v. *Bartlam* (5) LORD ATKIN clearly stated (6) how in such circumstances a judge should approach his duty.

> "I wish to state my conviction that, where there is a discretionary jurisdiction given to the court or a judge, the judge in chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper* v. *Cooper* (7), with which I entirely agree."

On the other hand counsel for the husband has submitted that as this is an appeal from justices which but for s. 4 (7) of the Maintenance Orders Act, 1958, would

(2) [1891] P. 272. (3) [1938] 3 All E.R. 116; [1938] P. 210.
(4) [1948] 1 All E.R. 343. (5) [1937] 2 All E.R. 646; [1937] A.C. 473.
(6) [1937] 2 All E.R. at p. 648; [1937] A.C. at p. 478. (7) [1936] 2 All E.R. 542.

have been heard by a Divisional Court of this Division I should exercise my jurisdiction in the same manner as a Divisional Court and approach my task as a Divisional Court exercising its appellate jurisdiction. In such a case my discretion is a more limited one governed by the terms of R.S.C., Ord. 59, r. 35, and my powers would be different.

I have come to the conclusion that the submission of counsel for the wife is right. The registration of maintenance orders in different courts as provided for in the Maintenance Orders Act, 1958, is designed to increase the convenience of, and reduce the costs to, litigants in the enforcement and variation of such orders as come within its terms. Within the limitations set out in s. 4 it gives to the justices the same jurisdiction as is exercised by the High Court and, as I have already stated, it should be exercised by applying the same considerations as the High Court. In the circumstances contemplated in s. 4 (4) the justices can remit the application to the original court, in which case where the original order was made by the High Court, it would fall to be dealt with by the registrar as if the order had not been registered. Any order of the registrar in these circumstances if appealed against would go under r. 61 of the Matrimonial Causes Rules, 1957, to the judge in chambers. It would be anomalous if an appeal from the justices direct under s. 4 (7) were to be heard and decided by a judge in chambers (8) as if he were exercising a Divisional Court jurisdiction.

I have come to the conclusion that the true view is that in exercising the jurisdiction given to them by s. 4 the justices are merely, for considerations of convenience, and saving of expense, acting in the place of the registrar and that any appeal from their decision should be dealt with by the judge in chambers (9) in the same way as orders of the registrar are dealt with in cases where there has been no registration in any other court. I am aware that justices can only act on oral evidence whereas before a registrar the evidence is presented by way of affidavit first and only orally thereafter on the registrar's order. These are procedural differences only which render more necessary the taking of a careful note of the evidence by the clerk to the justices so that a full and reliable note of the evidence is available to the judge at the hearing of the appeal.

I now turn to the facts of the case. The parties were married on Jan. 23, 1943, in Liverpool and finally set up the matrimonial home at 3, Kents Close, Uffculme, Devon. There are three children: William Richard born on Oct. 14, 1943, Carolyn Anne born on Apr. 25, 1945, and Pamela Joyce born on Apr. 13, 1947. On May 30, 1957, the wife filed her petition in the Taunton District Registry. It charged the husband with cruelty and in addition to her prayer that her marriage be dissolved she asked for custody of the three children, alimony pendente lite and permanent maintenance in respect of herself and the three children. On June 7, 1957, the husband entered an appearance and indicated that he did not intend to defend the action. He filed no answer. On July, 5, 1957, the husband filed an affidavit of means setting out his gross and net incomes for the years 1954 to 1957. Its accuracy was challenged by an affidavit by the wife dated Aug. 2, 1957. On this date she was living with the children at the home of her parents.

On Sept. 5, 1957, the case came before His Honour JUDGE PRATT sitting as a special commissioner at Exeter. He held that the wife had sufficiently proved the contents of her petition and pronounced a decree nisi and gave to the wife the custody of the three children, the husband to have access on agreed terms. On Sept. 17, 1957, an order was made for alimony pendente lite of £4 per week in respect of the wife and £2 per week less tax in respect of each of the three children of the marriage. On Dec. 10, 1957, the decree was made absolute.

On Jan. 2, 1958, the wife swore an affidavit of means which was filed the next day. In it she stated that she had moved on Dec. 21, 1957, to Springfield House,

(8) Appeal is to the judge by virtue of R.S.C., Ord. 41D, r. 3 (3); the appeal may be heard in chambers or in court (ibid.).

(9) As regards the procedure for appeal, see *Practice Direction*, [1960] 2 All E.R. 238.

Burgage, Wellington, paying £2 15s. per week for its use and occupation. She further stated that the house was only partly furnished and she was responsible for the internal decorations and the rates which amounted to £13 5s. 6d. for the half year. She also swore that since Dec. 16, 1957, the husband had failed to make any payment under the order of Sept. 17, 1957. On Jan. 9, 1958, the husband swore a new affidavit of means by which, inter alia, he put the wife to proof that she was paying £2 15s. per week or any sum in respect of the use and occupation of Springfield House, Burgage, and claimed that he was up to date in his payments under the previous order.

The matter of permanent maintenance came before Mr. Registrar LIGERTWOOD at Taunton on Jan. 14, 1958. He made an order for maintenance as from Jan. 9, 1958, during the joint lives of the parties in the following terms: (i) £400 per annum less tax payable monthly in respect of the wife. (ii) £104 per annum for each child less tax payable monthly. (iii) Petitioner's costs. There was no dum sola et casta clause in the order.

On Apr. 17, 1959, the wife made application under the Maintenance Orders Act, 1958, for the registration of the order of Jan. 14, 1958, in the Cullompton Magistrates' Court forwarding an affidavit dated Apr. 14, 1959, alleging that the husband was in arrear in his payments under the order. On Apr. 20, 1959, the High Court order was registered in the Cullompton Magistrates' Court. On Jan. 24, 1960, the husband took out a summons in the Cullompton Magistrates' Court asking that the rate of payments under the order be varied. The ground given was that the wife was cohabiting with a Mr. Radford. This was dismissed.

On Feb. 29, 1960, he issued a second summons asking that the order of Jan. 14, 1958, registered in the petty sessional division of Cullompton be " revoked or varied." The ground given was

> " that the [wife] has cohabited with Charles Radford of Bridge House, Bridge Street, Uffculme, Devon, being a married man whose wife is still living and whose marriage still subsists."

This summons is stated to be issued under s. 43 and s. 53 of the Magistrates' Courts Act, 1952. Section 53 is the section under which the justices are given power to " revoke, revive or vary " an order made in a magistrates' court. It will be seen, therefore, that the form of summons is appropriate to an application to discharge or vary an order under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended, on the ground of adultery. It raises no question of any alteration in the financial resources of the parties.

The case was heard by the justices on Mar. 21, 1960. I have been supplied with a copy of the notes of evidence given at the hearing on which they decided to reduce the annual payment to the wife to £26 per annum and the reasons on which they acted. The first reason given is that

> " they were satisfied that [the wife] had given birth to a still-born child on Feb. 17, 1960, of which her ex-husband was not the father and that Mr. Radford frequently spends the night with [the wife] at Springfield House, Burgage, Wellington, Somerset."

The evidence on both these points was exceptionally strong and no one could quarrel with the justices' findings on these points.

The second and third reasons show that the justices were alive to the fact that their powers in the case differed from those exercisable by virtue of the provisions of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. They do not show that they fully appreciated the differences in approach called for by the exercise of this new jurisdiction. There is for example no reference to any finding

A that since the making of the original order any changes in the financial positions of the husband and the wife had taken place.

The fifth and last reason given by the justices indicates the operative consideration which caused them to vary the wife's rate of payments to £26. It states:

> "We decided that it would be morally indefensible to expect [the husband] B to maintain his ex-wife for the benefit of another man with whom she appeared to be living quite openly. At the same time [the wife] has custody of the children and receives money for their maintenance. The children are sufficiently old that they do not constitute a perpetual tie restricting the wife's ability to seek employment if she wishes but on the other hand their presence means that she is not a completely free agent."

C This is coming dangerously close to acting as a court of morals and holding that to live in open adultery with another man is by itself a ground for varying the payment of maintenance to a nominal amount.

That is not the law and I have to address my mind to the evidence to see what was proved before the justices. Before doing so I must bear in mind that the husband did not defend the charge of cruelty, nor did he raise any counter D charge against her. This is, therefore, a case where the husband brought about the breakdown of this marriage and there is nothing to suggest that the wife by her conduct during marriage contributed to that breakdown. Any decision should therefore be based on the wife's conduct since the decree absolute and particularly on any change in the relative financial position of the parties since Mr. Registrar LIGERTWOOD made his order on Jan. 14, 1958.

E I have accordingly considered with anxious care the evidence laid before the justices and I am satisfied that it entitles me to come to the following conclusions: (i) There was no evidence whatever of any change in the husband's financial position. (ii) Having regard to the fact that no documentary evidence such as a rent book was produced to help establish that the wife occupied Springfield House, Burgage, as Mr. Radford's tenant; that in her affidavits sworn for the purpose of F the proceedings before the registrar she swore that the payment of £2 15s. per week was in respect of the " use and occupation " of Springfield House and finally to the fact that Mr. Radford in the course of an adulterous relationship spends many nights sleeping at the house I do not accept that any sum whether by way of rent or otherwise is paid by the wife to Mr. Radford. I believe the true position to be that the wife's financial position since the registrar made his order has now G improved to the extent of at least £2 15s. per week in that she occupies the house without payment. (iii) There is no evidence that Mr. Radford pays the wife any other allowance. That was his sworn testimony and he was called as a witness on behalf of the husband. Mr. Radford has a wife and home to keep. But there was evidence that the wife accompanied Mr. Radford on holidays. I think that it is H probable that in this and other respects the wife receives some financial benefits through her association with him although such benefits are irregular and limited. (iv) Although the wife may well have some earning capacity were she free to go out to work, with three children to look after and provide for I do not think that it is reasonable to expect her to do so in the present circumstances.

I have considered very carefully whether I ought not to send this case back to I the justices for reconsideration and if they thought proper to hear further evidence, or alternatively to call further evidence before me, and have decided that there is sufficient material for me to come to a decision and, in the circumstances, rather than put the parties to further expense I propose to deal with the matter on this appeal. Taking all the foregoing circumstances into account and also the fact that the wife has not acquired and cannot yet by marriage acquire a legal right to be maintained by Mr. Radford, I have come to the conclusion that the justices reduced the rate of payments in respect of her maintenance much

too drastically at this stage. It may be that later with further evidence the reduction could be justified and the husband still has a right to seek a further reduction if and when such evidence is available.

On the material before me I think that the just and reasonable order to make would be to halve the present maintenance rate in respect of the wife.

I accordingly allow her appeal and order that she be paid maintenance at the rate of £200 per annum less tax as from Mar. 21, 1960. The rates of payment in respect of the children, of course, remain unaltered.

Order accordingly.

Solicitors: *Jaques & Co.*, agents for *Clarke, Willmott & Clarke*, Wellington, Somerset (for the wife); *Pettit & Westlake*, agents for *Penny & Harward*, Tiverton (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re BLACK BOLT AND NUT ASSOCIATION OF GREAT BRITAIN'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Diplock, J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), May 23, 24, 25, 26, 27, 30, 31, July 15, 1960.]

Restrictive Trade Practices—Reference—Black Bolt and Nut Association of Great Britain—Minimum fixed price scheme—Discounts—Inter-trading between members—Obligation not to supply goods to government departments, railways, harbour boards or other large users at prices lower than lowest proposed quotation reported by any member to secretary of Association—Whether removal of restrictions would deny public substantial benefit—Whether restrictions reasonably required for purposes connected with maintenance of other restrictions accepted by parties—Restrictive Trade Practices Act, 1956 (4 *& 5 Eliz.* 2 *c.* 68), *s.* 21 (1) (*b*), (*g*).

For the requirements of s. 21 (1) (b) of the Restrictive Trade Practices Act, 1956, to be satisfied, it must be shown that, looking at all purchasers as a collective whole, they can be properly regarded as being denied specific and substantial benefits or advantages if the restriction were removed (see p. 138, letter A, post). It is sufficient to show that the removal of the restriction would deny specific and substantial benefits or advantages to members of the public in their capacity as purchasers, without taking into consideration what effect the removal of the restriction would have on members of the public in their capacity as consumers or as users, for that matter falls to be considered under the subsequent balancing provision of s. 21 (1) (see p. 137, letter F, post).

An association, on whom lies the onus of establishing the circumstances specified in s. 21 (1) (b), is entitled to choose the particular kind of goods in respect of which the association seeks to discharge that onus (see p. 137, letter B, post).

The Black Bolt and Nut Association of Great Britain had forty-four members who, between them, produced and supplied about ninety per cent. of the black bolts and nuts, carriage bolts and nuts and railway fastenings produced and supplied in the United Kingdom. These goods (hereinafter called " the fastenings "), were widely used in constructional and manufacturing industries where fastenings of high tensile strength were not required. They were produced in a very great variety of standard sizes (about three thousand) mainly to British Standards Specifications. In addition to

A the standard sizes, there was a demand for fastenings of shapes and dimensions differing slightly from the standard sizes. The great bulk of the demand was for use in industry, including building and construction, mining and railways, the fastenings reaching the ultimate user as components of some larger constructional or finished product. The quantity which reached the retail purchaser of nuts and bolts from the ironmonger's shop was very B small in comparison with the total production. The demand thus depended almost wholly on the general level of industrial and constructional activity. In general, the cost of the fastenings was a trivial element in the total cost of the final product of which they formed part and, accordingly, the demand responded scarcely at all to changes in the prices of fastenings. The first attempts to form an association of makers of black bolts and nuts dated from C the early years of the century, and the first effective price-fixing scheme was entered into between twenty-five members in 1933. Statutory control of the prices of fastenings was introduced in September, 1939, and continued until March, 1953. In January, 1954, a new price list (price list No. 3) (hereinafter called " the basic price list ") came into operation which contained fixed prices in shillings and pence per hundred units of a large number D of different types of fastenings. The prices quoted in the basic price list were not those actually charged, but formed the starting point from which the price to be charged by members of the Association on any particular scale was calculated from the basic price by the application of one or more of a number of discounts or plussages. The normal price was ascertained by applying a general discount on the price quoted in the basic price list E and was applicable to normal ordering quantities. For orders for smaller quantities there was a graduated tariff of discounts decreasing as the quantity of any particular standard product became smaller until, in the case of the smallest orders, it became reversed and became a plussage of five per cent. on the basic price. In the case of orders for large quantities of a single standard product, provision was made for a series of additional discounts F graduated according to the size of the order and the nature of the product. Quantity discount was allowed to user customers (that is, excluding merchants) who had purchased products to a minimum value from members of the Association during the previous year. No special discount was applicable to merchants as such, but merchants who qualified by a minimum holding of stock and minimum annual purchases from members of the Association G and entered into a stockholders' agreement, were termed " stockholders " and were entitled to a fixed discount on all purchases (restrictions 1, 5, 8 and 9). Inter-trading between the members of the Association was encouraged by an inter-trading discount (restriction 2). To this general price restriction scheme there was one exception. Sales to government departments, railways, harbour boards and other large users did not fall within it. On receipt of an H inquiry from any of these customers, a member was required to report to the secretary of the Association the price which he intended to quote. The lowest price for each item so reported by any member was circulated to all the members interested in quoting and became the minimum price which any member was entitled actually to quote for that item (restrictions 3, 4, 6 and 7).

The court was satisfied that the industry was an efficient industry; its I plant had been modernised and kept up to date as regards new methods of manufacture; and a high and uniform standard of product had been achieved and maintained. Profits had not been excessive and the uniform prices for fastenings had, since 1954, been reasonable. There had been an exceptional amount of co-operation between the members in the exchange of technical " know-how " and also a certain amount of joint research. The court was further satisfied that inter-trading had helped to keep the small manufacturer in business and enabled him to perform a useful service to users complementary to that of the large manufacturer.

On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the Association sought to support (i) the general price-fixing scheme (restriction 1) and the restriction relating to inter-trading sales between members (restriction 2) under s. 21 (1) (b) of the Act; (ii) the restrictions relating to sales to government departments, railways, harbour boards and other large users (restrictions 3, 4, 6 and 7) under either s. 21 (1) (b) or s. 21 (1) (g), and (iii) the restrictions relating to standard conditions of sale (restrictions 5, 8 and 9) under s. 21 (1) (g)†.

Held: (i) the court was satisfied of the circumstances mentioned in para. (b) or para. (g) of s. 21 (1) of the Restrictive Trade Practices Act, 1956 and was also satisfied of reasonableness within s. 21 (1) in relation to the following restrictions, viz., the general price-fixing scheme (restriction 1) and the restriction relating to inter-trading sales between members (restriction 2) but with the exception of the provisions for quantity discounts, and the restrictions relating to standard conditions of sale (restrictions 5, 8 and 9), which, accordingly, s. 20 (3) did not render void (see p. 140, letter D, post) for the following reasons:

(a) the saving in administrative costs to the purchasers whose purchases accounted for at least two-thirds of the home sales (i.e., the stockholders, medium-sized buyers and small buyers direct from the manufacturer) by the avoidance of having to " go shopping " (i.e., making many more inquiries before deciding on purchases: see p. 135, letter C, post) as a result of the general price-fixing scheme and the restriction relating to inter-trading sales between members was a specific and substantial benefit which would be denied to them under s. 21 (1) (b) if that scheme were removed (see p. 139, letter B, post); but, although the quantity discount provision was a specific advantage to the large buyer or a purchaser, it affected too small a proportion of the " public as purchasers " to be a substantial advantage to them as such (see p. 139, letter I, post) and thus the requirements of s. 21 (1) (b) were not satisfied in relation to the quantity discount provision which was deemed, therefore, to be contrary to the public interest.

---

* Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

" (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

† Section 21 (1), so far as relevant, provides: " For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . (g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the court not to be contrary to the public interest upon grounds other than those specified in this paragraph . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement . . . resulting or likely to result from the operation of the restriction ".

(b) the restrictions relating to standard conditions of sale were not unusual and were reasonably required for purposes connected with the general price restrictions and, therefore, in relation to these restrictions the circumstances set out in s. 21 (1) (g) were satisfied (see p. 140, letter A, post).

(c) the Association had also satisfied the court that (within the balancing provision of s. 21 (1)) these restrictions were not unreasonable, since the prices fixed by the Association since Jan. 1, 1954, had been reasonable, technical progress or improvements in efficiency in the industry had not been reduced or retarded, and, although the restrictions contained no express provisions as to the basis on which prices were to be fixed, the evidence showed that the Association had, since the abolition of price control, honestly and conscientiously endeavoured to change their fixed prices in accord with actual variations in cost, with a reasonable margin of profit, and it was likely that they would continue so to do (see p. 141, letter F, to p. 142, letter F, post).

(ii) the restrictions relating to sales to government departments, railways, harbour boards and other large users (restrictions 3, 4, 6 and 7) were deemed to be contrary to the public interest, since their removal would not deny to the public as purchasers, consumers or users any specific or substantial advantages within s. 21 (1) (b), and they were not reasonably required (within s. 21 (1) (g)) for purposes connected with the maintenance of any other valid restriction (see p. 140, letters B and C, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Cases referred to:

Blanket Manufacturers' Assocn.'s Agreement, Re, [1959] 2 All E.R. 1; [1959] 1 W.L.R. 442; *affd.* C.A., [1959] 2 All E.R. 630; [1959] 1 W.L.R. 1148.

Yarn Spinners' Agreement, Re, [1959] 1 All E.R. 299; L.R. 1 R.P. 118; [1959] 1 W.L.R. 154.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Black Bolt and Nut Association of Great Britain (hereinafter called " the Association "), and contained in the Association's constitution, list of members, price list No. 3, Carriage Bolts and Nuts Merchants' list, quantity discount scheme, list of user customers and in resolutions of the Association made pursuant to the constitution. By r. 2 of the constitution, the objects of the Association were:

" (a) To provide an organisation which will, through the fullest co-operation and support of all members, establish and maintain fundamental commercial and technical principles within the industry. (b) To afford a means whereby the industry may put forward, as a collective body, its views to government departments and other organisations. (c) To take all possible steps to ensure that the quality of the products offered is clearly specified and suitable for the particular application. To this end to tender mutual assistance on technical and production problems, and to make representations to government departments and other organisations on inspection, procedure, specifications, materials and kindred technical matters. (d) To take all necessary steps for the encouragement of greater efficiency in the industry. (e) To consider any matters of commercial and trade practice in the interest of the industry. (f) To collaborate with, or to be a member of, any other organisation. (g) To take any and all other steps to further the trade interests of its members."

The operations of the Association covered Great Britain and Northern Ireland. By r. 13, the central council of the Association, subject to the approval of a majority of the members present and voting in general meeting, made and issued

to all members from time to time regulations for the carrying out any or all of the Association's objects as defined in r. 2. By r. 32, the members, on joining the Association, bound themselves to observe the constitution. A

The facts are set out in the judgment of the court. The list of restrictions the subject of the references is set out at pp. 129, 130, post.

B. J. M. MacKenna, Q.C., and *W. Gumbell* for the Black Bolt and Nut Association of Great Britain. B

Peter Foster, Q.C., and *Arthur Bagnall* for the Registrar.

Cur. adv. vult.

July 15. **DIPLOCK, J.,** read the following judgment of the court: The Black Bolt and Nut Association of Great Britain, who are the respondents in this reference, has forty-four members who, between them, produce and supply C about ninety per cent. of the black bolts and nuts, carriage bolts and nuts and railway fastenings produced and supplied in the United Kingdom. These goods, which we shall refer to collectively as " the fastenings ", are widely used in constructional and manufacturing industries where fastenings of high tensile strength are not required. They are made of mild steel by cold forging and hot forging processes. The larger sizes can only be hot forged, which is the older D process; smaller sizes can be made by either process, cold forging being more economical and efficient where production in large quantity of a single size is called for. They are produced in a very great variety of standard sizes (namely, about three thousand) mainly to British Standard Specifications. In addition to the standard sizes, there is a demand for fastenings of shapes or dimensions differing slightly from the standard sizes which are known as " Off Standard " E Specials, and also for fastenings, generally larger, which cannot be related to standard products, which are known as " Out and Out " Specials. The great bulk of the demand is for use in industry, including building and construction, mining and railways, the fastenings reaching the ultimate user as components of some larger construction or finished product. The quantity which reaches the retail purchaser of nuts and bolts from the ironmonger's shop is trivial in relation F to the total production. The demand is thus a " derived " demand, depending almost wholly on the general level of industrial and constructional activity. In general, the cost of the fastenings is a trivial element in the total cost of the final product of which they form part, and, even in constructional steelwork, where the evidence was that the proportionate cost of black bolts and nuts is highest, it is only of the order of five per cent. In most products in which the fastenings are G used, it is less than this. Accordingly, the demand responds scarcely at all to changes in prices of the fastenings. Short of price changes sufficiently large to lead to substitution of other types of fastenings for black bolts and nuts or vice versa, a reduction of price is unlikely to increase the total demand for the product, and an increase in price is unlikely to reduce the total demand. The gross annual value of home trade sales in 1959 was some £12,500,000; that of export sales H about £1,000,000.

The requirements of individual industrial purchasers of the fastenings vary widely. Some may require a small quantity of a great variety of sizes, including " Off Standard " and " Out and Out " Specials; others large quantities of each of a lesser number of standard sizes. Promptness and certainty of delivery may be vital in constructional work or where the manufacture or installation of valu- I able machines may be held up for the want of a few pounds' worth of nuts and bolts. About twenty-six per cent. of the home trade passes through the hands of stockholding merchants, the bulk balance being sold direct by members of the Association to the industrial user. The nature of the demand and the importance of prompt delivery make it essential that the fastenings should be produced and stocked in a very large variety of sizes.

Of the forty-four members of the Association, more than half have very small works, and in the years 1954 to 1956 (which are the last years for which figures

A are available) between them supplied less than 7½ per cent. of the total quantity of the fastenings produced by the members of the Association as a whole. At the other end of the scale, the largest member supplied over twenty-six per cent. of the whole, and the three next largest a little under thirty per cent. In general, the larger works are best suited to supply economically large orders for standard sizes of black bolts and nuts, particularly the smaller sizes produced by the B cold forging process involving " long runs ", while the smaller works are better suited for supplying fastenings, particularly " Off Standard " and " Out and Out " Specials, which are required in relatively small batches at a time.

The first attempts to form an Association of makers of black bolts and nuts date from the early years of the century, but little was achieved. The Association was re-formed in 1924, but the trade was shortly overtaken by the general C industrial depression, and from then until the early thirties conditions in the trade were very bad. Demand, being dependent on the general level of industrial activity in the United Kingdom, was low; imports of low-priced fastenings were substantial, wages were depressed and short-time working common, profits small or non-existent, and fresh capital investment in the industry minimal. Competition for the orders available was intense, and the standard of the product D was variable and often low. It was in these circumstances that, in July, 1933, the first effective price-fixing agreement was entered into, when twenty-five members representing an estimated ninety-one per cent. of the production agreed to charge not less than the minimum prices and to adhere to the regulations and terms as and when fixed by the Association from time to time. In the later thirties up to the outbreak of war, there was a continuous and progressive improvement in E the prosperity of the industry, its manufacturing methods and the quality of the products. It has been urged on behalf of the Association not only that this was the consequence of the price-fixing agreement's restoring confidence and order to the trade, but also that the abolition of the price-fixing agreement would result in a reversion to the conditions of the late twenties and early thirties. We do not accept either of these contentions. The price-fixing agreement followed F on the abandonment by the United Kingdom of the gold standard and the imposition on black bolts and nuts of import duties which were further increased in August, 1934. It coincided with the beginning of the general improvement in industrial activity in this country. There were far too many factors involved to enable us to form a view whether or not any part of the improvement in the industry was due to the inauguration and observance of the price agreement G before the war. Furthermore, the economic climate today is so different from that of thirty years ago that the state of the industry in the absence of a price agreement in the 1920s and early 1930s is, in our view, no guide at all as to what would be the consequences of abolishing the price agreement today.

Statutory control of the prices of the fastenings was introduced on Sept. 1, 1939, and continued until March, 1953. The Association's minimum prices H (which were then on a weight basis) were initially adopted as the statutory maximum prices. In 1943, after discussions with the Ministry of Supply, a price list on a count basis (that is, " per 100 ") was issued, and this, with minor amendments as to form and lay-out in 1950, remained operative as the basic price list throughout the rest of the period of control. After the end of statutory price control, a new price list, known as price list No. 3, was prepared and came into I operation on Jan. 1, 1954. It contains fixed prices in shillings and pence per hundred units of a large number of different types of fastenings, each type being specified and priced in different standard sizes, the number of which in some cases exceeds three hundred for a single type of black bolt. The majority are described by the appropriate British Standards Specification, but for some types which include carriage bolts and nuts there is no British Standards Specification. The fixed prices which are set out in price list No. 3 we shall refer to as " the basic price list ". The prices quoted in the basic price list are not those actually charged, but form the starting point from which the price to be charged by members of the

Association on any particular sale is to be calculated. The basic price list for black bolts and nuts, which account for eighty-eight per cent. of the total trade in the fastenings produced by members of the Association, was based on costings in a manner to which we shall refer later, and was intended to be double the actual prices proposed to be charged on ordinary industrial sales when it came into operation on Jan. 1, 1954. The actual price appropriate to any particular sale is calculated from the basic price by the application of one or more of a number of discounts or plussages. What we may conveniently call the normal price is ascertained by applying a general discount to the price quoted in the basic price list. The general discount when the price list was introduced was 51¼ per cent. in respect of all standard products. It underwent a series of changes between 1954 and 1958, but for the past two years has remained static. The normal price is applicable to normal ordering quantities; for orders for smaller quantities there is a graduated tariff of discounts decreasing as the quantity of any particular standard product becomes smaller until, in the case of the smallest orders, it is reversed and becomes a plussage of five per cent. on the basic price. Similarly, in the case of orders for large quantities of a single standard product, provision is made for a series of additional discounts (which we will call " Large Order discounts ") graduated according to the size of the order and the nature of the product. The large order discount is calculated not on the price in the basic price list but on the normal price and rises to as much as fifteen per cent. on orders for half a million or more of a single size of some widely used products.

Apart from the variation of discounts according to the quantity of a particular product ordered, price list No. 3 provides for discounts of other kinds. What the Association calls quantity discount is allowed to user customers (that is, excluding merchants) who have purchased products to a minimum value from members of the Association during the previous year. The aggregate of the purchases made by the customer from all members of the Association is taken into account in assessing his qualification for the quantity discount, which at present ranges from 1¼ per cent. in the case of a customer whose previous year's purchases were not less than £25,000 to five per cent. if such purchases were not less than £250,000. The quantity discount is calculated on normal prices. No special discount is applicable to merchants as such, but merchants who qualify by a minimum holding of stock and minimum annual purchases from members of the Association and enter into an agreement, called the Stockholders Agreement, are termed " Stockholders " and are entitled to a fixed discount on all purchases. This is fixed at five per cent. for stockholders whose stock is £750 and annual purchases £2,500 and at 7½ per cent. for stockholders whose stock is £2,500 or more and annual purchases are £5,000 or more. The Stockholders Agreement does not require the stockholder to limit his purchases of the fastenings to members of the Association, nor does it compel him to charge on re-sale the prices fixed by the Association in price list No. 3. In practice, however, stockholders do sell only at the Association's fixed prices, since, even if their margin of profit (which is small) permitted, they would be naturally hesitant to endanger their relationship with their suppliers by under-cutting them. Moreover, price list No. 3 is available to their customers, so that only rarely would they be likely to find a market at prices higher than those fixed by the Association's price list. The latter consideration is accentuated by the prevalence of inter-trading between members of the Association encouraged by an inter-trading discount. No manufacturer, not even the largest, makes all varieties and sizes of the fastenings and it is the practice, introduced as long ago as 1945, for members to acquire from other members such types or sizes of the fastenings ordered from them by their own customers as they cannot conveniently or economically manufacture themselves. To all such inter-trading purchases, a minimum inter-trading discount of 7½ per cent. applies, and a resolution of Oct. 10, 1945, provides, inter alia, that members who supply goods on inter-trading terms should give at least as much consideration to a purchasing member as regards deliveries as they give

A to their other customers. The general pattern of inter-trading is between the larger and the smaller manufacturers, arising from their respective capabilities for producing large quantities of standard sizes in wide demand and lesser quantities of standard sizes for which the demand is relatively small or of " Off Standard " Specials or " Out and Out " Specials. Inter-trading thus enables the large manufacturer to fulfil his orders completely by sub-contracting that part of them B which calls for small quantities of unusual sizes, and the small manufacturer to accept orders for standard sizes in large demand which it is more economical for him to acquire from the large manufacturer at the inter-trading discount of 7½ per cent. than to manufacture himself.

The prices for all standard products are fixed prices ascertained by applying the appropriate discount or discounts or occasionally plussages to the prices C quoted in the basic price list which also lays down certain standard conditions of sale. The price list is widely circulated to stockholders and to potential industrial purchasers and the prices are thus well known to those who have regular requirements. In the case of " Off Standard " Specials, however, the prices are not fixed prices but minimum prices based on the quoted fixed price of the comparable standard article. In the case of " Out and Out " Specials, the price is freely D negotiated between the customer and the manufacturer.

A basic price list for carriage bolts and nuts, which account for only five per cent. of the total home trade, is included in price list No. 3 and is known as the " 8s. 1d. List ". It was settled as long ago as the 1930s and is not based on costings. A similar system of discounts and plussages is adopted for ascertaining the fixed prices of these products, but, owing to the earlier date and different E origin of the " 8s. 1d. List ", the discounts and plussages applicable are not the same as those applicable to the basic price list for ordinary black bolts and nuts. There is, however, one exception to the general price restriction scheme. Sales to government departments, railways, harbour boards and other large users do not fall within it. On receipt of an inquiry from any of these customers, a member is required to report to the secretary of the Association the price which F he intends to quote. The lowest price for each item so reported by any member is circulated to all the members interested in quoting and becomes the minimum price which any member is entitled actually to quote for that item.

The actual terms of the restrictions referred to this court by the Registrar are as follows:

G " Each of the members of the Black Bolt and Nut Association of Great Britain agree with every other member:

" Restriction No.

" 1. Save in respect of supplies delivered to any member's works and save in respect of supplies (other than supplies to meet day to day requirements) to government departments, railways, harbour boards and other large users not to offer or supply goods (1) save at or, as the case may be, save at a H price equal to or exceeding the price set out in or ascertainable from the registered price list No. 3 as appropriate to the transaction.

" 2. Not to offer or supply goods delivered to another member's works at a price exceeding the price set out in or ascertainable from the registered price list No. 3 as in other respects appropriate to the transaction less 7½ per cent. thereof.

I " 3. Not to supply goods to government departments, railways, harbour boards and other large users in response to inquiries other than inquiries for day to day requirements without first reporting receipt of the inquiry to the secretary.

" 4. Not to supply goods to government departments, railways, harbour

(1) By r. 30 of the constitution, " goods " refers to black iron and steel bolts, nuts, set screws, coach screws, washers and the like which fall within the scope of the Association.

boards and other large users in response to inquiries (other than inquiries for day to day requirements) at a price lower than that notified to him by the secretaries as the minimum price therefor.

" 5. Save in respect of supplies to government departments not to supply goods save on or subject to terms or conditions including the following terms: (i) a term in the words—' This quotation/tender or order/contract is made/accepted on the understanding that goods will be charged at the prices ruling at the date of despatch or at the date on which the goods are inspected (where inspection is normally made) and approved at the maker's works by the purchaser '. (ii) A term in the words—' No guarantee or warranty as to the rate of delivery or time of delivery is given or implied '. (iii) A term in the words—' Schedule orders may be arranged on the understanding that delivery will be spread over a period in accordance with schedules accepted by the purchaser but attention is drawn to the fact that the customer is liable to pay the price of the complete order and cancellation of delivery instructions does not reduce such liability '. (iv) A term in the words—' No claim shall be accepted for shortages or non-delivery of any part of a consignment unless such shortages or non-delivery is reported to the consignor within the given period from the date of the advice note required by the carriers '. (v) A term in the words—' Claims for defective material or workmanship should be notified to the consignor as soon as possible after date of delivery '.

" 6. Not to supply goods to government departments: (a) on terms providing for a firm price save where the member is in a position to deliver within six months and the tender has been accepted in twenty-eight days. (b) Save as aforesaid, not to supply goods to government departments save on or subject to terms and conditions including a term in the words ' this quotation is made on the understanding that the goods will be charged at prices ruling at the date of despatch or at the date on which the customer is advised that the goods are ready for despatch ', or, in the case of supplies to the Ministry of Supply only, a term reserving to the department the right to amend the contract prices in accordance with any changes which may be agreed from the current price investigation between the department and the trade association.

" 7. Save as indicated in restriction No. 6 herein, and save where and in so far as the Standard Conditions of Government Contracts for Stores Purchases are adopted and otherwise provide, not to supply goods to government departments save on the terms set out at para. (i) to para. (v) inclusive of restriction No. 5 herein.

" 8. Not to supply goods save on or subject to the terms and conditions in respect of carriage set out at reg. 3 and in the 8s. 1d. list forming part of the registered price list No. 3.

" 9. Not to supply goods packed otherwise than in accordance with the standard packing described in reg. 5 and reg. 41 and the relevant price operative sheets of the registered price list No. 3 save at a price increased by the charges therein set out as appropriate to the transaction."

Restrictions 1, 5, 8 and 9 relate to ordinary sales of black bolts and nuts and carriage bolts and nuts to consumers or stockholders. Restrictions 3 and 4 relate to sales to government departments, railways, harbour boards and other large users. Restrictions 6 and 7 relate to sales to government departments only; and restriction 2 relates to inter-trading sales between members. So far as ordinary sales of black bolts and nuts to consumers or stockholders are concerned, the dominant restriction is No. 1, Nos. 5, 8 and 9 being ancillary to it. It is important to note that it contains no provision as to the way in which the prices set out in price list No. 3 are to be fixed by the Association. So far as the constitution of the Association is concerned, the General Council, subject to the approval of the majority of the members in general meeting, have carte blanche to

A fix prices and terms and conditions of sale as they think fit. There is no express requirement that the prices so fixed from time to time should bear any relation to costs of production or any other factor. There have, in fact, been numerous changes of one kind or another in the prices set out in or ascertainable from price list No. 3 since it was introduced on Jan. 1, 1954. The basic prices of some items have been altered. The general discount, by application of which to the B basic prices the normal price of black bolts and nuts is ascertained, was altered on ten occasions between Jan. 1, 1954, and Apr. 14, 1958, but has remained unchanged since that date. The general discount applicable to carriage bolts and nuts was altered on seven occasions, the last of which was on June 1, 1959. The quantity discount was introduced on Sept. 15, 1954, and extended on Aug. 3, 1958. The large order discount was introduced on June 4, 1958, and extended on three C subsequent occasions, of which the last was on Oct. 19, 1959. The discount to stockholders has been amended on six occasions.

The absence of any express provision as to the manner in which prices are to be fixed makes it necessary to examine the procedure and policy which have, in fact, been adopted by the Association in arriving at the original basic price list and the subsequent changes in that and in the various discounts. The starting D point for the basic price list of black bolts and nuts was a series of costings supplied in 1953 by eleven members of the Association for about one hundred different products. These costings were returned on the following basis: (a) the normal level of activity (seventy-five per cent.) which was pre-determined by the central council; (b) the cost of materials, assessed by the accounting and costs committee in relation to the materials required to produce bolts and nuts to E British Standard Specification; (c) conversion costs based on individual members' machine rates or piecework rates and their assessment of output for economic batch quantities. The number of costings produced by each of these eleven members varied considerably, one member producing costings for as many as eighty-six items and at the other extreme one produced costings for no more than four items. In general, a straight average was taken of all the costings available F in respect of each item, although, in some cases, costings of individual members were omitted where they appeared to be out of scale. Nevertheless, the returns included in the average showed a wide variation of costs between different members on individual items. Furthermore, in respect of a considerable number of items, no more than three, and in some cases only two, returns were available. It was intended to provide a profit margin of ten per cent. of the selling price on G the items in commonest production, rising by steps of $2\frac{1}{2}$ per cent. to twenty per cent. on items in infrequent use, and the resulting figure was to be doubled to give the basic price to which a general discount of fifty per cent. was intended initially to be applied. The prices of the many hundreds of other sizes and types for which no costing returns had been made were to be fixed by interpolation from those of the items for which costings had been ascertained.

H The strict adoption of the ascertained straight average costs for particular items and adding the prescribed profit margin would have resulted in a price list for those items for which costing returns were available, which would have shown no orderly progression in price with increasing length or diameter of items otherwise similar and would have made the process of interpolation to fix the prices of other sizes and types impossible. Accordingly, very considerable I adjustments were, in fact, made to the arithmetical results of adding the prescribed profit margin to the ascertained straight average cost. In the result, a basic price list was produced which showed an orderly progression in prices with increasing diameter and increasing length but, save that the costings returned by the eleven members provided the starting point for the build-up of the price list in the way in which we have described, it cannot be said that the actual prices which finally appeared in the basic price list bore, in the case of any particular item, any definable relationship to the average costs of making it. In some

cases, indeed, ad hoc alterations were made at the eleventh hour on the representations of certain members unsupported by any costing data at all. A

Although the original basic price list was designed to be introduced with a general discount of fifty per cent., the various adjustments resulted in the prices as a whole being slightly higher than was intended and the price list No. 3 was introduced on Jan. 1, 1954, at a general discount of 51¼ per cent. As already stated, between that date and Apr. 5, 1958, there were ten reductions in the general discount, each of which followed on changes in manufacturing or other costs as a result of increases in the cost of raw material, wages, freight or other relevant items. The current general discount is 36¼ per cent. for all items except bolts and nuts of over ½ in. but under 1 in. diameter, for which the general discount is thirty-five per cent. The successive alterations in the general discount were not supported by any comprehensive costings from members, although there was a general costing investigation in 1955 in which nine members submitted costings on the same basis as those which formed the starting point for the basic price list in 1953. The Association's witnesses did not appear very clear as to the material on which the successive decisions as to the amount by which the general discount should be varied were based, but some of the larger manufacturers at least maintained adequate costings systems at their works, and it would appear that these were the main sources of information from which the decisions of the Association as to general increases in prices, by reduction of the general discount, were derived. Alterations in the general discount did not, however, represent the only changes affecting the prices of the fastenings. The basic price list itself was changed as respects the longer length bolts (that is, above 4 in. in length) in 1956, the price being increased by about 2½ per cent., while in 1959 there was a general reduction in the basic prices of small cold forged nuts as the result of the introduction of a more efficient process. The special discounts, namely, the quantity discount, the large order discount and the stockholders' discount, have also been changed from time to time and, since these variations have resulted in larger discounts, they have counteracted to some extent the effect of the increases in the normal price on purchasers of the classes to which these special discounts apply.

B C D E F

Carriage bolts and nuts, as already mentioned, constitute an exception to the general method by which the prices have been fixed. For historical reasons, the price list is based on what is known as the 8s. 1d. list. This was introduced in the 1930s when the trade was almost exclusively in United States' hands, 8s. 1d. representing the then sterling equivalent of $2, which was the price per gross of the cheapest item sold by the United States' manufacturers. This list still survives as the basic price list for carriage bolts and nuts, although it is now priced per hundred instead of per gross. Separate discounts and plussages are applicable to the 8s. 1d. list and are adjusted from time to time in the same way as in the case of ordinary black bolts and nuts. Only a few members manufacture carriage bolts and nuts, and a predominant share of the trade is in the hands of one member.

G H

The method of fixing prices adopted by the Association is open to obvious objections in principle and in detail. If the proof of the pudding were in the recipe, one would expect consumers to find it an unpalatable comestible. It is significant, however, that not only has there been no evidence of consumers being dissatisfied with the prices charged either generally or in relation to any particular item, but the Registrar's witnesses have not contended that the prices have been unreasonable, and all consumers and stockholders called have expressed their satisfaction with the prices and with the price-fixing scheme. It is common ground that the profits made by the industry, whether based on turnover or the return on capital employed, have certainly not been excessive. Whatever the objections to the method adopted in arriving at the fixed prices, it has, in fact, resulted in prices which are not unreasonable, which appear to have given general satisfaction to the consumer and which do not result in any profit to the members

I

A of the Association which is unreasonable. We are satisfied on the evidence that the industry is now an efficient industry. Although sheltered for twenty-seven years from the stimulating breezes of price competition, its plant has been modernised and kept up to date as regards new methods of manufacture. Furthermore, a high and uniform standard of product has been achieved and maintained so that users in practice have such confidence in the quality of the fastenings B manufactured by members of the Association that they habitually use them without any further testing, although undiscovered defects might well endanger the stability of the valuable structures or the efficiency of the valuable machines of which they form an inexpensive but vital part. Counsel for the Association, contrasting the present situation in this respect with that which existed before 1933 when plant was obsolete and standards variable and low, has contended that C the improvements in these respects are due to the price-fixing agreement. We are not satisfied of this. The price agreement in 1933 may well have made a contribution to stability and confidence in an industry which, like many others on whose prosperity it was dependent, had passed through hard times in the late twenties and early thirties. We do not believe, however, that, in the war-time and post-war years, the absence of a price agreement would have deterred D the larger manufacturers at any rate from modernising their plant or achieving and maintaining the high standard of their products, nor are we satisfied that price competition would have resulted in any widespread lowering of standards. The most commonly used fastenings are sold to British Standards Specification which, on the evidence, appears to be adequate for the purposes for which the fastenings are used. It may well be that some manufacturers would attempt E to increase their turnover by reducing prices and might be tempted to cut costs by running their plant for unduly long periods before re-tooling or by economising on inspection or control with a consequent reduction in standards, but such a policy would, we think, have defeated itself in an industry whose output forms a component of relatively small value in the finished products in which it is used, and where maintenance of a high standard is essential to their F safety and utility. It is, however, right to observe that the mere existence of such a danger might make it necessary for the consumer to make a practice of testing for himself before using fastenings purchased from a manufacturer on whose standards experience had not already shown him he could unhesitatingly rely.

It has also been contended on behalf of the Association that the price-fixing G agreement has resulted in a spirit of co-operation in the industry manifested in the exchange of technical information, joint research and in particular inter-trading. The evidence has shown an exceptional amount of co-operation between the members, and there seems no doubt that there is a free exchange of technical " know-how " which has enabled the smaller members in particular to improve their efficiency; there has also been a certain amount of joint research. We think H that it is right to say that co-operation of this kind has been fostered by the absence of price competition, since it is only human nature to be more reluctant to impart " know-how " to a competitor who may use it to undercut one's own prices and take away one's own customers than to a competitor who can only use it to benefit himself and his product.

Inter-trading raises other considerations. As has been already indicated, I the larger and smaller manufacturers fulfil functions that are to some extent complementary. While the large manufacturer can in general produce most economically standard fastenings in common demand which make possible the use of costly equipment and the enjoyment of " long runs ", the smaller manufacturer's works are better adapted to short runs of the less commonly needed and, in particular, the large fastenings, " Off Standard " Specials and " Out and Out " Specials. Orders from consumers are frequently for a variety of different sizes of the fastenings in widely varying quantities, and it is common for even the largest manufacturers to obtain particular items included in a single

order from smaller manufacturers on inter-trading terms. The smaller manufacturers themselves engage in a considerable amount of inter-trading; one witness stated that as much as thirty-six per cent. of his sales to his customers were of products he himself acquired from other members on inter-trading terms. In addition to avoiding uneconomical use of plant, this practice is helpful to consumers and stockholders because they can place orders for all their requirements with one or a few manufacturers. The volume of inter-trading has recently increased as a result of the introduction by the co-operative negotiations of the Association of a new type of machine for cold-forging a range of nuts which has been installed by some large manufacturers. This has rendered obsolescent the older processes used by the smaller manufacturers, who now purchase their requirements on inter-trading terms from manufacturers owning the new machine, who are thereby enabled to use the machine more economically on " longer runs".

Restriction No. 2 and the complementary resolution about the consideration to be given to inter-trading purchasers as respects advantageous delivery have, we think, undoubtedly fostered inter-trading. No doubt, without that restriction and resolution and without the price-fixing scheme, some inter-trading would continue, for it is a two-way traffic of advantage to both the large manufacturer and the small; but we think it is probable that the volume of inter-trading would diminish if the restrictions were abolished because a separate bargain as respects price and delivery would have to be made whenever one manufacturer sought to sub-contract with another. In times of high demand it would be risky for a manufacturer to accept an order which included items which he was not in a position to manufacture himself until he had made inquiries as to the possibility of sub-contracting for those items at a suitable price and date of delivery. It is his knowledge that all members are willing to supply him with available items on inter-trading terms and to give him as much consideration as respects delivery as they give to their own customers that gives him confidence to accept such orders under the present system. Inter-trading under the Association's scheme has, we are satisfied, helped to keep the small manufacturer in business and enabled him to perform a useful service to users complementary to that of the large manufacturer.

The greatest emphasis has, however, been placed by the Association on the advantage of " stability of prices " in this particular trade. This imprecise phrase is here used by them to indicate that, as a result of the restrictions: (i) a uniform price for each of the products is charged by all members of the Association; (ii) that uniform price is in practice varied only in response to changes in costs of production and distribution; and (iii) the uniform price is a reasonable price. We have already indicated our finding that the uniform prices for the fastenings have, since 1954, been reasonable, in the sense that they have resulted in no more than a reasonable return on turnover and capital employed in the industry, and that the industry is efficiently run. No consumer has complained that the prices have been too high, and the Registrar does not so contend. It is on the advantage or detriment of elements (i) and (ii) that issue has been joined.

Certain special features of this trade, which we have already mentioned, are claimed by the Association to make it one in which uniformity of price is particularly beneficial to purchasers. (a) All but a very small amount of the fastenings are purchased for use in constructional or manufacturing industry as components of finished products of whose total cost the cost of the fastenings forms only a trivial proportion. (b) The demand is dependent on the general level of constructional and industrial activity and is not responsive to changes in price. (c) The fastenings are required in several thousand different sizes and shapes, and single orders by individual users may call for a great variety of different fastenings in widely varying quantities of each type. (d) A uniform high standard of quality is essential since the stability and efficiency of the finished product may

depend on the fastening being up to the specified standard. (e) Prompt and punctual delivery is important, since completion of the finished product may be held up for the lack of a few fastenings of one particular type. (f) To provide an efficient service to users, adequate stocks in a very great variety of shapes and sizes must be maintained and readily available, and facilities must be provided for the speedy execution of special orders.

Only a trivial proportion of the fastenings reaches the public through retail channels. The vast bulk are purchased by industrial users either directly from the members of the Association or from stockholders who themselves buy directly from the members of the Association at the stockholders' discount.

The advantage of the uniform price to the stockholder is, put colloquially, that he does not have to " go shopping ". He knows the price that he can quote, he knows the price he must pay from whatever manufacturer he buys; date of delivery is the only matter for negotiation. If prices for individual items of the many hundreds of sizes and shapes which he has to stock varied from manufacturer to manufacturer, he would be compelled to make many more inquiries before making his purchases, and his administrative costs would be increased. The margin of 7½ per cent. on which he at present operates and which covers not only his overheads and administrative expenses but a return on his capital locked up in stock, would, we are satisfied on the evidence, be scarcely adequate to cover the additional cost involved in " going shopping ", while the profit margin available on the present fixed prices leaves little room for any appreciable overall reduction in prices under free competition, although it may be that there are some imbalances in the present basic price list which under free competition might be adjusted by the price of some items rising and others falling. In the net result, however, we see no prospect of the stockholder recouping his additional expenses of " going shopping " save by raising his own prices to his purchasers. The position of the industrial user purchasing direct from members of the Association is much the same. He, too, does not have to " go shopping ". Three witnesses were called from the constructional engineering industry in which the cost of black bolts and nuts forms a higher proportion of the cost of the finished product than in some other industries and which would stand to benefit most by a reduction in prices of the fastenings. Even here, a difference of ten per cent. in price of the fastenings would make a difference of only ½ per cent. in the cost of the finished product. All these witnesses were of opinion that a saving of as high as ten per cent. would not compensate for the trouble and administrative expense of " going shopping ". We have already indicated that an overall saving of this magnitude is, in our view, out of the question; but an obvious answer that suggests itself is that, under free competition, the industrial user would have the choice of restricting his purchases to one or two selected manufacturers and not going into the market generally to see if the goods can be obtained at a cheaper price. However, the question of timeous delivery would remain as an important one. At present, under the inter-trading arrangements, an industrial user can place his order with a single manufacturer who can obtain the items which he does not himself make, or which he does make but has oversold, from another manufacturer. In times of great demand, when the problem of delivery is likely to be most important, there would be less prospect than under the present system of the single manufacturer's being able to satisfy the industrial user's requirements as to delivery. It seems to us that, if the uniform price were abolished, the industrial user would either have to incur the trouble and administrative expense of " going shopping " himself or would have to purchase his requirements from a stockholder who would have to " go shopping " for him.

The industrial users called as witnesses also expressed the fear that price competition might result in lowering of quality standards by some manufacturers and render it necessary for the users themselves to test the products before putting them into use. As we have already said, we are not greatly impressed by this possibility, but we recognise that a lack of complete confidence in the quality

of the fastenings to be used may make users feel it prudent to take precautions which, in the result, may prove to be unnecessary. Such precautions add to the expense, it may be considerably, particularly in constructional engineering, where the present practice is to take delivery on the site where the fastenings are to be used.

The fact that the uniform price is, in practice, varied only in response to changes in costs of production and distribution is alleged by the Association to encourage the maintenance of adequate stocks both by manufacturers themselves and by stockholders. Without the price-fixing arrangements, so it is contended, prices would fluctuate also with supply and demand and increase the financial risk entailed in maintaining large stocks. We are not satisfied that this premise is correct at least as regards the general level of prices. Supply and demand in this industry are not responsive to price changes. The larger manufacturers who have built up a goodwill with regular customers would, we think, be unlikely to raise their prices in response to temporarily increased demand, and they are necessarily price leaders; nor do we think that there is sufficient margin of profit in the present fixed prices to permit of anything more than a marginal reduction in the face of falling demand. Furthermore, the size of stocks maintained must vary primarily with anticipated demand. This does not seem to us to be a trade in which speculation in " futures " is ever likely to be a feature, and we are not satisfied that the maintenance of stocks would be affected substantially either way by the removal of the restrictions.

As respects the general price-fixing scheme (namely, restriction 1), the Association rely on para. (b) and para. (g) of s. 21 (1) of the Restrictive Trade Practices Act, 1956. Although in form as submitted to us this is one restriction, it, in fact, contains a number of inter-related provisions of two distinct types, namely:

(i) those that fix the price of the fastenings to purchasers generally according to the size of the order, that is: (a) the normal prices by the application of the general discount to the prices in the basic price list, (b) the prices for small quantities by the application of various discounts smaller than in (a) or plussages to the basic price list, (c) the prices for large quantities by the application of the large order discounts to the normal prices;

(ii) those that provide for different prices according to the character of the purchasers, that is: (a) the stockholder's discount of five per cent. or $7\frac{1}{2}$ per cent. off normal prices, (b) the quantity discounts varying from $1\frac{1}{2}$ per cent. to five per cent. off normal prices according to the total value of purchases by the purchaser from all members of the Association during the preceding year.

The provisions mentioned in (ii) above do not differ in character from restriction 2, referred to us, which provides for the discount to be allowed in inter-trading sales. They are, in our view, properly to be treated as separate restrictions and as such, together with restriction 2, are sought to be justified under para. (b) of the subsection. Restrictions 5, 8 and 9, which relate to standard conditions of sale, are sought to be justified under para. (g). Restrictions 3 and 4, which relate to sales to government departments, railways, harbour boards and other large users, and restrictions 6 and 7, which relate to government departments alone, are sought to be justified under either para. (b) or para. (g).

The true construction of s. 21 (1) (b) of the Act has been argued in two previous cases (*Re Yarn Spinners' Agreement* (2) and *Re Blanket Manufacturers' Assocn.'s Agreement* (3)). In neither case did the court find it necessary to reach a concluded opinion. In view of the nature of the benefits or advantages relied on by the Association, it is necessary that we should do so in this case. The relevant words of para. (b) are:

> " that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by

(2) [1959] 1 All E.R. 299; L.R. 1 R.P. 118. (3) [1959] 2 All E.R. 1.

A virtue of the restriction itself or of any arrangements or operations resulting therefrom."

The words " purchasers ", " consumers " and " users " are defined by sub-s. (2) to include " persons purchasing, consuming or using for the purpose or in the course of trade or business or for public purposes "; and the expression " purchasers, consumers or users of any goods " in para. (b) of sub-s. (1) must, in our B view, be read with this extended meaning. The expression " any goods " in para. (b) is to be contrasted with the expression " the goods to which it "—(scilicet the restriction)—" applies " in para. (a). In our view, it entitles the Association, on whom lies the onus of establishing the circumstances specified in para. (b), to choose the particular kind of goods in respect of which they seek to satisfy that C onus. The word " other " qualifying " specific and substantial benefits or advantages " merely excludes the particular benefit or advantage of protection against injury which is dealt with expressly in para. (a).

The main controversy in the arguments before us has been directed to the words " the public as purchasers, consumers or users of any goods ". Counsel for the Registrar contends that this should be read conjunctively, and that, to satisfy the requirements of para. (b), the Association must satisfy the court that D the removal of the restriction would deny specific and substantial benefits to all persons who purchase, consume or use the goods, or at any rate to the majority of such persons. On his contention, it would not be sufficient to show that the removal of the restrictions would deny specific and substantial advantages to all persons who purchase the goods unless denial of specific and substantial advantages could also be shown to all or at least the majority of persons who E consume the goods or use them. Counsel for the Association, on the other hand, goes so far as to contend that the requirements of para. (b) are satisfied if he can show that the removal of the restriction would deny specific and substantial benefits or advantages to any particular class of purchasers, such as, in this case, stockholders. We do not think that either of these constructions is right. The beneficiaries of the relevant benefits or advantages are " the public "; but not F members of the public in general but in one or more specified capacities, that is, as purchasers, or as consumers, or as users. The use of the word " or " instead of " and " seems to us to indicate clearly that it is sufficient to show that the removal of the restrictions would deny specific and substantial benefits or advantages to members of the public in their capacity as purchasers, without taking into consideration, for the purposes of para. (b), what effect the removal of the G restriction would have on members of the public in their capacity as consumers or as users. That matter falls to be considered when balancing, under the latter part of sub-s. (1), the benefits or advantages to the public in their capacity as purchasers against any detriment either to " the public ", which includes members of the public in all capacities, or to any persons who are purchasers, consumers, or users of the goods, even although such persons represent but a small H proportion of the total number of purchasers or of consumers or of users. On the other hand, counsel for the Association's construction appears to us to give no effect to the words " the public ". The expression " the public as purchasers ", which is to be contrasted with the expression used later in the balancing provisions

I " persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties . . .)",

connotes collectively all persons who purchase the goods whether for re-sale, like stockholders, or for use whether directly from the members of the Association or from stockholders or from retailers. It is not sufficient to show merely that some small category of purchasers would be denied benefits or advantages by the removal of the restriction, nor is it fatal to show that some small category of purchasers would be denied no benefit or advantage or even would receive some benefit or advantage if the restriction was removed, although that would fall to

be considered under the balancing provisions at the end of the subsection. What must be shown, to satisfy the requirements of para. (b), is that, looking at all purchasers as a collective whole, they can be properly regarded as being denied specific and substantial benefits or advantages if the restriction were removed. It is unnecessary for the decision of the present case to consider whether it would be sufficient to show a benefit or advantage to a bare majority of purchasers either in number or in value. Having regard to the balancing provisions, that is a question which is unlikely to be crucial.

The evidence of the stockholder witnesses is all one way, namely, that the existence of the price-fixing scheme and the fixed stockholders' discount facilitates their operations and enables them to avoid the administrative expense of " going shopping " which, if it had to be incurred, would make it impossible for them to operate on a margin of 7½ per cent., let alone five per cent. This is a benefit or advantage to them which we think is specific. Having regard to the very large number of individual items involved in respect of which, in the absence of the price-fixing agreement, they would have to invite quotations from different manufacturers in connexion with their orders, we are satisfied that their present saving in administrative expenses is substantial, and that the removal of the general restrictions would deny to stockholders benefits or advantages which are substantial. Sales to stockholders, however, account for only twenty-six per cent. of the trade.

The evidence of users, buying direct from members of the Association, was to the same effect. The witnesses called were, in fact, engaged in the constructional engineering industry; but it is in this industry that the cost of black bolts and nuts forms the highest proportion of the cost of the finished article, and users in this category would have the greatest interest in any reduction in price. These witnesses, who we think can be described as typical medium-sized buyers (their individual annual purchases ranged from £3,000 to £15,000 per annum) were also of the opinion that the administrative expense to them of " going shopping " and in some cases of the precautionary inspection of goods on delivery which they might regard as necessary would be substantial, and would exceed any saving in the cost of their requirements which could reasonably be expected to result from price competition in this industry. As we have already indicated, there is no appreciable margin for any overall reduction of prices, and we accept their evidence as to the probable increase in their administrative costs if the general restrictions were removed. As in the case of stockholders, we are satisfied that the saving in administrative costs is a specific benefit or advantage and that, in the case of large and medium-size buyers with a wide range of requirements, it is substantial. The proportion of the total sales which go to purchasers in this class cannot be accurately stated; but since about thirty per cent. of the total home sales are to purchasers who are entitled to quantity discounts and whose minimum annual purchases must exceed £25,000, sales to stockholders and to large and medium-sized buyers must, we think, together account for over two-thirds of the total volume of home sales of black bolts and nuts and carriage bolts and nuts. The " public as purchasers ", however, includes the small buyer who buys his requirements of the fastenings either from the stockholder or directly from the manufacturer. The user who buys all his requirements from the stockholder would probably not " go shopping " even if the general restriction were removed. The same specific advantage now enjoyed by the large and medium-sized buyer would not, therefore, be denied to such a purchaser from the stockholder if the restriction were removed. The small buyer direct from the manufacturer would also need to " go shopping "; but there is no evidence to satisfy us that in his case the benefit or advantage of not having to " go shopping " which he would be denied if the general price-fixing restrictions were removed is substantial. Having regard to the view which we take as to the improbability of any appreciable overall reduction in prices if the general price-fixing restrictions were removed, we do not think that the small buyer would obtain any substantial

A advantage from the removal of those restrictions; indeed, it may well be that those who purchase from stockholders would be compelled to pay higher prices than at present owing to the increase in the stockholder's administrative expenses.

In the result, therefore, we are satisfied that purchasers whose purchases account for at least two-thirds of the home sales would be denied a specific and substantial advantage if the general price-fixing restrictions were removed, and B that the remaining buyers would as purchasers suffer no appreciable countervailing disadvantage or detriment. This is sufficient to satisfy the onus lying on the Association of proving the circumstances specified in para. (b) of s. 21 (1).

We can deal briefly with the Association's other contentions in relation to that paragraph. For the reasons which we have indicated, although the maintenance of the general price restrictions does reduce the risk of deterioration in C the quality of the products of some manufacturers, we are not satisfied that any significant decline in quality would result from the removal of the restrictions, although we appreciate that some buyers might regard the risk as necessitating precautionary examination of the goods on delivery, with a consequent increase in their administrative expenses. The evidence, however, is not sufficiently strong to satisfy us that this advantage, considered by itself, is substantial. The same D observations apply to the alleged advantage of the maintenance of stocks which it is contended would fall if the general price-fixing restrictions were removed.

It was also contended that the general price-fixing restrictions promoted investment in the industry, co-operative research and co-operation in sharing of " know-how ", all of which would be reduced if the restrictions were removed. E We doubt if these are sufficiently specific advantages or benefits. We do not think that the rate of investment in the industry as a whole would be reduced if the price restrictions were removed, and, although the high degree of co-operation between the members which now exists might well be reduced, it is, in our view, a matter of speculation only as to what effect any reduction of this kind of co-operation would have on the efficiency of the industry as a whole if price F competition replaced the present system. That particular aspect of co-operation within the industry which is represented by inter-trading is, however, of importance, particularly as a factor in avoiding the need for purchasers to " go shopping ", and we have already taken it into consideration. The inter-trading provisions of the general price-fixing scheme of which they form an integral part have also, we think, probably resulted in keeping at any rate some of the small G manufacturers in business and avoidance of some plant duplication, and removal of these restrictions would, no doubt, necessitate some re-organisation in the industry to fulfil users' requirements of standard products in small demand, " Off Standard " Specials and " Out and Out " Specials. But such advantages in this respect which users would be denied if the general price-fixing restrictions, including the inter-trading provisions, were removed, are, in our view, too vague H and speculative to be specific.

For the purpose of our consideration of the application of s. 21 (1) (b) to the general price-fixing restrictions, including the provisions relating to inter-trading, we have not so far sought to distinguish between the individual restrictions nor, in general, is there any need to do so, for they form part of an integral whole. There is, however, one exception, namely, the quantity discount provision as I defined in this case. This is really no more than a sop to the large buyer and an inducement to him to restrict his purchases to members of the Association. It is, no doubt, a specific advantage to the large buyer as a purchaser, but large buyers, including those whose quantity discount is no more than $1\frac{1}{4}$ per cent., account for only about one-third of the trade. This is not a substantial advantage to " the public as purchasers ", more particularly as its effect, under the Association's method of fixing the general discount, must have been to increase to some extent the normal prices paid by the rest of the purchasers. A quantity discount based on the aggregate of purchases from all members of the Association has no such

economic justification as the large order discount, and counsel for the Association in his final speech has conceded that he cannot justify it under para. (b).

Restrictions 5, 8 and 9, which set out the standard conditions of sale, are not unusual and are reasonably required for purposes connected with the general price restrictions. To remove them, while leaving the main restrictions, would re-introduce the necessity of purchasers "going shopping", the avoidance of which is the ground on which we have held that the circumstances specified in para. (b) are satisfied in relation to the main price-fixing restrictions.

It remains to deal with the application of para. (b) to restrictions 3, 4, 6 and 7, of which the two former relate to the obligation not to supply goods to government departments, railways, harbour boards or other large users at a price lower than the lowest proposed quotation reported by any member to the secretary of the Association, while the two latter relate exclusively to the terms of contracts with government departments. No serious attempt has been or, we think, could be, made to contend that the removal of these restrictions would deny specific or substantial advantages to anyone as purchasers, consumers or users. Presumably the members of the Association think that these restrictions are advantageous to themselves, but this, of course, does not satisfy the requirements of para. (b) of the subsection.

In the result, therefore, we are satisfied that the circumstances specified in para. (b) of the subsection exist in the case of restrictions 1 and 2 with the exception of the provisions for quantity discounts contained in the registered price list No. 3. We are also satisfied that the circumstances specified in para. (g) of the subsection (4) exist in the case of restrictions 5, 8 and 9. We are not satisfied that any of the circumstances specified in para. (b) or para. (g) of the subsection exist in the case of restrictions 3, 4, 6 or 7, or in the case of the provisions for the quantity discounts contained in the registered price list No. 3 referred to in restriction 1. These are, accordingly, contrary to the public interest.

This does not, however, conclude the matter save as regards the last mentioned restrictions. The onus lies on the Association also to satisfy us that those restrictions in respect of which the circumstances specified in para. (b) or para. (g) of the subsection exist are

> "not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction."

It has not been suggested that non-members of the Association engaged or seeking to engage in the trade suffer any detriment from the restrictions, at any rate other than the provisions relating to quantity discounts which we have already held to be contrary to the public interest. The evidence indicated that they do not, in fact, undersell the members of the Association. In times of heavy demand, it may be that they sometimes obtain prices higher than the Association's fixed prices. As regards purchasers, consumers and users of the goods, we have already expressed our view that the prices which have been fixed by the Association since Jan. 1, 1954, have, in fact, been not unreasonable. We do not think that overall they would have been lower had there been free competition in price; nor do we think, if the prices in the future are fixed in the same way as they have been fixed in recent years, they will be higher than they would be under free competition. Competition in price would not increase demand for the fastenings. It may be that, owing to imbalances in the price list, the prices of some items would fall slightly and of others rise slightly. But, on balance, there is very little room for any decrease in prices and, subject to certain general considerations

(4) The terms of s. 21 (1) (g) are set out at p. **124, letter I, ante.**

A with which we deal later, we think that any possible detriment in higher prices under the scheme is more than outweighed by the increased administrative costs of the purchasers in " going shopping ".

Although in general the high standard of the fastenings, the maintenance of which is we think undoubtedly encouraged to some extent by the restrictions, is of benefit to users, it has been suggested that the maintenance of the restrictions B does operate to the detriment of one class of user. To reduce the standard gives scope for economy in costs of production by running machines longer between re-tooling and by reducing the standards of inspection and control of production. The price-fixing scheme, it is said, prevents a user who would be content with an inferior article from purchasing it at a cheaper price. There is no evidence that there are, in fact, users in this category or, assuming that there are, that their C demands cannot be adequately met by producers outside the Association. A producer of inferior fastenings of any particular size or shape would have to produce exclusively for this special market, since the economies which would enable him to reduce his price would make it impossible for him to produce a high quality article. There is no evidence that non-members of the Association have thought it worth while to cater for such a market and we do not think that, D if the price restrictions were abolished, any producers who are members of the Association would be likely to do so.

There are, however, two important general considerations which affect the public. We accept that, in general, the consequence of competition is to encourage progress and efficiency in an industry; but the evidence here is that, despite the existence of price fixing in this industry for the past twenty-seven E years, it is efficient as compared with its counterpart in other countries and very considerable technical progress has been made during that time and especially in the more recent years. It is incapable of proof either way whether, as the Registrar claims, there would have been greater efficiency and progress if there had been no price fixing, or, as the Association claim, there would have been less. There has been in this industry an exceptional amount of technical co-operation F and sharing of " know-how " between members which has assisted in raising the efficiency in particular of the smaller manufacturers. There has been throughout the stimulus of competition for business, although not the added stimulus of competition in price between members. We do not think that there are any positive grounds for supposing that, in this particular and exceptional industry, technical progress or improvements in efficiency which would otherwise have been made G have, in fact, been reduced or retarded by the existence of the price-fixing scheme, nor do we think that the position in this respect is likely to be different if the price-fixing restrictions continue to operate.

There is, however, another consideration that has given us great difficulty. The restrictions contain no express provisions as to the basis on which prices are to be fixed. So far as the rules and regulations of the Association are con- H cerned, this is left to the discretion of the central council with the approval of a majority of the members in general meeting. However wisely or reasonably they have exercised that discretion in the past, it is contended by the Registrar that to declare the restrictions to be not contrary to the public interest would be to give carte blanche to the Association to fix their prices at whatever level they thought fit in the future and that would be a detriment to the public. If I that were the effect of a declaration by this court that the restrictions were not contrary to the public interest, we should agree that the detriment to the public in general far outweighed the specific and substantial advantages to the public as purchasers of the fastenings which they would be denied by the removal of the restrictions. But that, in our view, is not the effect of such a declaration. The court has to take into consideration the benefits or advantages enjoyed *or likely to be enjoyed* by virtue of the restrictions and the detriment resulting *or likely to result* from their operation. The words emphasised require the court to weigh probabilities. In doing so, it is entitled to take into consideration the way in

which the Association has exercised its price-fixing power in the past and statements and assurances given by witnesses who are members of the Association as to the way in which they intend that that power shall be exercised in the future. The evidence shows that the Association have, since government control of prices was abolished in March, 1953, honestly and conscientiously endeavoured to change their fixed prices in accord with actual variations in costs, with a reasonable margin of profit. The methods that they in fact adopted in 1953 were open to obvious objections to which we have already referred and, no doubt, had the price list No. 3 been inaugurated after the passing of the Act, a much more defensible method would have been adopted. Furthermore, subsequent alterations in general discount could, and should, have been supported by more comprehensive and recorded costings. But, whatever the theoretical objections, the practical result of the methods adopted has been a price list which is rational and reasonable, resulting in a profit level, whether on turnover or capital employed, which cannot be regarded as in any way excessive. This has been confirmed by the recent costing investigation carried out by the accountants for the Registrar and the Association for the purposes of this hearing. Responsible witnesses called on behalf of the Association have assured us of their intention to operate the scheme in the future as they have operated in the past and to change prices when and only when there are changes in cost of production and distribution and only to the extent of such changes, retaining no more than the same percentage profit margins which they have adopted in the past.

It would have been better had the method of fixing prices in relation to costs of production and distribution been expressed in the restrictions; but, in the face of the assurances which we have received and in the light of the Association's record in the past, we are satisfied that it is likely that any changes in prices will be made on the same basis as in the past in strict relation (downwards as well as upwards) to changes in costs of production and distribution, and, accordingly, we are satisfied that the specific and substantial benefits or advantages likely to be enjoyed by virtue of the restrictions outweigh any detriment likely to result from their operation, and that, having regard to this, the restrictions are not unreasonable. So to determine, with the consequent declaration that the restrictions in question are not contrary to the public interest, is far from giving carte blanche to the Association to fix prices as they please. One of the most important relevant circumstances in enabling us to reach our conclusion in favour of the restrictions is that the prices in fact fixed under the scheme are reasonable and changes therein are made when and only when there are ascertained changes in costs and only proportionately to such changes. If the Association were at any time to fix prices which were unreasonable, or to fix them on some other basis (not being an improvement, for which there is plenty of scope, in particular in ascertaining the relevant costings, including the actual level of activity of the plant, for the purpose of fixing either the basic prices of particular items or the discounts), this would be a material change in the relevant circumstances entitling the Registrar to apply to the court under s. 22 of the Act, and a very different view might be taken by the court in those changed circumstances. In this connexion, it is fitting to point out that the effect of our decision that the Association's provisions for quantity discounts are contrary to the public interest and accordingly void will have the effect of increasing to a limited extent the overall profits of the members of the Association, and this is a factor to be taken into account in determining any future changes in prices and, indeed, in considering whether a consequential change in the general discount would be appropriate in the immediate future.

Declaration accordingly.

Solicitors: *Allen & Overy* (for the Black Bolt and Nut Association of Great Britain); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

CHUNG KWOK HOTEL CO., LTD. *v.* FIELD.

[COURT OF APPEAL (Hodson, Ormerod and Harman, L.JJ.), July 14, 15, 1960.]

Landlord and Tenant—Recovery of possession—Judgment for possession at future date—Conveyance of landlord's interest between judgment and date for possession—No express assignment of benefit of judgment—Whether benefit passed—Whether benefit assignable—Whether judgment enforceable.

The benefit of a court order for possession of premises made in favour of a landlord in an action against his tenant does not pass by a mere transfer or conveyance by the landlord of his estate or interest in the land (see p. 145, letter D, post).

Goldthorpe v. *Bain* ([1952] 2 All E.R. 23) explained and distinguished.

QUAERE: whether the benefit of such an order, or (where the order is coupled with an order for costs) of that part of the order which deals with possession, is assignable at law (see p. 145, letter A, post).

Appeal allowed.

[As to the enforcement of an order for possession after the landlord's title has terminated, see 23 HALSBURY'S LAWS (3rd Edn.) 709, para. 1450, note (l) and, as to actions for possession in county courts, ibid., para. 1452; and for cases on the subject, see 21 DIGEST 586, *1641, 1642.*]

Cases referred to:

Goldthorpe v. *Bain*, [1952] 2 All E.R. 23; [1952] 2 Q.B. 455; 3rd Digest Supp.

Knight v. *Clarke*, (1885), 15 Q.B.D. 294; 54 L.J.Q.B. 509; 50 J.P. 84; 21 Digest 586, *1642.*

Appeal.

The defendant, Louis Kenneth Field, the tenant of the unfurnished first floor flat at 24, Inverness Terrace, Paddington, London, appealed against an order of His Honour JUDGE ANDREW, made on Jan. 18, 1960, at Marylebone County Court, whereby it was declared that " all necessary assignments have been made and the plaintiffs [i.e., Chung Kwok Hotel Co., Ltd., the owners of the freehold interest in the flat and the present landlords thereof] are entitled to issue a warrant for possession " and the defendant was ordered to pay the plaintiffs' costs. The flat had been decontrolled under the provisions of the Rent Act, 1957, and in 1957 the then landlord, Mrs. Silvester, brought an action in the Marylebone County Court for possession against the tenant, who had held over and become a statutory tenant on the expiry of a written tenancy agreement for one year. The parties came to terms, and on Feb. 23, 1959, by consent judgment for possession was given and it was ordered that the tenant should give the then landlord possession on Sept. 1, 1959, and that the then landlord should pay the tenant's costs on Scale 4. By an agreement for sale made on May 8, 1959, incorporating the Law Society's Conditions of Sale, 1953, the then landlord agreed to sell her freehold interest to certain purchasers. Special condition 5 of the agreement provided that " the property is sold subject to and with the benefit of the existing tenancy of the first floor . . . and subject to and with the benefit of . . . an order of the Marylebone County Court ", being the order for possession. By an agreement dated June 5, 1959, the purchasers sold " the benefit of the contract dated May 8, 1959 " to a sub-purchaser " for and on behalf of a company in course of incorporation to be known as Chung Kwok Hotels, Ltd." On June 15, 1959, the purchasers assigned to the sub-purchaser " the benefit of the . . . agreement dated May 8, 1959." On July 4, 1959, the landlord, in whose favour the possession order had been made, transferred by a registered transfer " the land comprised in " Title No. 144578 (i.e. 24, Inverness Terrace) to the sub-purchaser. Later the same day the sub-purchaser executed a deed of trust of inter alia " the freehold land and dwelling-house No. 24, Inverness Terrace " in favour of Chung Kwok Hotel Co., Ltd., which had by then been incorporated. Later the

same day the sub-purchaser transferred " the land comprised in the title above-mentioned " to the company by a registered transfer. The tenant refused to give up possession to the company, and on Jan. 18, 1960, the county court judge made the declaration now appealed against.

P. A. W. Merriton for the tenant.
R. H. W. Dunn for the company, the landlords.

HARMAN, L.J., delivering the first judgment at the request of HODSON, L.J., stated the facts and continued: The sub-purchaser, being the inheritor of the benefit of the contract with Mrs. Silvester, may, I think, and probably does have a right against her to call on her to do what was necessary to enforce her judgment; but very unfortunately he omitted to transfer that right to the present landlords, merely executing in their favour a common form registered transfer. Consequently, so far as I can see, the present landlords have not the benefit of the covenant with Mrs. Silvester that it was so desirable they should have. It may possibly be that they can call on the sub-purchaser to exercise his rights against her, but they have not ever purported to do so.

In August, 1959, the time was drawing near when the tenant had agreed to vacate the property. He was not the sort of person who would propose to keep his word if he could get out of it, and he made an application of a very strange sort to the county court to vacate the judgment on the ground that Mrs. Silvester no longer had any interest in the property. The county court judge had no hesitation in saying that that was nonsense; and counsel for the tenant appears here and he very candidly agrees that it was nonsense; but it had this result, that the attention of the judge was drawn by counsel to the County Court Rules, and he pointed to Ord. 25, r. 6 (1), which is in these terms so far as it matters:

> " Where—(a) any change has taken place after judgment, by death, assignment, or otherwise, in the parties entitled to enforce a judgment or order or in the parties liable under a judgment or order . . . the party claiming to be entitled to enforce the judgment or order may apply on affidavit to the court for leave to issue the necessary process, and the court may—(i) if satisfied that the party so applying is entitled to issue such process, make an order to that effect; or (ii) if not so satisfied, order that any issue . . . necessary to determine the rights of the parties be tried in an action."

Such an application as that, in the High Court anyhow, can be made in the first place ex parte, and if the judge or master to whom it is made is not satisfied he will then direct an issue to be tried. Something of that sort apparently happened here. When the issue came on, the learned county court judge, having heard argument on the matter, decided it in favour of the present landlords, and his order, which is dated Jan. 18, 1960, is in these terms: First, that " the new owners " (that is to say the present landlords) " have not created a tenancy in favour of the defendant." That was a point that was argued below and not taken here, so I need say no more about it. Second, that " All necessary assignments have been made and the plaintiffs are entitled to issue a warrant for possession ". When the judge says " All necessary assignments have been made ", he must, I suppose, be construing the legal documents because there is nothing oral in the way of an assignment, nor could there be in a matter of this sort. The learned judge did not, I think, give any reason. He simply held that it was quite enough for the present landlords to show that they had had a registered transfer of the land and were the registered owners of it at the present date; and he held the point taken (which it is true has no merits except the ingenuity of its inventor) to have been abandoned.

On appeal to this court two points are taken:—first, that an order for possession of this sort is not assignable at all; secondly, that, even if it is, there has been no assignment. I do not think that it is necessary to decide finally whether an order of this kind is assignable at law. I myself rather doubt it. There would be

an obvious difficulty in this case in that the order itself contains an order for costs. Whether part of an order can be assigned without the rest seems to me at least very doubtful. I should on the whole think that it could not. So that I should be inclined to the view, without deciding it, that this order, or the part of the order which deals with possession, is probably not at law assignable.

However, that is not the end of the matter. The order which I have read (1) mentions the word "assignment". There is no doubt that many orders are assignable. Judgments for debt clearly are; though that example does not sufficiently explain the word "assignment" in the order. Another kind of assignment is that by operation of law, where the judgment creditor or the judgment holder dies, or becomes bankrupt, or of unsound mind: in those events there will have devolved on the statutory assignee –that is to say the trustee in bankruptcy or the receiver in lunacy or the personal representative—the benefit of the judgment obtained by his predecessor.

The corresponding order in the ANNUAL PRACTICE, R.S.C., Ord. 42, r. 23, does not contain the word "assignment". It simply says that: "(a) where . . . any change has taken place by death or otherwise" then the party alleging himself to be entitled may apply for leave to issue execution. That may have a little significance. The question here, then, is whether there has been any assignment if the judgment, or that part of it which relates to possession, be assignable. It is said by counsel for the present landlords that the benefit of such a judgment passes on a mere conveyance of the land—as if it was, so to speak, one of the appurtenances passing under the general words of a conveyance. That is not a view which I can take.

Counsel cited in support of that proposition *Goldthorpe* v. *Bain* (2), where JENKINS, L.J., was dealing with a case of death and where the bold argument was put up that a judgment for possession, anyhow in the case of a statutory tenancy, was a thing merely personal to the person who obtained it and did not devolve on his or her personal representative. That view the learned lord justice had no difficulty in rejecting. He used words which, if they were taken without relation to the context in which they were used, might cover a case like the present. He said (3):

> "In such a case, the judgment being one which concerns a proprietary interest of the deceased landlord which would normally pass to the landlord's personal representatives, those representatives, or a beneficiary claiming through them by means of an assent, on proof to the court of the grant of probate and of the assent, if there is one, would, prima facie, be entitled as of right to an order under Ord. 25, r. 6, declaring them entitled to enforce the order for possession."

That is all that he decided; and the fact that he talks about such an assignee being a successor in title does not mean that a mere assignment of the land inter vivos and without more will pass the benefit of an order of this sort. Therefore it seems to me that the difficulty that the present landlords are in is that they have not got an assignment of the benefit of this judgment.

The other case cited to us was *Knight* v. *Clarke* (4) where the landlord had (as Mrs. Silvester has) parted with the whole interest in the property after the date when he obtained judgment. The headnote reads:

> "Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ . . ."

(1) C.C.R., Ord. 25, r. 6 (1) (a). (2) [1952] 2 All E.R. 23; [1952] 2 Q.B. 455.
(3) [1952] 2 All E.R. at p. 27; [1952] 2 Q.B. at p. 464.
(4) (1885), 15 Q.B.D. 294.

Therefore the proper person to enforce this judgment was Mrs. Silvester. It is quite true that the tenant might have come forward and said that it would be futile to do this because she had lost all interest in the premises; but if she was supported by the present landlords, who now have the beneficial interest, I do not doubt that the writ would go in Mrs. Silvester's favour. Therefore the present landlords are not without remedy: they have merely taken the wrong way to achieve it.

In my judgment this point, although it is a technical point, succeeds, and the appeal must be allowed.

HODSON, L.J.: I agree, and for the same reasons.

ORMEROD, L.J.: I agree, for the same reasons.

Appeal allowed.

Solicitors: *Beach & Beach* (for the tenant); *Cliftons* (for the landlords).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

NOTE.

Re ROBERTSON'S WILL TRUSTS.

[CHANCERY DIVISION (Russell, J.), June 21, 22, 1960.]

Trust and Trustee—Variation of trusts by the court—Exercise of special power of appointment as a preliminary step to proposed arrangement—Genuine intention to benefit objects of power—Possible advantage to appointor if scheme approved—Whether fraud on power—Whether proposed arrangement should be approved—Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 c. 53), *s.* 1.

[As to fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275-278, paras. 522-524; and for cases on the subject, see 37 DIGEST 504-508, *972-1006*.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

This originating summons, dated Feb. 15, 1960, was issued on the application of Major General Cecil Bruce Robertson (referred to hereinafter as " the applicant "), who had a protected life interest in a settled share of the trust fund under the trusts declared by the will, dated Nov. 18, 1933, of his father, William Bruce Robertson, deceased. By the summons the applicant asked that the arrangement specified in the schedule to the summons might be approved by the court under the Variation of Trusts Act, 1958, on behalf of the applicant's infant son (the fourth respondent) and all other persons (other than those who were respondents) who would be entitled to a discretionary interest in the settled share under the protective trusts affecting the same in the event of the failure or determination of the applicant's interest therein.

Under the terms of the testator's will, the applicant's settled share was to be held after his death on trust for such of his children or remoter issue as he should by deed or will appoint, and in default of appointment in trust for all or any of his children or child who should attain the age of twenty-one years, and if more than one in equal shares. The will empowered the trustee (the first respondent), with the consent of the applicant, to make certain advances to the children, and this power had been fully exercised.

The applicant had three children (the second, third and fourth respondents) and three grandchildren (the children of the second respondent). The fourth respondent attained his majority on the eve of the hearing of the summons by the court. The persons who would have discretionary interests in the settled share

of the trust fund under the protected trusts declared in the will, if the interest of the applicant failed or determined in his lifetime, were the applicant, his wife, his three children, his grandchildren, and any further issue which he might have.

The objects of the proposed arrangement were (a) to attempt to reduce the estate duty liability (b) to make capital available for the benefit of the children, and (c) to ensure that, as far as possible, the income of the applicant would not be depleted as a result of the proposals and that he and his wife would be enabled to maintain their existing standard of living. To achieve these objects it was proposed to divide or apportion the capital of the settled share between the applicant and the three children according to their respective interests, which, on an actuarial valuation, were found to be forty-four per cent. for the life interest of the applicant and fifty-six per cent. for the reversionary interest of the children—equivalent to the ratio of thirty-three to forty-two. Accordingly, it was proposed to divide the settled share into seventy-five equal parts, of which thirty-three were to be allocated to the applicant and fourteen to each of the three children. In furtherance of the scheme, by a deed of appointment dated Feb. 8, 1960, the applicant (whose protected life interest had not suffered any forfeiture) appointed his settled share, subject to his life interest, to his three children absolutely, in equal shares (the fourth respondent's share being contingent on his attaining the age of twenty-one). The applicant desired to purchase an annuity with the thirty-three seventy-fifths of the capital which he would receive under the proposed arrangement, and it was found that in the circumstances an annuity so purchased would bring in an income larger than the income which he received from his life interest in the settled share.

At the hearing of the summons, the point was raised by the court that, as the applicant might indirectly obtain a benefit for himself under the power of appointment which he had exercised, this might be a fraud on the power and might preclude the court approving the arrangement. Counsel for the applicant informed the court, as additional information regarding the working out of the scheme, that the applicant had been advised in the autumn of 1959 that, because of the protective trusts affecting his life interest in the settled share in the trust fund, he could not release his life interest without the assistance of the court, but that he could exercise the power of appointment over the capital of the settled share in favour of his children and could apply to the court to approve an arrangement whereby he would release his life interest. The applicant felt that he was not in a position simply to give up his life interest, and the possibility of dividing his share in the trust fund between himself and his children in accordance with the actuarial values of their respective interests was suggested and was agreed to by the applicant, provided that an actuarial valuation showed that the amount which he would receive would be sufficient to purchase an annuity to replace the income which he would be giving up. On Nov. 11, 1959, an actuary valued the applicant's interest at thirty-three seventy-fifths and the childrens' interest at forty-two seventy-fifths and advised that the applicant's thirty-three seventy-fifths would purchase an annuity larger than the amount of the income which he was at present enjoying from the trust fund.

D. S. Chetwood for the applicant, the tenant for life.

P. R. Oliver for the first respondent, the Royal Bank of Scotland (the trustee).

D. J. Nicholls for the second and third respondents, the two older children of the applicant.

G. B. H. Dillon for the fourth respondent, the applicant's youngest child.

RUSSELL, J.: I myself raised the question whether possibly the appointment was a fraud on the power, because, if it were, the proposed scheme of arrangement, involving the disbursement of the fund, would be one which the court ought not to approve. I have considered the evidence and the additional information supplied to the court in regard to the working out of the scheme, and

I am satisfied that there is no reason to continue to suppose that there was a fraud on the power. It is quite plain that, from the inception, the purpose and intention of the appointor, the applicant, was to benefit his three children, and not himself, by making the appointment in question, consistently with his being in no worse position with regard to the trust fund whether the scheme went through or not. It is the fact that he was, at an intermediate stage, advised that his financial position would actually be improved if the appointment was made and the court approved the scheme. I do not think that that justifies the supposition that his purpose or intention was changed or added to. This question was raised by the court, but I do not think that it is proper that I should deliver a judgment discussing and adding to the reported authorities on the subject of fraud on the power. I have had a number of cases cited to me (1) on the question of fraud on the power, but I do not think that it is necessary for me to deal with them, although I am very much indebted to counsel for drawing my attention to them.

I am prepared to make an order in favour of the applicant, approving the scheme of arrangement, and extending to all persons (other than those who are respondents to the summons) who would be entitled to a discretionary interest in the settled share under the protective trusts. The form of the scheme is set out in the schedule to the summons, and, having already been through it, I need not go through it again. There are added to it arrangements as to insurance which were insisted on by two of the children. My approval of the scheme will be conditional on that insurance being effected. I am not insisting on the insurance because it does not concern those with whom I am concerned, but I have to approve the scheme and that is the only scheme to which the parties themselves are prepared to agree.

Order accordingly.

Solicitors: *Boyce, Evans & Sheppard* (for the applicant and the respondent trustee); *Lithgow, Pepper & Eldridge* (for the respondent children).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

---

(1) The following cases were cited in argument: *Re Huish's Charity*, (1870), L.R. 10 Eq. 5; *Re Dick, Knight* v. *Dick*, [1953] 1 All E.R. 559; *Re Merton's Settlement, Public Trustee* v. *Wilson*, [1953] 2 All E.R. 707; *Re Greaves' Will Trusts, Public Trustee* v. *Ash*, [1953] 2 All E R. 1395 *revsd.* C.A. [1954] 1 All E.R. 771.

R. *v.* HOGAN. R. *v.* TOMPKINS.

[Court of Criminal Appeal (Lord Parker, C.J., Cassels and Donovan, JJ.), July 4, 1960.]

Criminal Law—Autrefois convict—Escape of prisoner—Disciplinary proceedings before, and award of punishment by, visiting justices for the offence of escaping created by Prison Rules, 1949 (*S.I.* 1949 *No.* 1073), *r.* 42 (13)—*Subsequent trial on indictment for prison breach—Separate count for simple escape struck out—Whether award of visiting justices a bar to indictment.*

The appellants, while serving sentences of preventive detention, escaped from prison. Punishments were awarded to them by visiting justices for escaping, that is, for the offence against prison discipline created by r. 42 (13) of the Prison Rules, 1949. They were subsequently tried on indictment for prison breach, viz., escape by force, and were convicted and sentenced. A separate count of the indictment for simple escape was struck out by the trial judge in view of the proceedings before the visiting justices.

Held: although prison breach was an aggravated form of the offence of simple escape and arose in this case from the same matter as the offence for which the appellants had been punished under the Prison Rules, 1949, yet the visiting justices in imposing punishment for the escape were dealing with a matter of internal prison discipline, and their decision was not that of a court of competent jurisdiction so as to bar an indictment for the same escape; accordingly the conviction of the appellants should stand, the consequences of the previous convictions for breach of prison discipline having been taken into consideration in imposing sentences.

R. v. *Miles* ((1890), 24 Q.B.D. 423) explained and approved.

Per Curiam: strictly, the count for simple escape should not have been struck out, but in deciding on any sentence for it the court would have had to take into consideration the consequences of the proceedings before the visiting justices (see p. 152, letter C, post).

Appeals dismissed.

[Editorial Note. This case may be compared with *Lewis* v. *Mogan* ([1943] 2 All E.R. 272) in which a seaman, who had been punished by the master of his ship for absence without leave and been ordered a forfeiture of wages, was subsequently charged before a court of summary jurisdiction under the Defence (General) Regulations, 1939, reg. 47A, and his plea of the disciplinary proceedings in bar of the information failed.

As to a plea of autrefois convict, see 10 Halsbury's Laws (3rd Edn.) 405-407, paras. 736-738; and for cases on the subject, see 14 Digest (Repl.) 380, 381, *3714-3727*, 390-393, *3786-3819*.

As to breach of prison, see 10 Halsbury's Laws (3rd Edn.) 635, para. 1209; and as to offences against prison discipline, see 30 Halsbury's Laws (3rd Edn.) 611, para. 1178.

For a summary of the Prison Rules, 1949, as amended, see 18 Halsbury's Statutory Instruments 11.]

Cases referred to:

R. v. *Elrington*, (1861), 1 B. & S. 688; 31 L.J.M.C. 14; 5 L.T. 284; 121 E.R. 870; sub nom. *R.* v. *Ebrington*, 26 J.P. 117; 14 Digest (Repl.) 384, *3751*.

R. v. *Miles*, (1890), 24 Q.B.D. 423; 59 L.J.M.C. 56; 62 L.T. 572; 54 J.P. 549; 14 Digest (Repl.) 384, *3752*.

R. v. *Thomas*, [1949] 2 All E.R. 662; [1950] 1 K.B. 26; 33 Cr. App. Rep. 200; 14 Digest (Repl.) 383, *3735*.

Appeals.

The appellants, Michael Hogan and Edward Tompkins, were convicted at Winchester Assizes on Mar. 24, 1960, of prison breach, aiding a prisoner to escape and resisting a prison officer, and were sentenced to two years' imprisonment for each of the offences, the sentences to run concurrently and to be consecutive to

the sentences which they were already serving. They both applied for leave to appeal against conviction on all three counts, submitting that the indictment was totally defective. The main ground of appeal, in each case, was that the appellant had already been tried and punished by the visiting committee of justices under the Prison Rules, 1949, as amended, for his escape, and, therefore, he could not be charged with prison breach, because prison breach was merely escape with aggravation and the evidence on the charge of prison breach was the same as the evidence on which he had been convicted for escape. Leave to appeal against conviction for prison breach was granted.

The authority and cases enumerated below were cited in argument in addition to those cited in the judgment*.

Henry Palmer for the appellants.
M. G. Polson for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellants, Michael Hogan and Edward Tompkins, were convicted at Winchester Assizes before HILBERY, J., of prison breach, aiding a prisoner to escape and resisting a peace officer. They were sentenced to two years' imprisonment on each count, the sentences to run concurrently, but to be consecutive to the sentence which they were then serving. They appeal, by leave of the single judge, against conviction for prison breach.

The short facts were these. Both the appellants were serving a sentence of preventive detention at Parkhurst. They planned with another man called Taylor to escape. In order to escape, the wire under a skylight had to be cut. The wire was cut, and, although the appellants said that somebody else had done it, the jury quite clearly took the view that whoever did do it was doing it as part of this plan to escape. In due course the three of them got out of the skylight; they were pursued by some prison officers and, in the course of a struggle which ensued, one of the prison officers was stunned and suffered a wound on his forehead. Taylor got away and was still at liberty at the time of the trial.

The indictment on which the appellants were charged consisted of five counts: (i) prison breach, that is to say, escaping by force; (ii) simple escape; (iii) aiding a prisoner, Taylor, to escape; (iv) doing grievous bodily harm to the prison officer with intent; and (v) resisting the prison officer. To dispose of the fourth count first, they were acquitted of doing grievous bodily harm with intent. It is not easy to see why, but the jury could not have been satisfied that they had done grievous bodily wounding with intent, although they found the appellants guilty on the fifth charge. So far as the simple escape was concerned, the appellants being then unrepresented, counsel for the Crown properly brought to the attention of the judge that the appellants had already been dealt with by the visiting justices under the Prison Rules, 1949 (S.I. 1949 No. 1073), as amended (1). Rule 42 provides:

---

* ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (34th Edn.), paras. 3421, 3434; *R.* v. *Morris*, (1867), L.R. 1 C.C.R. 90; *R.* v. *Hinds*, (1957), 41 Cr. App. Rep. 143.

(1) The Prison Rules, 1949, have been amended by the Prison Rules, 1952 (S.I. 1952 No. 1405) and the Prison Rules, 1956 (S.I. 1956 No. 1986). The relevant part of r. 42 was not amended by the later rules, but a new r. 44 was substituted by r. 6 of the Rules of 1952 and the new rule was amended by r. 2 of the Rules of 1956. As amended, r. 44, so far as is material, reads:

"(1) Where a prisoner is reported for any of the following offences, namely:—(a) escaping or attempting to escape from prison . . . (b) assault upon an officer . . . the governor shall, unless upon investigating the report in accordance with r. 43 he is satisfied that it should be dismissed, forthwith report the fact to the commissioners and shall, unless otherwise directed by them, refer the case to the visiting committee.

"(3) The committee shall inquire into every case referred to them under paras. (1) and (2) of this rule and, if they find the offence proved, shall (subject, in the case of a prisoner serving a sentence of . . . preventive detention, to the provisions of the rules in that behalf) make one or more of the following awards . . ."

A "A prisoner shall be guilty of an offence against discipline if he . . . (13) escapes from prison or from legal custody."

Under r. 44 (1), as amended, the matter was reported to the visiting committee of justices for them to inquire into. Under r. 44 (3), as amended, the visiting committee had power to determine and award thereon (2). Pursuant to the rules, B the visiting committee in this case, in regard to escaping from prison, made a number of awards; they forfeited all privileges for twenty-eight days, they excluded associated work for twenty-eight days, they forfeited earnings for twenty-eight days and they awarded the appellants cellular confinement for fifteen days. In the case of Hogan, they also awarded a No. 1 diet for fifteen days, and, finally, the eligibility of both the appellants for release was postponed for six months, C by which I understand that any remission up to six months was forfeited. On being told that the appellants had been dealt with by the visiting justices, the learned judge struck out the second count and the appellants continued to be charged and were convicted for prison breach.

In those circumstances the point taken on their behalf is really this: that prison breach is, in effect, escaping by force; in other words, it is a simple escape with D aggravation, and it is said that, if a man has been convicted already, albeit for a different offence, namely, for simple escape, a charge cannot be brought against him subsequently for an aggravated offence if the offences in both cases arise on exactly the same matter. That that is a principle of law is undoubtedly true, as can be seen from *R.* v. *Miles* (3). In that case the prisoner had been convicted of simple assault; later it was sought to charge him on indictment with a number of E different offences, but arising out of exactly the same assault. It was put as a matter of unlawful and malicious wounding; alternatively, as inflicting grievous bodily harm; and, in the further alternative, as an assault thereby occasioning actual bodily harm. POLLOCK, B., referred (4) to the judgment of COCKBURN, C.J., in *R.* v. *Elrington* (5), where the chief justice said:

F "... we must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

In his judgment in *R.* v. *Miles* (6), HAWKINS, J., said:

G "The true ground upon which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same assault; and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment."

H

That decision, as I understand it, remains good law; the only qualification to be put on it is that the principle does not apply where the consequences have changed. That clearly appears from the decision of this court in *R.* v. *Thomas* (7), where a man, having been convicted of wounding with intent to murder, was subsequently charged with murder, the person assaulted having in the interval I died. Where, however, the circumstances remain the same, the decision, as we understand, in *R.* v. *Miles* (3) is still good. Accordingly, counsel for the appellants,

---

(2) In the case of prisoners serving a sentence of preventive detention, the awards set out in r. 169 (1) (ii) of the Prison Rules, 1949, as amended by r. 25 of the Prison Rules, 1952, and r. 6 (2) of the Prison Rules, 1956, are to be substituted for the awards which may be made by the visiting committee under r. 44 (3) of the Rules of 1949, as amended. (3) (1890), 24 Q.B.D. 423. (4) (1890), 24 Q.B.D. at p. 436.
(5) (1861), 1 B. & S. at p. 696. (6) (1890), 24 Q.B.D. at p. 432.
(7) [1949] 2 All E.R. 662; [1950] 1 K.B. 26.

for whose argument the court is indebted, submits that this is just such a case, and that, the appellants having been dealt with by the visiting committee of justices, the charge, albeit in the aggravated form of escaping by force, prison breach, ought not to have been left to the jury. A

The court, however, feels that the principle in *R.* v. *Miles* (8) is meant to apply, and can only apply, to the decisions of courts of competent jurisdiction. Though not strictly a case of autrefois convict, it is very much on those lines. It so happens that the offence created by r. 42 (13) of the Prison Rules, 1949, an offence against discipline, is in fact the same as the common law offence of escape (9). In the present case, however, the visiting justices have dealt with the matter as an offence against discipline under the Prison Rules, 1949, as amended. They have not dealt with the common law offence of simple escape. It follows, therefore, in our judgment, that, strictly, HILBERY, J., need not have struck out the second count charging simple escape, although clearly it was the sensible thing to do, because, if the appellants were convicted of simple escape alone, the learned judge, in deciding on the sentence, would have to take into consideration what had already happened as a matter of prison discipline. It is quite another matter to say that a prisoner, having been found guilty of a breach against discipline, cannot then be charged with the common law offence of simple escape in its aggravated form as a prison breach. It seems to us that he clearly can, just, indeed, as the visiting justices could have dealt with the breach against discipline if that had come before them after the appellants had been convicted at assizes. The truth of the matter is that the visiting justices are dealing with matters of internal discipline with which this court is in no way concerned. Accordingly, in our judgment, the charge of prison breach was properly left to the jury; it was for the judge to take into consideration, as no doubt he did, that the appellants had already been convicted of a breach of discipline for simple escape and had forfeited certain privileges. In our judgment, therefore, there is no ground for interfering in this case, and the appeals are dismissed. I would only add that, if the court had found it necessary to quash the conviction in respect of prison breach, there would be no ground whatever for interfering with the sentence. The only result is that the appellants have had a day out of prison. B C D E F

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *John Robinson & Jarvis*, Ryde, Isle of Wight (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(8) (1890), 24 Q.B.D. 423.
(9) See 10 HALSBURY'S LAWS (3rd Edn.) 636, para. 1210.

BURDETT-COUTTS AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Buckley, J.), June 30, July 1, 12, 1960.]

Estate Duty—Rates of estate duty—Plant and machinery used in business—Partnership—Death of partner—Partnership dissolved by death—Application of reduced rates—Finance Act, 1954 (2 & 3 *Eliz.* 2 *c.* 44), *s.* 28 (1).

By a deed of partnership dated Jan. 17, 1957, a father entered into a partnership with his son for the period of their joint lives in the business of farmers. The deed provided that the capital of the partnership should consist of the net value as at Oct. 11, 1956, of agricultural machinery and plant and other assets in the business of a farmer then carried on by the father, less outstanding liabilities of that business, and should be credited to the father as his capital; and that any further sums which either partner should contribute should be credited to such partner as capital of his. The son did not contribute any capital during the continuance of the partnership. The deed provided that the profits should be divided and the losses borne equally. On the death of either partner the survivor was to have the option, to be exercised within three months of the death, of purchasing the share of the deceased partner in the capital and assets of the partnership. The deed further provided that if on the death of either partner, the other should not exercise his option, the partnership should be wound up in accordance with the Partnership Act, 1890. On Feb. 22, 1957, the father died. At that date the assets of the partnership included plant and machinery used in the farming business and the business was a going concern. By a codicil to his will, the father gave all his share of the capital and assets of the partnership together with his share of any partnership profits due to him at his death to his son absolutely subject to any duties payable in respect thereof by reason of his death. By s. 28 (1) of the Finance Act, 1954, where an interest in a business passes on death estate duty chargeable on the death in respect of machinery or plant used for the purposes of the business was chargeable at a reduced rate.

Held: the reduced rate of estate duty was applicable because—

(i) even assuming that on the true construction of the deed the partnership was dissolved immediately on the death of the father, nevertheless each partner retained an interest in every asset of the former partnership that remained unrealised or unappropriated and, accordingly, " an interest in a business " within s. 28 (1) of the Act of 1954 passed on the father's death (see p. 159, letter B, post); further, the words " interest in a business " in s. 28 (1) did not bear any such restricted meaning as excluded this consequence.

Glen v. *Inland Revenue* (1926 S.C. 44) distinguished.

Dictum of ROMER, J., in *Manley* v. *Sartori* ([1926] All E.R. Rep. at p. 663) and *Perpetual Exors. & Trustees Assocn. of Australia, Ltd.* v. *Australia (Commonwealth) Taxation Comr.* ([1954] 1 All E.R. 339) applied.

(ii) estate duty became chargeable on the father's death " in respect of " machinery or plant used in the partnership business within the meaning of s. 28 (1) (see p. 160, letter H, post).

[As to the rate of estate duty on business assets, see 15 HALSBURY'S LAWS (3rd Edn.) 68, para. 136.

As to property which passes on death, and property which is deemed to pass on death, see 15 HALSBURY'S LAWS (3rd Edn.) 7, para. 10, and 8, para. 11; and for a case on the subject, see 21 DIGEST 8, *28*.

For the Finance Act, 1954, s. 28, see 34 HALSBURY'S STATUTES (2nd Edn.) 137.

For the Finance Act, 1940, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 483; and for the Finance Act, 1894, s. 7, see ibid., 360.]

Cases referred to:

Glen v. *Inland Revenue*, 1926 S.C. 44; Digest Supp.

Manley v. *Sartori*, [1926] All E.R. Rep. 661; [1927] 1 Ch. 157; 96 L.J.Ch. 65; 136 L.T. 238; 36 Digest (Repl.) 624, *1866*.

Perpetual Exors. & Trustees Assocn. of Australia, Ltd. v. *Australia (Commonwealth) Taxation Comr.*, [1954] 1 All E.R. 339; [1954] A.C. 114; [1954] 2 W.L.R. 171; 3rd Digest Supp.

Rodriguez v. *Speyer Brothers*, [1919] A.C. 59; 88 L.J.K.B. 147; 119 L.T. 409; 39 Digest 61, *717*.

Willett v. *Blanford*, (1842), 1 Hare, 253; 11 L.J.Ch. 182; 66 E.R. 1027; 36 Digest (Repl.) 625, *1877*.

Adjourned Summons.

This was an application by originating summons by Whimbrel Esther Burdett-Coutts and John Burne Turner, the executors of the will and two codicils of Herbert Seabury Hunt Burdett-Coutts, deceased, against the Inland Revenue Commissioners, for the determination of the question whether a proportionate part of the estate duty chargeable on the death of the deceased in respect of his share or interest under a deed of partnership dated Jan. 17, 1957, and made between the deceased and Martin Seabury Burdett-Coutts ought to be treated as "chargeable in respect of" such of the assets of the said partnership as consisted of machinery and plant used for the purposes of the partnership business within the meaning of the Finance Act, 1954, s. 28, and ought accordingly to be charged in accordance with the reduced scale of rates referred to in that section. The facts appear in the judgment.

R. O. Wilberforce, Q.C., and *K. J. T. Elphinstone* for the plaintiffs.

R. E. Borneman, Q.C., and *E. Blanshard Stamp* for the defendants.

Cur. adv. vult.

July 12. **BUCKLEY, J.**, read the following judgment: By a deed of partnership dated Jan. 17, 1957, H. S. H. Burdett-Coutts (whom I will call "the father") entered into partnership with his son, M. S. Burdett-Coutts (whom I will call "the son"), as from Oct. 12, 1956, during their joint lives in the business of farmers. The deed provided that the capital of the partnership should consist of the net value as at Oct. 11, 1956, of the live and dead stock, agricultural machinery and implements, book debts and other assets of the business of a farmer then carried on by the father, less the outstanding liabilities of that business, and should be credited to the father as his capital; and that any further sums which either partner should contribute should be credited to such partner as capital of his. In fact, the son did not contribute any capital during the continuance of the partnership. The deed provided that the profits should be divided and the losses borne equally. The deed also provided that on the death of either partner the survivor should have the option, to be exercised within three months of the death, of purchasing the share of the deceased partner in the capital and assets of the partnership: it also contained corresponding provisions applicable on the expulsion or retirement of a partner. The deed further provided that, if on the expulsion, retirement or death of either partner the other should not exercise his option, then the partnership should be wound up in accordance with the Partnership Act, 1890, but so that on a sale of the partnership assets by auction each partner or his personal representatives should be entitled to bid.

On Feb. 22, 1957, the father died. At that date there were undistributed profits amounting to £687 3s. 11d., one half of which fell to be added to the capital account of each partner as at the date of the father's death. The partner's capital accounts then stood at £27,077 1s. 10d. for the father, and £343 11s. 11d. for the son. The assets of the partnership included plant and machinery used in the farming business worth about £6,600. By a first codicil to his will the father gave all his share of the capital and assets of the partnership together with his share of any partnership profits due to him at his death to the son absolutely,

A subject to any duties payable in respect thereof by reason of his death. Consequently the son, having become entitled to the father's share in the partnership under the codicil, never exercised the option under the deed of partnership. The residuary estate of the father was sufficient to meet all the debts and liabilities of his estate (other than estate duty on his share of the partnership) without recourse to his said share or to any other property specifically disposed of.

B I have to decide whether the estate duty payable on the father's death in respect of his share or interest in the plant and machinery which I have mentioned ought to be charged in accordance with the reduced rate of duty prescribed by the Finance Act, 1954, s. 28, as the plaintiffs, who are the father's executors, contend, or at the normal rate applicable to the father's estate. Section 28 (1) is in the following terms:

C

> " Where a business or an interest in a business passes on a death, any estate duty chargeable on the death in respect of industrial hereditaments used in and occupied for the purposes of the business or in respect of machinery or plant so used shall (except as hereinafter provided) be charged in accordance with a scale of rates of duty representing the usual scale for the time being in force with a reduction of forty-five per cent. in each of the

D rates."

Subsection (2) deals with any case in which duty is chargeable in respect of shares or debentures of a company which fall to be valued by reference to the value of the company's assets in accordance with the Finance Act, 1940, s. 55. Subsection (3) (inter alia) extends the operation of the section to any case in which the relevant

E business is carried on not by the last-mentioned company but by a subsidiary thereof. Subsection (4) deals with any case where the hereditaments, machinery or plant were leased by the deceased to a company to which sub-s. (2) applies. Subsection (5) deals with any case in which a company's business is treated as passing on a death by virtue of the Finance Act, 1940, s. 46. The section is designed to grant relief from duty in respect of plant and machinery in cases

F in which the deceased's interest in the business for the purposes of which the plant or machinery is used, is direct or arises indirectly through the medium of a company or companies. The plaintiffs claim that the father in the present case had an interest in the partnership business which passed on his death within the terms of sub-s. (1).

The defendants contend that the section is only applicable to a share in a

G partnership business where that share passes on the death in specie, that is, where the death has no effect on the continuance of the partnership even as regards that share, which passes intact to someone else. The defendants' counsel have referred me to the observations of Lord President CLYDE in *Glen* v. *Inland Revenue* (1). The question in that case arose under the Finance Act, 1914, s. 15 of which, so far as relevant, provides as follows:

H

> " Where the Commissioners of Inland Revenue are satisfied that estate duty has become payable on any property consisting of . . . any interest in . . . a business, passing upon the death of any person, and that subsequently within five years estate duty has again become payable on the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of estate duty payable on the second

I death . . . in respect of the property so passing shall be reduced . . ."

to the extent specified in the section. The facts in *Glen* v. *Inland Revenue* (1) were somewhat unusual. A father and two of his sons carried on business in partnership. By a re-arrangement of the partnership relations the father accepted a sum of £124,646 in full of his whole rights in the old firm and its assets, and agreed to allow this sum to remain as a loan to the new firm at four per cent. interest, on condition that, if called up by him, or in any event on his death, it

(1) 1926 S.C. 44.

was to be repaid by ten yearly instalments. The father contributed no capital to the new firm apart from the loan, but had an interest in the profits to the extent of a one-tenth share. He died in 1922, leaving a will by which he bequeathed the residue of his estate (including the loan) to his family, in certain shares, and estate duty was duly paid thereon. The two sons, who continued to carry on the business, thereafter came to an arrangement with their father's executors, under which the sons agreed to repay the loan at once in return for a certain discount; and, in settling with the executors, they retained in the business the respective shares of the loan falling to them, by crediting themselves with the amounts in the books of the firm. Within two years of the father's death one of the sons died, and estate duty became payable on his estate. His executrix having claimed a reduction, under s. 15 of the Finance Act, 1914, of the estate duty payable on the sum credited to the son in the firm's books in respect of his share of his father's loan, the Commissioners of Inland Revenue refused the claim.

The Lord President opened his judgment (2) with these general observations on s. 15:

> " The section applies to estate duty which falls twice in rapid succession upon certain kinds of property passing on death. The property which it is the object of the statute to protect is described as consisting of two kinds: it may be (a) ' property consisting of land ' or of ' any interest in land ', or it may be (b) property consisting of ' a business ' or ' any interest in a business '. The crippling effect of the repeated incidence of estate duty on the management of landed estate and on the conduct of industrial or commercial business is the mischief for which the section offers a palliative. If two successive owners of an estate, or of a business, die within a short interval, the last successor must denude the estate, or bleed the business, to whatever extent may be necessary to enable him to pay the double estate duty, with disastrous results to the estate or the business.
>
> " Whatever may be the precise content of the expression ' any interest in land ' and ' any interest in a business ', it seems safe (having regard to the intention of the enactment) to say that the interest referred to must be such that the exhaustion of it in paying repeated estate duties will be detrimental to the landed estate, or to the business, as the case may be. In other words, the interest must be such that its fate and fortune is one with the fate and fortune of the land or business. A share in a partnership may, by the terms of the articles of copartnery, be descendible to heirs or legatees; or its value may, on the death of the partner, become a debt to his representatives. In the latter case, what reason could there be for protecting the jus crediti of the representatives (qua creditors of the firm) from the effects of repeated incidence of estate duty any more than in the case of any other asset—whether in the form of jus crediti or of property—which formed part of the deceased's estate? The diminution of the estate passing to the representatives, as the result of the exaction of estate duty, is no doubt grievous for the persons entitled to it, but it infers no prejudice to the business, which in terms of the partnership articles is in any case liable for the value of the deceased partner's share, neither more nor less. The same reasoning applies to a charge on a landed estate. It is true that, in popular language, both a charge on land and the loan capital of a business might be called an ' interest ' in the land or in the business; but the fact that the jus crediti in the secured charge or in the loan of capital passes several times on successive deaths, and so suffers exhaustion (more or less) in the hands of those who succeed to it by the payment of estate duty, has no prejudicial effect on either the landed estate or the business. On the other hand, the repeated incidence of estate duty on a

(2) 1926 S.C. at pp. 53, 54.

A business or on shares therein to which successive partners became entitled in terms of the partnership is a drain on the life-blood of the business."

Later he said (3):

"A good deal of argument was presented to us as to the precise nature of the father's loan capital and the executors' right to repayment of it. There B is no ground for regarding it as anything else than a loan. Whether the case would be different if the interest of the father had consisted of an ordinary contribution of partnership capital it is unnecessary to consider. Confining attention to the actual case before us, the question is whether the right which emerged to the father's executors to be repaid the loan of £124,646 was an 'interest in the business' which the partnership had carried on down to C the father's death. In view of the considerations explained in the earlier part of this opinion, it seems plain that the answer to that question must be in the negative. The father's loan was no more an 'interest in the business' than any other loan obtained for the purpose of use in the business would have been."

He also gave as an additional reason for holding the section to be inapplicable D that the property or interest which passed on the son's death was not the same property or interest which passed on the father's death. None of the other three judges said anything about the Lord President's general observations. LORD SKERRINGTON held that the interests which passed on the two deaths were not identical. LORD CULLEN held that quoad the loan the father had no interest in the business. LORD SANDS, while concurring in the result, safeguarded him- E self in the following terms (4):

"I am not satisfied that where there are two partners all the working capital they provide may not in certain circumstances be held to represent respective interests in the business, although in order to hold a balance as between the parties in respect of inequality of interests it may not all be treated in the same way in the partnership accounts."

F

I have referred to this case at some length because counsel for the defendants say that LORD CLYDE's general observations are authority or justification for the view of the Estate Duty Office which I am told has been and is the basis of departmental practice in cases such as the present one under the Finance Act, 1954, s. 28 (1). That view is stated in the Law Society Gazette for July, 1956, G p. 320, as follows:

"1. The reduced rate is applicable where (a) the right of the deceased partner's representatives is to a share of the partnership assets as such (an uncommon case); or (b) the deceased's share of the partnership assets passes to a beneficiary under the partnership agreement, either directly or by virtue of the exercise by the deceased of a power conferred by the partner- H ship agreement.

"2. In the case of a partnership at will without an agreement, a share in the assets of the business does not pass on the death of a partner and estate duty is accordingly payable at the full rate. The partner's death dissolves the partnership (Partnership Act, 1890, s. 33 (1)) and his interest in the business—to be ascertained according to the rules set out in s. 44 of the I Act—is a sum of money constituting a debt due from the surviving partners (see s. 43)."

This practice is recognised in leading text-books on death duties: DYMOND (13th Edn.), p. 535; GREEN (4th Edn.), p. 323; HANSON (10th Edn.), p. 1050.

LORD CLYDE's general observations, in their general application, were obiter dicta. His rationes decidendi were (a) that the father's loan was no more an "interest in the business" than any other loan would have been, and (b) lack of

(3) 1926 S.C. at p. 55. (4) 1926 S.C. at p. 57.

identity in the property passing on the two deaths. Secondly, LORD CLYDE expressly reserved his opinion whether the case would have been different, had the father contributed to the partnership capital. Thirdly, none of the other judges based his decision on LORD CLYDE'S general observations. Lastly, the general observations related to an enactment differing in important respects from the section which I have to consider, affording a much stronger context for justifying the learned judge's view of the nature of the property to be protected from the adverse effects of taxation than s. 28 of the Act of 1954 affords. I do not derive much assistance from LORD CLYDE'S remarks, or from the decision in *Glen* v. *Inland Revenue* (5).

I shall now consider the terms of s. 28 (1) of the Act of 1954. To secure the benefit of that subsection it must in the present case be established (i) that an interest in the partnership business passed on the death of the father, and (ii) that estate duty became chargeable on the father's death in respect of machinery or plant used in the partnership business. For the purpose of considering whether an interest in the business passed on the death, I am content to assume that on the true construction of the deed of partnership, the partnership was dissolved immediately on the father's death. This is probably the correct view, although it is arguable that the partnership continued until the end of the option period with the consequence that the father's share did pass in specie at his death. On the footing that the partnership became dissolved immediately on the father's death, the rights which vested in his personal representatives were not identical with those which were vested in the father immediately before his death. Was the change such that his personal representatives became entitled to no interest in the business? This question must be answered in the negative. The defendants say that, the partnership being dissolved, all that the father's estate was entitled to immediately after his death was a sum of money to be ascertained on taking an account in the winding-up of the partnership, had the option been exercised, a sum of money representing the purchase price payable on an exercise of the option and ascertained in accordance with the provisions of the deed in that behalf; and they contend that what passed was the right to such a sum of money only, and that this did not comprise any interest in the partnership business.

I cannot accept this argument. It may be true to say that when a partnership is dissolved and to be wound up the ultimate rights of the former partners (including legal personal representatives of deceased former partners) inter se are to receive the amounts which turn out to be due to them respectively on the final account. It may be true that (apart from some exceptional agreement) none of them has any exclusive interest in any asset of the partnership or, at any rate until all the liabilities of the partnership have been paid, any definite share of interest in any one partnership asset capable of being realised and got in otherwise than in the liquidation of the partnership (*Rodriquez* v. *Speyer Brothers* (6)). But this is not to say that they have no interest in the assets of the partnership pending the final liquidation.

In *Manley* v. *Sartori* (7), ROMER, J., had to decide how profits earned after dissolution of a partnership by a continued employment of partnership assets in a continuance of the partnership business should be distributed. Following WIGRAM, V.-C., in *Willett* v. *Blanford* (8), he held that such profits belonged to the former partners in the proportions in which they were interested in the assets employed in earning those profits. ROMER, J., after reading s. 42 (1) of the Partnership Act, 1890, which in terms refers to a deceased partner's share of the partnership assets, said (9):

> "Now the rights of the deceased partner or his legal personal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to

(5) 1926 S.C. 44.
(6) [1919] A.C. 59.
(7) [1926] All E.R. Rep. 661; [1927] 1 Ch. 157.
(8) (1842), 1 Hare, 253.
(9) [1926] All E.R. Rep. at p. 663; [1927] 1 Ch. at p. 163.

A regard him as being merely entitled to a particular sum of cash ascertained from the balance-sheet of the partnership as drawn up at the date of his death. So that if, after the death of Charles James Calder, any profits were in fact earned by using any single partnership asset, the profits so far as attributable to the use of that partnership asset are profits in which the executors of Charles James Calder have a share to the extent of their share in that partic-
B ular asset; that is to say, in proportion to their share in the total assets of the partnership."

This case is authority for the view that, when a dissolved partnership is to be, or is in course of being, wound up, each partner or his estate retains an interest in every single asset of the former partnership which remains unrealised or un-
C appropriated, and that that interest is proportionate to his share in the totality of the surplus assets of the partnership. It follows that, where the partnership business survives the dissolution as a going concern, each partner retains an interest in that business as well as in every asset employed in it. The advice of the Judicial Committee of the Privy Council in *Perpetual Exors. & Trustees Assocn. of Australia, Ltd.* v. *Australia* (*Commonwealth*) *Taxation Comr.* (10) is to the like effect.

D In any case, therefore, where a partnership at will or for joint lives becomes dissolved and liable to be wound up on the death of one of the partners and at the date of the death the partnership business is a going concern, it necessarily follows, in my judgment, that an interest in that business passes on the death of the deceased partner. The testamentary dispositions of the deceased partner may, as in the present case, do away with the necessity for a winding-up of the
E partnership by constituting the surviving partner the sole owner of the partnership assets, but this cannot affect the character of the property which passes on the death of the deceased partner to his legal personal representatives: nor can the fact that the surviving partner after the death buys up the interest of the deceased partner either under an option (as in the case last cited) or by negotiation with the deceased partner's legal personal representatives affect
F that character. For these reasons I conclude in the present case that on the death of the father an interest in the partnership business did pass.

The defendants contended that, although this view might be correct if there were no context in other estate duty legislation showing in what sense the legislature used the term " interest in a business " in such legislation, the use of the same expression in the Finance Act, 1914, s. 15, and the observations of the
G Lord President in *Glen* v. *Inland Revenue* (11) show that in enactments on this subject the term is used with a restricted meaning. I have already stated my reasons for thinking that that case does not assist me, nor do I consider that there is a sufficiently close relationship or similarity between s. 15 of the Act of 1914 and s. 28 of the Act of 1954 to justify an inference that the legislature meant to use the expression in precisely the same sense in the later enactment as in the earlier,
H if in the earlier enactment it ought to bear a restricted meaning.

I turn now to the question whether on the death of the father any estate duty became chargeable " in respect of " the plant and machinery used in the partnership business within the meaning of s. 28 (1). Counsel for the defendants has contended that no duty became payable in respect of any specific asset of the partnership; the duty became payable, he says, on the value of the father's share, there
I being no sufficient nexus between the value of that share and the assets employed in the partnership to make it appropriate to describe the duty as payable in respect of any of those assets. This is an argument which, if valid, must be equally applicable to any share in a partnership, whatever the effect of the death may have been on the partnership, on the share, or on the partners' respective rights. It would exclude every case of partnership from the operation of the section. It would, so far as I can see and so far as counsel for the defendants has suggested,

(10) [1954] 1 All E.R. 339; [1954] A.C. 114. (11) 1926 S.C. 44.

confine the operation of s. 28 (1) in its application to the passing of an interest in a business to cases where a business is held in joint ownership by persons who are not partners, which would be, one would think, most exceptional, and possibly cases where a business is held by trustees in trust for persons beneficially interested in undivided shares. But the commonest and most obvious way in which a man may have an interest in a business, otherwise than through a company, is a partnership, and one must, at least start with a disposition to suppose that the legislature had partnership in mind in framing this subsection.

The value of the assets of a partnership underlie and are directly related to the value of each partner's share, just as the value of a company's assets underlie and are directly related to the value to be attributed to shares which have to be valued in accordance with the Finance Act, 1940, s. 55. There is, in my judgment, as close a nexus between partnership assets and the value of a partner's share as there is between the value of a company's assets and the value to be placed on a shareholder's holding which falls to be valued under the last-mentioned section. It is clear from s. 28 (2) of the Act of 1954 that relief under the section is available in the latter case and, in my judgment, relief is also available under sub-s. (1) in any case in which the value of machinery or plant used in the relevant business underlies and contributes to the value of the deceased's interest in that business. Counsel for the defendants submitted that " in respect of " in s. 28 (1) meant the same as " on " and that no duty could properly be said to be payable on any of the partnership assets by reason of the father's death. Even in the case of the death of a sole proprietor of a business no duty could, in my judgment, be said with strict accuracy to be payable " on " any plant or machinery used in his business, for duty is not payable on specific assets comprised in a dead man's personal estate but on the value of his net personal estate after making such allowances for liabilities as are prescribed by the Finance Act, 1894, s. 7. The value of the assets employed in the dead man's business, however, are an element of the value of his net personal estate and must be ascertained before the value of the net personal estate can be ascertained. Just as, in the case of a partner whose death dissolves and may necessitate the winding-up of his partnership, the value of his interest in the partnership is an element of the value of his net personal estate and the value of that interest and consequently the value of the net personal estate can only be ascertained after ascertaining the value of the partnership assets. In each case it is, in my judgment, equally appropriate to describe some part of the duty chargeable on the death as being chargeable " in respect of " the assets employed in the business.

For the purposes of arriving at the net value of any assets in respect of which duty is to be charged at a reduced rate under s. 28 (but for that purpose only) s. 31 (6) requires the assets of the business to be marshalled in the manner there laid down, but this can have no bearing on the question whether a given case does or does not fall within s. 28 (1) and cannot affect the reasons which I have endeavoured to express for holding that in the present case estate duty became chargeable on the father's death in respect of machinery or plant used in the partnership business.

I will consequently declare that the estate duty payable on the death of the father so far as it is chargeable in respect of the share or interest of the father which passed on his death in the machinery and plant used at the time of his death in the business of the partnership constituted by the deed of partnership should be charged in accordance with the reduced scale of rates of duty referred to in the Finance Act, 1954, s. 28.

Declaration accordingly.

Solicitors: *Lawrence, Graham & Co.*, agents for *Ellis & Fairbairn* (for the plaintiffs); *Solicitor of Inland Revenue* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Goddard, Lord Tucker, Lord Denning and Lord Parker of Waddington), June 27, 28, 29, 30, July 1, 28, 1960.]

Criminal Law—Capital murder—Intent—Police officer acting in execution of his duty—Defence that prisoner had no intention to kill or do grievous bodily harm—Direction to jury—Presumption of intending natural consequence of acts—Objective test—"Reasonable man"—"Grievous bodily harm"—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 18.

Where an accused, being a person of sound mind so that in law he is responsible and accountable for his actions, is tried for murder, in circumstances in which the alleged malice aforethought is intent to cause grievous bodily harm, and the jury is satisfied that the accused was unlawfully and voluntarily doing an act that was clearly aimed at someone, the sole test of the mental element in the alleged crime is what a reasonable man (i.e., an ordinary man capable of reasoning, see p. 169, letter G, post) would, in all the circumstances, have contemplated as the natural and probable result of the act; accordingly, if the act was of such a kind that, judged by this test, grievous bodily harm was its natural and probable result, it is immaterial what the accused in fact contemplated or whether he ever contemplated at all (see p. 167, letters A to D, post).

The respondent was driving a car in which there was stolen property. The car was stopped by a police officer on point duty in the normal course of traffic control and, while so stopped, another policeman, who was acquainted with the respondent, came to the driver's window and spoke to the respondent. As a result of what the police constable saw in the back of the car, he told the respondent to draw in to his near-side. The respondent began to do so, and the constable walked beside the car. However, the respondent suddenly accelerated and made off down an adjoining road. The constable began to run with the car, and, despite the fact that it had no running board, succeeded in hanging on to the car. The car pursued an erratic course, and eventually the constable was thrown off in the path of another vehicle which ran over him, causing fatal injuries. At his trial on an indictment for capital murder, the respondent maintained that he had no intention of either causing the constable severe injury or of killing him. The trial judge's final direction to the jury in his summing-up was as follows: ". . . if you are satisfied that . . . he must, as a reasonable man, have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder". Moreover, in the course of summing-up, the trial judge referred to the presumption of law that a man intends the natural and probable consequences of his acts without directing the jury that the presumption was rebuttable. The jury returned a verdict of capital murder under the Homicide Act, 1957, s. 5 (1) (d)*. On appeal,

Held: there had been no misdirection in the summing-up, for the following reasons—

(i) the objective test that the trial judge had applied, viz., the test of what a reasonable man would contemplate as the probable result of his acts and, therefore, would intend, was, as stated at letter D above, the right test (see p. 169, letter F, post).

R. v. *Ward* ([1956] 1 All E.R. 565) and *R.* v. *Vamplew* ((1862), 3 F. & F. 520) explained.

* Section 5 (1), so far as material, reads as follows: ". . . the following murders shall be capital murders, that is to say . . . (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting."

(ii) the respondent's knowledge of the circumstances and the nature of his acts having been ascertained, there was no need thereafter to explain to the jury that the presumption that a man intended the natural consequences of his act was rebuttable, for the only thing that could rebut it would be proof of incapacity to form any intent, viz., proof of insanity or diminished responsibility (see p. 170, letter A, post).

R. v. *Steane* ([1947] 1 All E.R. 813) distinguished.

PER CURIAM: (i) in summing-up to a jury in such cases reference to the presumption of law that a man intends the natural and probable consequences of his acts might well be omitted; the criterion of the reasonable man is simpler (see p. 170, letter I, post).

(ii) grievous bodily harm, in relation to murder or the statutory offence of causing it contrary to s. 18 of the Offences against the Person Act, 1861, means simply bodily harm that is really serious (see p. 171, letter I, post).

R. v. *Ashman* ((1858), 1 F. & F. 88) criticised.

Decision of the COURT OF CRIMINAL APPEAL (sub nom. *R.* v. *Smith*, [1960] 2 All E.R. 450) reversed.

[Editorial Note. This decision restores the objective test of the mental element in murder as distinct from the subjective test, but the decision rests on the premise that there has been proof of an unlawful voluntary act " aimed at " someone. The words " aimed at " are used in order to exclude mere negligence (see p. 167, letter B, post), but they may seem to predicate necessarily the existence of some initial purpose, if not of intention.

As to proof of intention generally, see 10 HALSBURY'S LAWS (3rd Edn.) 282, para. 522, p. 457, para. 842; and for cases on the subject, see 14 DIGEST (Repl.) 500-502, *4819*, *4830-4835*, *4839*, *4840*, and 3rd DIGEST SUPP.

For the Homicide Act, 1957, s. 5 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 177.]

Cases referred to:

Hosegood v. *Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 27 Digest (Repl.) 336, *2798*.

Public Prosecutions Director v. *Beard*, [1920] A.C. 479; sub nom. *R.* v. *Beard*, 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 14 Cr. App. Rep. 159; 14 Digest (Repl.) 71, *332*.

R. v. *Ashman*, (1858), 1 F. & F. 88; 15 Digest (Repl.) 986, *9645*.

R. v. *Cox*, (1818), Russ. & Ry. 362; 15 Digest (Repl.) 985, *9644*.

R. v. *Faulkner*, (1877), 13 Cox, C.C. 550.

R. v. *Lumley*, (1911), 76 J.P. 208; 22 Cox, C.C. 635; 15 Digest (Repl.) 951, *9195*.

R. v. *Meade*, [1909] 1 K.B. 895; 78 L.J.K.B. 476; 73 J.P. 239; 2 Cr. App. Rep. 54; 14 Digest (Repl.) 71, *328*.

R. v. *Miller*, [1951] V.L.R. 346; A.L.R. 749; 15 Digest (Repl.) 953, *5841*.

R. v. *Philpot*, (1912), 7 Cr. App. Rep. 140; 14 Digest (Repl.) 369, *3575*.

R. v. *Steane*, [1947] 1 All E.R. 813; [1947] K.B. 997; [1947] L.J.R. 969; 177 L.T. 122; 111 J.P. 337; 32 Cr. App. Rep. 61; 14 Digest) (Repl.) 33, *47*.

R. v. *Vamplew*, (1862), 3 F. & F. 520; 15 Digest (Repl.) 952, *9205*.

R. v. *Vickers*, [1957] 2 All E.R. 741; [1957] 2 Q.B. 664; 121 J.P. 510; 41 Cr. App. Rep. 189; [1957] 3 W.L.R. 326; 3rd Digest Supp.

R. v. *Ward*, [1956] 1 All E.R. 565; [1956] 1 Q.B. 351; 40 Cr. App. Rep. 1; [1956] 2 W.L.R. 423; 3rd Digest Supp.

Appeal.

The Crown appealed, pursuant to a certificate of the Attorney-General dated May 31, 1960, from an order of the Court of Criminal Appeal (BYRNE, SACHS and WINN, JJ.), dated May 18, 1960, and reported sub nom. *R.* v. *Smith*, [1960] 2 All E.R. 450, allowing an appeal by the respondent, Jim Smith, against his conviction at the Central Criminal Court (DONOVAN, J., sitting with a jury), on

Apr. 7, 1960, of the capital murder of Leslie Edward Vincent Meehan, under the Homicide Act, 1957, s. 5 (1) (d), and substituting a verdict of manslaughter. The facts are stated in the opinion of VISCOUNT KILMUIR, L.C.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *J. M. G. Griffith-Jones* and *S. A. Morton* for the Crown.

Edward Clarke, Q.C., *Miss A. M. Jennings* and *D. B. Watling* for the respondent.

Their Lordships took time for consideration.

July 28. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, the respondent, Jim Smith, was convicted on Apr. 7, 1960, of the wilful murder on Mar. 2, 1960, of Leslie Edward Vincent Meehan, a police officer acting in the execution of his duty. Such a crime constitutes capital murder under s. 5 of the Homicide Act, 1957, and, accordingly, the respondent was sentenced to death. There was never any suggestion that the respondent meant to kill the police officer, but it was contended by the prosecution that he intended to do the officer grievous bodily harm as a result of which the officer died.

In his final direction to the jury, the trial judge, DONOVAN, J., said:

> " . . . if you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder . . .
>
> " On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter."

The respondent appealed to the Court of Criminal Appeal alleging misdirection by the trial judge, the main ground being that the direction cited above was wrong in that the question for the jury was what he, the respondent, in fact contemplated. The appeal was heard by the Court of Criminal Appeal on May 9 and 10, 1960, when the court allowed the appeal, substituted a verdict of guilty of manslaughter, and imposed a sentence of ten years' imprisonment. The court gave its reasons on May 18, 1960. They upheld the respondent's contention, holding that (1):

> "... there always remained the question whether the appellant [the present respondent] really did . . . realise what was the degree of likelihood of serious injury."

Thereupon the Attorney-General gave his fiat certifying that the appeal of Jim Smith involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House on the appeal of the Director of Public Prosecutions. The appeal certainly involves an important question, raising, as it does, the question what is the proper direction to be given to a jury in regard to the necessary intent which has to be proved in cases of murder, and also in cases under s. 18 of the Offences against the Person Act, 1861 (2).

The facts can be summarised as follows: At about 7.30 p.m. on Mar. 2, 1960, the respondent, accompanied by a man named Artus, was driving a Ford Prefect motor car through Woolwich. In the boot and the back of the car were sacks

---

(1) [1960] 2 All E.R. at p. 455.

(2) See 5 HALSBURY'S STATUTES (2nd Edn.) 793. The section deals with " Shooting or attempting to shoot, or wounding, with intent to do grievous bodily harm, or to resist apprehension."

containing scaffolding clips that they had just stolen. The car was stopped in Beresford Square by the police officer on point duty in the normal course of traffic control and, while so stopped, P.C. Meehan, who was acquainted with the respondent, came to the driver's window and spoke to him. No doubt as a result of what P.C. Meehan saw in the back of the car, he told the respondent when the traffic was released to draw in to his near-side. The respondent began to do so, and P.C. Meehan walked beside the car. Suddenly, however, the respondent accelerated along Plumstead Road and P.C. Meehan began to run with the car shouting to the officer on point duty to get on to the police station. Despite the fact that the respondent's car had no running board, P.C. Meehan succeeded in hanging on and never let go until some 130 yards up Plumstead Road when he was thrown off the car and under a bubble car coming in the opposite direction, suffering a crushed skull and other injuries from which he died. What happened during the time the car travelled that 130 yards was the subject of considerable evidence. The police officer on traffic duty, P.C. Baker, said that he last saw the car doing what he thought was about twenty miles per hour with P.C. Meehan running and holding on to it. Mr. Doran, a bus driver, whose vehicle had also been held up in Beresford Square, said that the respondent's car suddenly accelerated with P.C. Meehan holding on to it; that it started to zigzag; and that the police officer appeared to be thrown across the bonnet of the car. Mr. Lynch, who was standing in the centre of the square, said that the car suddenly accelerated, zigzagging all the time, the police officer holding on, his feet hanging on the ground; that it kept on accelerating and he thought he saw the right hand of someone in the car trying to push the officer off. He thought that the car reached a speed of thirty to sixty miles per hour. Four cars were coming in the opposite direction. The driver of the first car, a Mr. Gill, said that the respondent's car appeared to come at him at a fast to medium speed. There appeared to be someone on the car either falling from the driver's seat or picked up on the bonnet. He felt a slight bump on the rear of his car but sufficient to make him stop. The driver of the second car, a Mr. Mills, said that he saw the respondent's car gathering speed and swerving towards him. The side of his car was struck. The driver of the third car, a Mr. Eldridge, thought that the respondent's car was travelling at about forty to fifty miles per hour; he saw what he could only describe as an object hanging on below the driver's window. His car was struck violently, the off-side front mudguard being bashed in. Having regard to the fact that there were no marks on the respondent's car the inevitable conclusion is that the contact of all three cars was with P.C. Meehan. Mr. Rollingson, the driver of the fourth car, a bubble car, said that the respondent's car was going very fast and swerving. He saw something coming towards him; there was a terrific crash and he stopped and P.C. Meehan was underneath his car. The respondent's car went tearing up the road. Mr. Heywood, a cyclist, who was ahead of the respondent's car and was passed by the car just after P.C. Meehan was thrown off, described the car as going fast. Finally, Artus, the passenger in the respondent's car, described how the officer was holding on to the door by the driver's window with his left hand and was banging the windscreen with his right hand. He said that the respondent said: "Let go, Bert.".

After P.C. Meehan had been thrown off, the respondent drove his car a little further up Plumstead Road and into a side turning where he and Artus threw the sacks of clips out of the car. Artus then went off but the respondent returned to the scene. According to P.C. Weatherill, the respondent first asked: "Is he dead?" and then, on being told that it was believed so, he said: "I knew the man, I wouldn't do it for the world. I only wanted to shake him off." The respondent, however, denied that he had spoken the last few words. The respondent was taken to the police station. On being arrested and cautioned, he said: "I didn't mean to kill him but I didn't want him to find the gear." The respondent then made and signed a statement in which, inter alia, he said:

A "P.C. Meehan jumped on the side of the car and I got frightened. I don't know what I got frightened about. I don't think I thought of the stolen gear I had on board. I don't know what I did next in respect of driving the car. All I know is when he fell off he must have been hurt. I knew he fell off, and I then took a turning off the Plumstead Road. I drove up this turning some way and turned right down a back street.

B "I stopped the car in this back street, as George wanted to get out of it. I got out too and chucked the gear out of the car on to the pavement. I got rid of it, because I was scared the police would find it in my motor."

The respondent gave evidence at the trial. He said that, when P.C. Meehan jumped on the side of the car, his foot went down on the accelerator and he was scared. "I was scared very much. I was very much frightened." He agreed that C he did not take his foot off the accelerator.

"I never thought of it, sir. I was frightened. I was up in the traffic. I never thought of it. It happened too quick."

Asked why he did not take his foot off the accelerator, he said: "I would have done, but when he jumped on the side he took my mind off what I was doing." D "When he jumped on I was frightened. I was up the road before it happened. It all happened in a matter of seconds." He further said that, when going up Plumstead Road, he didn't realise that the officer was still hanging on to the car. Asked about his car swerving, he said: "My motor was swaying because of the load in the back."

In this state of the evidence, the defence was twofold—(i) That he did not realise E the officer was hanging on to the car until the officer fell off and that he could not keep a straight course having regard to the weight of metal in the back. In other words, he raised the defence of accident. (ii) Alternatively, that it was a case of manslaughter and not murder in that he had no intent to kill or to do grievous bodily harm.

As regards the defence of accident, the learned judge went through the relevant F evidence, and ended by saying this:

"There is a limit, is there not, members of the jury, to human credulity, and you may think that the accused man's unsupported assertion on this part of the case goes well past it, that the evidence is overwhelming, and he knew his car was carrying the officer up the road? The matter is one for you, but if you arrive at the conclusion that, of course, he knew, it is one which G I would regard as abundantly right. Indeed, on the evidence I do not see how you could properly arrive at any other conclusion. If that be so the defence of pure accident goes."

My Lords, it would seem that this observation was fully justified on the evidence, and the jury by their verdict must have rejected the possibility of accident. Indeed, the defence of accident was never suggested either in the Court of H Criminal Appeal or in your Lordships' House.

It is in regard to the second defence that the summing-up of the learned judge has been criticised and, indeed, has been held to amount to a misdirection by the Court of Criminal Appeal. It is said that the jury were misdirected as to the intent which has to be proved in order to constitute the necessary ingredient of malice. The passages complained of are these:

I "The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts.

* * *

"If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: Could any reasonable person fail to appreciate that the likely

result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention, and that would lead to a verdict of guilty on the charge of capital murder.

* * *

" Now the only part of that evidence of P.C. Weatherill which the accused challenges is the part that incriminates him, namely, ' I only wanted to shake him off.' He says he did not say that. Well, you may think it is a curious thing to imagine, and further it may well be the truth—he did only want to shake him off; but if the reasonable man would realise that the effect of doing that might well be to cause serious harm to this officer, then, as I say, you would be entitled to impute such an intent to the accused, and, therefore, to sum up the matter as between murder and manslaughter, if you are satisfied that when he drove his car erratically up the street, close to the traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder, and you should not shrink from such a verdict because of its possible consequences.

" On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter."

The main complaint is that the learned judge was there applying what is referred to as an objective test, namely, the test of what a reasonable man would contemplate as the probable result of his acts, and, therefore, would intend, whereas the question for the jury, it is said, was what the respondent himself intended. This, indeed, was the view of the Court of Criminal Appeal who said (3):

" Once mere accident was excluded, the present case became one in which the degree of likelihood of serious injury to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said that there was a certainty that such injury would result; and it was one in which there always remained the question whether the appellant really did during the relevant ten seconds realise what was the degree of likelihood of serious injury. If the jury took the view that the appellant [the present respondent] deliberately tried to drive the body of the police officer against oncoming cars, the obvious inference was open to them that the appellant intended serious injury to result; if, however, they concluded he merely swerved or zigzagged to shake off the officer, or if they concluded that for any reason he may not have realised the degree of danger to which he was exposing the officer, a different situation would arise with regard to the inferences to be drawn. In the former case the jury might well have felt they were dealing with consequences that were certain; in the latter only with degrees of likelihood."

Putting aside for a moment the distinction which the Court of Criminal Appeal were seeking to draw between results which were " certain " and those which were " likely ", they were saying that it was for the jury to decide, whether, having regard to the panic in which he said he was, the respondent in fact at the time contemplated that grievous bodily harm would result from his actions or, indeed, whether he contemplated anything at all. Unless the jury were satisfied that he in fact had such contemplation, the necessary intent to constitute malice would not, in their view, have been proved. This purely subjective approach

(3) [1960] 2 All E.R. at p. 455.

involves this, that, if an accused said that he did not in fact think of the consequences and the jury considered that that might well be true, he would be entitled to be acquitted of murder.

My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that on which the courts have always acted. The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e., was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law and I would only make a few citations.

The true principle is well set out in that persuasive authority THE COMMON LAW by HOLMES, J. After referring to STEPHENS' DIGEST OF THE CRIMINAL LAW and the statement that foresight of the consequence of the act is enough, he says (at p. 53):

> "But again, What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. Again, we must seek a reduction to lower terms. If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen."

And again (at p. 56):

> "But furthermore, on the same principle, the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience."

In *R.* v. *Faulkner* (4), the Court of Crown Cases Reserved for Ireland, on grounds immaterial to this case, quashed a conviction for arson of a sailor who with intent to steal tapped a cask of rum. He was holding a lighted match and the rum caught fire and the vessel was destroyed. PALLES, C.B., stated the law as follows (5):

> "In my judgment the law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the corpus delicti which actually ensues. In my opinion this inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct

(4) (1877), 13 Cox, C.C. 550.

(5) (1877), 13 Cox, C.C. at p. 561.

is reckless or the reverse. This much I have deemed it right to say to prevent misconception as to the grounds upon which my opinion is based."

In *R.* v. *Lumley* (6), AVORY, J., directed the jury in these terms:

"When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder."

In *R.* v. *Philpot* (7), the accused had strangled his wife. In evidence, he said:

"something seemed to snap in my head, and I jumped up and caught her by the throat. I lost control of myself altogether. I did not know what I was doing exactly; I felt as if I was holding a very strong galvanic battery, and wanted to leave go, and could not."

The real issue was whether or not he was sane at the time. The jury found that he was sane and that he acted in a fit of temper without intending to kill her. In answer to a question from the judge, the foreman said:

"The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing."

The judge then asked them to reconsider their verdict, saying that a man is held to intend the consequences of his act and, as a result, the jury found the accused guilty of murder. The Court of Criminal Appeal (consisting of LORD ALVERSTONE, C.J., HAMILTON, J., and LUSH, J.), in dismissing the appeal said (8):

"The jury found that he killed her in a fit of temper; they added that he did not realise the consequences of his act, but they cannot have meant that he began to do a harmless act, or one but little blameworthy, which afterwards developed into something causing death. They must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences of his act. The only act in question was that which caused death, and the appellant who committed this act, if sane, must be held to have intended that consequence."

In *Public Prosecutions Director* v. *Beard* (9) your Lordships' House had to consider how far evidence of drunkenness could be taken into consideration in order to determine whether the accused had the necessary intent. Reference was made to *R.* v. *Meade* (10), in which the Court of Criminal Appeal had said that it was a defence if it was shown that the accused's mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous. In dealing with that case, LORD BIRKENHEAD, L.C., in his speech said (11):

"Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have no doubt that the proposition in *Meade's* case (10) in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act."

Coming to more recent times, the judgment of the Court of Criminal Appeal in *R.* v. *Ward* (12) is to the same effect. LORD GODDARD, C.J., said (13):

(6) (1911), 22 Cox, C.C. 635 at p. 636.
(7) (1912), 7 Cr. App. Rep. 140.
(8) (1912), 7 Cr. App. Rep. at p. 143.
(9) [1920] A.C. 479.
(10) [1909] 1 K.B. 895.
(11) [1920] A.C. at p. 503.
(12) [1956] 1 All E.R. 565; [1956] 1 Q.B. 351.
(13) [1956] 1 All E.R. at p. 567; [1956] 1 Q.B. at p. 356.

A "The test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would contemplate or would not contemplate. If the act is one about which the jury can find that a reasonable man would say: 'It would never occur to me that death would result or grievous bodily harm would result', then the jury can find him guilty of manslaughter. If, however, the jury come to the conclusion B that any reasonable person (that is to say, a person who cannot set up a plea of insanity) must have known that what he was doing would cause at least grievous bodily harm, and if the child died of that grievous bodily harm, then a verdict of murder is justified and what was done does amount to murder in law."

C Indeed, the only case which could possibly be said to support the view taken by the Court of Criminal Appeal in the present case is *R.* v. *Vamplew* (14), in which a young girl of thirteen was charged with the wilful murder of an infant about ten weeks' old by administering poison. In summing-up, Pollock, C.B., directed the jury (15) that:

D "the crimes of murder and manslaughter were in some instances very difficult of distinction. The distinction which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one, however, could commit murder without that consciousness. The jury must be satisfied, before they could find the prisoner guilty, that she was conscious, and that her act was deliberate. They must be satisfied that she had arrived at that maturity of the intellect which was E a necessary condition of the crime charged."

It is clear, however, from the argument in the case and, indeed, from the last sentence of the direction of the chief baron that the real issue in the case was whether, by reason of her age, the accused had the necessary mens rea. Indeed, it so cited in Archbold's Criminal Pleading Evidence and Practice (34th Edn.), para. 28 and para. 2472.

F My Lords, the law being as I have endeavoured to define it, there seems to be no ground on which the approach by the trial judge in the present case can be criticised. Having excluded the suggestion of accident, he asked the jury to consider what were the exact circumstances at the time as known to the respondent and what were the unlawful and voluntary acts which he did towards the police officer. The learned judge then prefaced the passages of which complaint G is made by saying, in effect, that if, in doing what he did, he must as a reasonable man have contemplated that serious harm was likely to occur then he was guilty of murder. My only doubt concerns the use of the expression "a reasonable man", since this to lawyers connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who H is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury.

Another criticism of the summing-up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again:

I "The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts."

It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this

(14) (1862), 3 F. & F. 520. (15) (1862), 3 F. & F. at p. 522.

purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable.

Strong reliance was, however, placed on *R.* v. *Steane* (16), in which LORD GODDARD, C.J., said:

> "No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

That, however, was a very special case. The appellant had been charged and convicted of doing acts likely to assist the enemy, with intent to assist the enemy. His case was that, while he might have done acts likely to assist the enemy, he had only done so out of duress and in order to save his wife and children. Accordingly, this was a case where, over and above the presumed intent, there had to be proved an actual intent or, it might be said, a desire by the appellant to assist the enemy.

It was also said that the Court of Criminal Appeal were right in stating the law thus (17):

> "The law on this point as it stands today is that this presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."..

This passage in the judgment of the Court of Criminal Appeal seems to have been lifted verbatim from the judgment of DENNING, L.J., in *Hosegood* v. *Hosegood* (18), a case dealing with proof of constructive desertion. In that case, my noble and learned friend, DENNING, L.J., was approving the school of thought which said that a husband is not to be found guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring the married life to an end. Accordingly, the words in that passage were being used in connexion with a case where an actual or overall intent or desire was involved. No such overall intent or desire is involved in the consideration of intent to kill or to do grievous bodily harm. Thus an overall intent or desire, e.g., an intent or desire to escape, could not afford any defence. While, however, I can see no possible criticism of the trial judge in regard to the use he made of the presumption in the present case, I cannot help feeling that it is a matter which might well be omitted in summing-up to a jury. The phrase "presumption of law" and the reference, if it has to be made, to the presumption being "rebuttable" are only apt to confuse a jury. In my opinion, the test of the reasonable man, properly understood, is a simpler criterion. It should present no difficulty to a jury and contains all the necessary ingredients of malice aforethought.

(16) [1947] 1 All E.R. 813 at p. 816; [1947] K.B. 997 at p. 1004.
(17) [1960] 2 All E.R. at p. 453. (18) (1950), 66 (pt. 1) T.L.R. 735 at p. 738.

Before leaving this part of the case, I should mention that the Court of Criminal Appeal in their judgment (19) drew a distinction between serious harm which was "certain" to result and serious harm which was "likely" to result. In their judgment, if serious harm was certain to result the presumption could safely be relied on and there was no need for the judge to tell the jury that it was rebuttable. On the other hand, if serious harm was only a likely consequence a judge should, in their opinion, tell the jury that the presumption was rebuttable and that it was for them to determine whether the accused in fact intended to inflict serious harm. My Lords, there is, in my opinion, no warrant for such a distinction and no authority can be adduced in support thereof. Indeed, counsel for the respondent did not, in your Lordships' House, seek to support the distinction. The Court of Criminal Appeal apparently based their opinion on the passage which I have already cited in the judgment given by LORD GODDARD, C.J., in *R.* v. *Ward* (20), in which the words "must have known that what he was doing would cause at least grievous bodily harm" occur. They treated these words as the true ratio of the decision in *R.* v. *Ward* (21), whereas the case really decided that the direction to the jury was correct—a direction which had used the word "likely" not "certain". It seems clear that LORD GODDARD was not considering the distinction which the Court of Criminal Appeal have drawn. In my opinion, the true question in each case is whether there was a real probability of grievous bodily harm.

The last criticism of the summing-up which was raised before your Lordships was in regard to the meaning which the learned judge directed the jury was to be given to the words "grievous bodily harm". The passages of which complaint is made are the following:

> "When one speaks of an intent to inflict grievous bodily harm upon a person, the expression grievous bodily harm does not mean for that purpose some harm which is permanent or even dangerous. It simply means some harm which is sufficient seriously to interfere with the victim's health or comfort.
>
> * * *
>
> "... in murder the killer intends to kill, or to inflict some harm which will seriously interfere for a time with health or comfort.
>
> * * *
>
> "If the accused intended to do the officer some harm which would seriously interfere at least for a time with his health and comfort, and thus perhaps enable the accused to make good his escape for the time being at least, but that unfortunately the officer died instead, that would be murder too."

The direction in these passages was clearly based on the well-known direction of WILLES, J., in *R.* v. *Ashman* (22) and on the words used by GRAHAM, B., in *R.* v. *Cox* (23). Indeed, this is a direction which is commonly given by judges in trials for the statutory offence under s. 18 of the Offences against the Person Act, 1861, and has on occasions been given in murder trials: cf. *R.* v. *Vickers* (24).

My Lords, I confess that, whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words "grievous bodily harm" a meaning other than that which the words convey in their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" means no more and no less than "really serious". In this connexion, your Lordships were referred to the judgment of the Supreme Court of Victoria in *R.* v. *Miller* (25). In giving the judgment of the court, MARTIN, J., having expressed the view that

---

(19) [1960] 2 All E.R. at p. 454.
(20) [1956] 1 All E.R. at p. 567; [1956] 1 Q.B. at p. 356.
(21) [1956] 1 All E.R. 565; [1956] 1 Q.B. 351. (22) (1858), 1 F. & F. 88.
(23) (1818), Russ. & Ry. 362. (24) [1957] 2 All E.R. 741; [1957] 2 Q.B. 664.
(25) [1951] V.L.R. 346.

the direction of WILLES, J., could only be justified, if at all, in the case of the statutory offence, said (26):

> "It is not a question of statutory construction but a question of the intent required at common law to constitute the crime of murder. And there does not appear to be any justification for treating the expression 'grievous bodily harm' or the other similar expressions used in the authorities upon this common law question which are cited above as bearing any other than their ordinary and natural meaning."

In my opinion, the view of the law thus expressed by MARTIN, J., is correct, and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence. It was, however, contended before your Lordships on behalf of the respondent that the words ought to be given a more restricted meaning in considering the intent necessary to establish malice in a murder case. It was said that the intent must be to do an act "obviously dangerous to life" or "likely to kill". It is true that, in many of the cases, the likelihood of death resulting has been incorporated into the definition of grievous bodily harm, but this was done no doubt merely to emphasise that the bodily harm must be really serious, and it is unnecessary, and I would add inadvisable, to add anything to the expression "grievous bodily harm" in its ordinary and natural meaning.

To return to the summing-up in the present case, it is true that, in the two passages cited, the learned judge referred to "grievous bodily harm" in the terms used by WILLES, J., in *R.* v. *Ashman* (27), but in no less than four further passages and, in particular, in the vital direction given just before the jury retired he referred to "serious hurt" or "serious harm". Read as a whole it is, I think, clear that there was no misdirection. Further, on the facts of this case, it is quite impossible to say that the harm which the respondent must be taken to have contemplated could be anything but of a very serious nature coming well within the term "grievous bodily harm".

Before leaving this appeal I should refer to a further contention which was but faintly adumbrated, namely, that s. 1 (1) of the Homicide Act, 1957, had abolished malice constituted by a proved intention to do grievous bodily harm and that, accordingly, *R.* v. *Vickers* (28) which held the contrary was wrongly decided. As to this, it is sufficient to say that, in my opinion, the Act does not in any way abolish such malice. The words in parenthesis in s. 1 (1) of the Act and a reference to s. 5 (2) make this clear beyond doubt.

In the result, the appeal should, in my opinion, be allowed and the conviction of capital murder restored.

LORD GODDARD: My Lords, I agree with the opinion which has just been pronounced.

LORD TUCKER: My Lords, I also agree.

LORD DENNING: My Lords, I agree.

LORD PARKER OF WADDINGTON: My Lords, I also agree.

Appeal allowed and cause remitted to the Court of Criminal Appeal to do what should be just and consistent with the judgment.

[July 29. The Court of Criminal Appeal (BARRY, PEARSON and DIPLOCK, JJ.), on an application by *S. A. Morton*, counsel for the Crown, ordered that the respondent's appeal to the Court of Criminal Appeal be dismissed, and that his conviction be restored.]

Solicitors: *Director of Public Prosecutions* (for the Crown); *Prothero & Prothero* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(26) [1951] V.L.R. at p. 357. (27) (1858), 1 F. & F. 88.
(28) [1957] 2 All E.R. 741; [1957] 2 Q.B. 664.

BARCLAYS BANK, LTD. *v.* NAYLOR (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Cross, J.), July 14, 15, 21, 1960.]

Income Tax—Annual payment—Covenant to pay to trustees for seven years—Trust as part of scheme for overseas employees of company—Provision for education of employees' children—Trustees' discretion to make payments to employees' children—No consideration from employee or child.

Owing to the difficulty of getting men of good calibre to serve abroad, particularly in view of the problem of educating children during parents' absence from this country, a company instituted a scheme to provide part of the cost of educating children of certain employees of the company and of subsidiary companies serving overseas. The company executed a deed of covenant under which the company covenanted to pay to four trustees £27,000 less income tax at the standard rate annually for seven years and the trustees agreed to hold the sums received on trust in their discretion to apply the sums for the maintenance or education or otherwise for the benefit of defined beneficiaries or, if there were none, for charity. The beneficiaries were specified in a list, to and from which the company could make additions and deletions at will, and the beneficiaries were to cease to be entitled to the benefit of the scheme on the employee's transfer or death. A son (aged nine) of an employee of a subsidiary company was included in the scheme and payments amounting to seventy-five per cent. of the school fees of the son plus £50 a year towards maintenance during holidays less income tax at standard rate were made by the trustees into a bank account in the son's name, plus a loan of an amount equal to the income tax deducted pending recovery from the Inland Revenue. The employee made further payments in and on his instructions the bank paid school fees and other expenses out of the account. The bank claimed repayment of income tax deducted from the Inland Revenue on behalf of the son.

Held: the income tax deducted was recoverable by the bank on behalf of the son because—

(i) the payee, the son, was not bound to provide any consideration for the payments by the company, nor was the employee, his father (between whom and the company there was no agreement relating to the payments) placed under any legal or moral obligation to remain in the service of the subsidiary company, and, therefore, although the company in covenanting to make the payments to the trustees did so from motives of commercial advantage, yet no consideration was given by the son or the employee and the payments did not lose for income tax purposes their character of annual payments, viz., pure income profit (see p. 180, letters F and G, post).

Inland Revenue Comrs. v. *National Book League* ([1957] 2 All E.R. 644) distinguished.

(ii) when trustees entrusted with income applicable for the benefit of a child applied it, in a proper exercise of their discretion as trustees, in paying the child's school bills for which his parent was liable, the income was not thereby rendered the parent's income, and accordingly the income credited to the son's account when so applied, did not become the employee's income (see p. 181, letter C, post).

Appeal allowed.

[As to what are annual payments for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 362-364, para. 666; and for cases on the subject, see 28 DIGEST (Repl.) 169-176, *678-709.*]

Cases referred to:

Howe (Earl) v. *Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest (Repl.) 351, *1549.*

Inland Revenue Comrs. v. *Forster*, (1935), 19 Tax Cas. 738; 28 Digest (Repl.) 340, *1507*. A

Inland Revenue Comrs. v. *National Book League*, [1957] 2 All E.R. 644; [1957] Ch. 488; [1957] 3 W.L.R. 222; 28 Digest (Repl.) 175, *708*.

Nicoll v. *Austin*, (1935), 19 Tax Cas. 531; 28 Digest (Repl.) 230, *1003*.

Case Stated.

The bank appealed to the General Commissioners of Income Tax for Charing Cross against the refusal of the inspector of taxes to allow a claim by the bank on behalf of Michael Cheetham, the infant son of an employee of a subsidiary of Imperial Chemical Industries, Ltd. for repayment of income tax deducted from payments made to Michael Cheetham. The payments were made by trustees in pursuance of a scheme instituted by Imperial Chemical Industries, Ltd., for assistance to be given in the education of children of overseas employees of the company and of subsidiaries. The bank contended that sums paid to the trustees by Imperial Chemical Industries, Ltd., under a deed of covenant were annual payments and income in the hands of the trustees and that payments of such sums as were credited to the account of Michael Cheetham (to which account also his father, the employee, made payments), the beneficiary beneficially entitled thereto, by the trustees' exercise of their discretion under the deed in his favour were income of the beneficiary. The Crown contended that the payments were not annual payments because they were made in pursuance of an arrangement by which Imperial Chemical Industries, Ltd., undertook to meet certain obligations of the employee in respect of his son's education and to contribute towards the son's maintenance on the understanding that the employee remained in the employment of a company controlled or influenced by Imperial Chemical Industries, Ltd. The commissioners held that the covenant was not entered into without conditions or stipulations and the payments to the trustees so far as they were utilised for education grants were therefore not annual payments within the Income Tax Acts. They rejected the bank's claim. The bank appealed by way of Case Stated to the High Court.

Heyworth Talbot, Q.C., and *Hubert H. Monroe, Q.C.*, for the bank.

F. N. Bucher, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Cur. adv. vult.

July 21. **CROSS, J.**, read the following judgment: On Nov. 22, 1956, the board of Imperial Chemical Industries, Ltd. considered a memorandum entitled " Education assistance: expatriate staff ". The passages in it which are relevant for the purposes of this case are as follows:

> " The difficulty of getting men of good calibre to serve I.C.I. abroad is getting greater and also the difficulty of keeping those we have abroad. This is due to the demand for such people at home, the increased taxation abroad, and less security and attraction of work abroad because of nationalist tendencies.
>
> " Among the chief objections to service abroad is the difficulty of educating children owing to lack of appropriate facilities in many places and the high cost of arranging for children to be housed and educated at home when the parents are abroad. A scheme of assistance is in force whereby £50 per annum for each child up to a maximum of two children is incorporated in married employees' cost of living allowance. This is intended to pay the premium for insurance policies to pay for the children's education from thirteen to eighteen years old. This is now quite inadequate because even for this limited purpose it should be increased to £80-£90 per annum and even this figure is only correct if the insurance is taken out when the child is born; the parents may not be abroad then, and in addition it provides nothing for education between eight and twelve years. In many places overseas, children have to come home to school at eight years of age.

A "A new scheme is now recommended for approval by the board to provide part of the cost of educating the children of certain employees serving overseas. This is likely to involve setting up a trust to be financed by I.C.I. The scheme would normally relieve the parent of seventy-five per cent. of the school fees actually payable in each particular case plus £50 per annum per child towards the cost of holiday accommodation; the trustees B (or a committee if a trust is found not to be advisable) would have discretion in special circumstances to reduce but not to increase the payment. This would be effective all the time between the child's eighth and eighteenth birthdays. It has been estimated that this will provide about sixty per cent. of the total cost of school fees, extras and holiday expenses of each child.

"People covered by the scheme would be broadly those expatriates whose C conditions of service are controlled or influenced by I.C.I. (therefore normally excluding, for example, Canadian Industries, Ltd., Imperial Chemical Industries of Australia & New Zealand, Ltd., and African Explosives & Chemical Industries, Ltd.) and who work in territories where appropriate educational facilities do not exist or where the climate is unsuitable for children."

D The memorandum went on to point out, among other things, that the cost of the scheme for the first full year would be approximately £27,000 in terms of profit before tax, and that their married staff who had children over eight at the inception of the scheme, and would therefore benefit from it immediately, would lose their existing education allowance.

E The board approved the scheme, and on Dec. 22, 1956, the overseas personnel officer circulated to the heads of overseas departments of the company, for transmission to the management of each overseas organisation whose staff was eligible to participate, a further memorandum describing the scheme. This memorandum stated, among other things, that the children of British expatriate staff of certain named subsidiary companies of Imperial Chemical Industries, F Ltd. would be eligible if they were sent to or allowed to remain in the United Kingdom for educational purposes, but that the assistance would normally cease on either (a) the death of the child, (b) the child leaving school, (c) the parents ceasing to be resident in a relevant territory as a result of retirement or transfer, or (d) the death of the father.

Imperial Chemical Industries (China), Ltd., was one of the overseas sub- G sidiaries referred to in that memorandum, and a Mr. John Aldred Cheetham, who was employed by that company, was one of those whose children would be eligible for assistance under the scheme. He had one child, Michael, then aged nine. In February, 1957, a letter was sent to him by the administrator of what was described as the expatriate children's bursary trust No. 1 in the following terms:

H "Dear Mr. Cheetham, a trust has been established with the object of assisting in the education of children of certain overseas residents and I enclose form E.1 so that if the circumstances warrant it you can apply. This form should be completed and returned to me without delay.

"Considerable pains have been taken to set up a trustee body which is I distinct and legally separate from I.C.I. or any associated company and this is most important to avoid creating the impression in any quarter that the payments to be made are otherwise than by the trust (as distinct from the company) and to the children (as distinct from the parents). If an application is made by you, and it qualifies, you will be sent an explanatory form setting out the arrangements and giving instructions. From this you will see that care has been taken to ensure that no suggestion of assistance by the company is allowed to reach the school or to appear in any way. The arrangements are confidential to the trustees, the beneficiaries, the bank and

the taxation authorities in the United Kingdom, and I shall be glad if you will maintain this position.

"As the payments will be the income of the children they should not in any event be included in the parents' income for tax purposes but in cases where United Kingdom income tax has been deducted by the trustees, repayment of the tax will have to be claimed, and for this reason disclosure has been made to the Inland Revenue in the United Kingdom only."

Mr. Cheetham filled in on the form Michael's names, the date of his birth and the name of the school in England which he was attending, and he signed the form and returned it as requested. Although the administrator's letter stated that the trust had already been established, it was not in fact set up until Mar. 28, 1957, when the company entered into a deed of covenant with four trustees who were originally the overseas controller, the taxation controller, the assistant secretary of Imperial Chemical Industries, Ltd., and the overseas personnel officer.

The material provisions of the deed are as follows. There are two recitals:

"(i) I.C.I. is desirous of making such provision as is hereinafter contained for the individuals hereinafter described as the beneficiaries; and (ii) on or shortly before the execution of this deed, I.C.I. has approved a list (hereinafter called 'the initial list') as the initial list of beneficiaries for the purpose of this deed."

Then:

"(1) In this deed the expression 'the beneficiaries' means the persons whose names are at the material time included in the list of beneficiaries, that is to say the initial list as varied from time to time by exercise of the powers contained in the next following clause.

"(2) I.C.I. shall have the following powers exercisable from time to time, namely: (a) Power to add to the list of beneficiaries the name of any person who at the date of exercise of the power is either, (i) an infant child of any overseas employee; or (ii) a child of an overseas employee who though not an infant is undergoing or about to undergo educational or vocational training. (b) Power to add to the list of beneficiaries the name of any person who at the date of exercise of the power is a dependant of an overseas employee. (c) Power to delete from the list of beneficiaries the name of any person included therein whether such person was included in the initial list or was added to the list by exercise of the foregoing powers of addition. I.C.I. shall not however be under any duty to exercise the foregoing powers if it shall not choose to do so. In this clause an overseas employee means a person who at the date of exercise of the power is an employee resident outside the United Kingdom of any company managed and controlled for the purposes of United Kingdom income tax not within the United Kingdom in which I.C.I. then owns or controls directly or indirectly thirty-five per cent. or more of the voting stock.

"(3) I.C.I. hereby covenants with the trustees that it will for a period of seven years starting with the year 1957 pay to the trustees on the 1st day of April in each such year the sum of £27,000 less income tax at the standard rate for the time being in force."

"(5) The trustees shall hold the sums covenanted by cl. 3 hereof to be paid by I.C.I. and any further sums which may be paid pursuant to any such future deed of covenant as aforesaid Upon trust at their discretion to pay or apply the same as received to or for the maintenance, education or otherwise for the benefit of all or any one or more to the exclusion of the other or others of the beneficiaries for the time being, in such shares and in such manner in all respects as the trustees in their discretion may think fit, with power to the trustees, in the case of any infant beneficiary to pay any sum to

the parent or guardian of the infant or to the person in whose custody the infant is living, for the maintenance, education or benefit of the infant without the trustees being responsible for the application thereof by such parent, guardian or person.

" Provided always that: (a) the trustees may at their discretion postpone the application of the whole or any part of the sums received at any particular time and apply them at a later time as if they had been received at such later time; (b) if at any time there is no person included in the list of beneficiaries then (subject and without prejudice to the aforesaid power of postponement) the trustees shall apply the sums received at that time to a charitable purpose; and (c) if at any time the beneficiaries are so few that the sums received exceed in the opinion of the trustees what should reasonably be applied for the benefit of the beneficiaries, then (without prejudice to their aforesaid power to postpone) the trustees shall have power to apply such part as they shall think of the sums received to a charitable purpose."

The initial list of beneficiaries contained the names of sixty-eight children, of whom Michael Cheetham was one. On Apr. 2, 1957, the trustees of the deed of covenant held their first meeting, at which they considered the initial list of beneficiaries, and in the exercise of their discretion decided that sixty-one of the sixty-eight children on the initial list should be each paid a specified sum. The sum against Michael's name was £82 11s. 3d.

On Apr. 8, 1957, the administrator of the trust wrote to Mr. Cheetham as follows:

" Dear Mr. Cheetham, This trust will operate with effect from the commencement of the autumn term, 1956, and you are advised that your application on behalf of Michael Haigh Cheetham has been accepted. This letter is to tell you how the arrangements work and indicate what action is required by you. (1) In respect of each term a sum of money will be paid to an account which we will open in the name of your child at the Millbank, London, S.W.1, branch of Barclays Bank, Ltd. This sum will amount to seventy-five per cent. of the basic school fees plus one-third of £50 per annum, i.e., £16 13s. 4d. towards maintenance during the school holidays, being the sum which the trustees have decided to pay, less United Kingdom income tax at the standard rate. The deficiency will be made up by a loan equal to the amount of the income tax deducted. The object of the loan is to enable expenses to be met until your child is able to obtain repayment as a single person resident in the United Kingdom of the appropriate part of the tax which has been deducted from the payment. The word ' appropriate ' is used because the repayment will be affected by other income which the child may possess. When the repayment of tax has been received it will be available to repay the loan.

" (2) The sums placed by the trustees in the bank account of your child will in themselves of course (subject to para. 5 below) not be sufficient to meet the school and holiday expenses, and it is a part of the arrangements that you should pay into that account a sufficient sum to enable the school bills to be met. At no time should the account be otherwise than in credit. It is assumed that you are agreeable to this, but if you are not, will you please say so.

" (3) When you receive the school bills you should check them and forward them forthwith to the bank manager instructing him in your capacity as parent and/or guardian of the child to pay them and debit the child's account. The bank manager will submit the bills to me so that the payments in para. 1 can be made. You will appreciate that what will in effect be taking place is that the child will be paying his own school expenses out of income of his own, at least so far as the payments made to him or her by the trustees are concerned.

" (4) As you will see, the manager of the Millbank Branch of Barclays Bank, Ltd., has agreed to co-operate. The repayment of tax due to the child as a single person will be claimed by the income tax department of the bank and the repayment will be credited to your child's account. You will receive in due course the necessary forms of authority in favour of the bank's income tax department, so that the tax recovered can be applied against the loan."

On Apr. 12 the secretary of the trust sent a further letter, the following provisions of which are relevant:

" I refer to the letter of Apr. 8 in which reference was made to the amount of money to be credited to your child's account at Barclays Bank, Ltd., Millbank. The account has been opened in the name of Michael Haigh Cheetham, and the total amount which has been credited to the account for the autumn term, 1956 and the spring term, 1957 is £143 11s. 8d. This amount is made up as follows: Grant from the trust (net) £82 11s. 3d., loan from Imperial Chemical Industries, Ltd., £61 0s. 5d., total £143 11s. 8d. This loan is in fact the amount of income tax at the standard rate deducted from the grant (gross) referred to in para. 1 in the letter of Apr. 8, and to the extent that the tax is recovered, this loan must be repaid. Attached to this letter is an undertaking acknowledging the loan and agreeing to repay to the extent tax is recovered. I should be obliged if you would sign this and return it direct to me.

" In para. 4 of the letter of Apr. 8 reference is made to the claim which is to be made by the income tax department of the bank for the repayment of the appropriate amount of tax deducted, referred to in para. 1 above. In this connexion I enclose a form of authority addressed to the bank authorising them to: (a) prepare and submit to the Inland Revenue on behalf of your child the form for repayment of tax; (b) credit the amount of this repayment to the child's account; (c) credit Imperial Chemical Industries, Ltd., with the same amount. As you will be operating the account on the child's behalf, the bank will require two copies of your normal signature. I therefore enclose two ' specimen signature slips ' which should be prepared in the following manner: Normal signature of parent . . . Name of child . . .

" In order to assist the bank, a further form has been devised addressed to the manager, Barclays Bank, Ltd., Millbank, S.W.1, and a copy of this is also enclosed. To this form should be attached the school bill for the summer term, 1957. The form authorises the bank to pay the school bill direct to the school and to debit your child's account."

Mr. Cheetham duly signed the undertaking and other documents referred to in the letter. Under the authority signed by Mr. Cheetham, Barclays Bank, Ltd., the appellants, as agents for Michael, in due course claimed repayment of the £61 0s. 5d. income tax attributable to the £82 11s. 3d. This claim was disallowed by the inspector of taxes, and the bank appealed to the commissioners. The main contentions of the bank, which have been repeated before me, were:

" (ii) That payments made by I.C.I. to the trustees pursuant to the said deed of covenant dated Mar. 28, 1957, were annual payments and income in the hands of the trustees; . . . (iv) that when the trustees exercised their discretionary power and made a payment to a beneficiary under the said deed they identified the individual who was beneficially entitled to the income which they had received; . . . (vi) that once the income went into the hands of the beneficiary identified by the exercise of the discretionary power it was income of that beneficiary."

The contentions of the Crown were:

" (i) Upon the whole of the evidence the payment in question was in pursuance of an arrangement by which I.C.I. undertook to meet certain

liabilities incurred by Mr. Cheetham for Michael's education, and to make a contribution towards Michael's maintenance, upon the understanding that Mr. Cheetham remained in the employment of a company controlled or influenced by I.C.I.; (ii) the payment in question was not an annual payment in the sense of the Income Tax Acts."

The decision of the commissioners, which was given in writing, was as follows:

"This appeal concerns a repayment claim made by an infant as a result of a scheme entered into by the Imperial Chemical Industries, Ltd., quite openly to provide for the education of children of employees of companies controlled or influenced by the I.C.I. whilst such employees are abroad in certain territories. We have considered the deed dated Mar. 28, 1957, and certain correspondence which took place, both before and after the execution of this deed, and we are of the opinion that we are entitled to consider the correspondence and minutes of directors' meetings prior to the date of the deed to see the substance of the arrangement."

That, of course, is a reference to the two memoranda, part of which I have read.

"We consider that although the agreement between the I.C.I. and Mr. Cheetham which appears from the correspondence possibly was not legally enforceable, there was a clear understanding that a proportion of his son's school fees would be paid so long as Mr. Cheetham remained in his overseas employment, and it was also made clear to him that it would cease on his transfer or death, and that he would lose the £50 per annum paid up to date. We consider that (i) I.C.I. were making these payments to the trustees in order that employees of companies controlled or influenced by the I.C.I. should have more attractive emoluments; (ii) such companies would obtain the benefit of attracting better employees at a smaller cost; and (iii) that I.C.I. would obtain benefit through the better well being of these companies.

"Therefore we find that the covenant was not entered into without conditions or stipulations and that the payments to the trustees so far as they are utilised for education grants are not annual payments within the Income Tax Acts and for that reason the claim for repayment of tax fails."

The bank asked for a Case to be stated, and that is the Case which has now come before me.

It is to be observed that the commissioners refer to an agreement between I.C.I. and Mr. Cheetham. To my mind, there was no agreement, properly so called, between them at all. There was in fact no evidence that Mr. Cheetham had seen either of the two memoranda, but I am quite prepared to assume that he fully appreciated the nature of the scheme as it applied to him—i.e., that he realised that he was going to lose the £50 per annum which had hitherto been included in his cost of living allowance but that Michael was going to become entitled to an income of a larger amount, to be utilised for his education and holiday expenses, which would come to an end if and when Mr. Cheetham ceased to be employed overseas by I.C.I. It is also obvious that I.C.I. did not execute the deed of covenant out of disinterested benevolence, but in order to provide an inducement to people like Mr. Cheetham to continue in the service of their subsidiary companies overseas. There was, however, no agreement between I.C.I. and Mr. Cheetham that he should remain in their service in consideration of the provision of an income for Michael.

I think that counsel for the Crown accepted that this was the position on the facts as found by the commissioners, and it is relevant to observe that he did not argue—and, indeed, expressly refrained from arguing—that the deed of covenant and the trust thereby created were not to be taken at their face value. His submissions were twofold. Logically, I think, his first submission was that the payments of £27,000 per annum were not annual payments within the meaning of the Income Tax Acts at all; secondly, he submitted that the sum

of £83 odd credited to the bank account in Michael's name was not part of his income but was part of his father's remuneration. A

In support of his first submission, counsel reminded me that a sum paid annually under a deed of covenant is not necessarily an " annual payment ". In his well-known judgment in *Earl Howe* v. *Inland Revenue Comrs.* (1), SCRUTTON, L.J., pointed out that, if a man covenants to pay £x annually to a butcher in return for a supply of meat for his family, the sums paid under the covenant are not " annual payments " within the meaning of the Income Tax Acts from which the payer can deduct tax, but are gross sums which go to swell the receipts of the butcher's trading account. This principle was applied by the Court of Appeal in *Inland Revenue Comrs.* v. *National Book League* (2) to a seven-year covenant in favour of a charity. There the charity in question stated that members who entered into deeds of covenant to pay their subscriptions for seven years would be entitled to enjoy such amenities as were provided from time to time by the charity to its members, even though the subscriptions of other members might be raised. B C

Counsel for the Crown submitted, I think correctly, that the judgment of the Court of Appeal in that case did not depend on the conclusion that the charity had entered into a legally binding agreement with the covenantors. If, in return for the covenant, the payee is, as a practical matter, obliged (whether the obligation is a strictly legal obligation or not) to provide any appreciable recurring consideration to the covenantor, the sums paid under the covenant are not " annual payments " within the meaning of the Income Tax Act. They are not, to use LORD GREENE'S well-known phrase (3) " pure income profit " of the covenantee. D E

I do not think, however, that this principle has any application to the present case. Michael was clearly under no sort of obligation to do anything in return for any benefits he might receive under the deed: nor, as I have pointed out, was Mr. Cheetham under any obligation, either legal or moral, to remain in the service of Imperial Chemical Industries (China), Ltd. Counsel for the Crown, recognising this, argued that the performance by the trustees of their obligations under the deed resulted in a continuing consideration to Imperial Chemical Industries, Ltd., in the form of a more contented staff. But to say this is, I think, to confuse motive with consideration. Imperial Chemical Industries, Ltd. was admittedly not actuated by benevolence in executing the deed. It executed it in order to obtain a commercial advantage; but that advantage will result (if at all) simply through the performance by the trustees of their duties under the deed. These duties would have been precisely the same if the covenantor had had no commercial advantage in mind. The case is again quite unlike *Inland Revenue Comrs.* v. *National Book League* (2), for there the charity, as a condition of getting the payments from the covenantor, ceased to be free to use its income for its proper objects exactly as it chose but was, as a practical matter, bound to apply at least some of it in providing benefits for the covenantors. F G H

In support of his second submission, counsel for the Crown relied on cases such as *Nicoll* v. *Austin* (4) and *Inland Revenue Comrs.* v. *Forster* (5), which establish that, if an employer provides his employee with " money's worth ", that " money's worth " will be treated as part of his remuneration for the purposes of tax under Sch. E. No doubt the payment of part of the expense of educating an employee's child may be " money's worth " to the employee, but I

(1) 7 Tax Cas. 289. (2) [1957] 2 All E.R. 644; [1957] Ch. 488.
(3) *Re Hanbury, Comiskey* v. *Hanbury*, (1939), 20 A.T.C. 333 at p. 335.
(4) 19 Tax Cas. 531. (5) 19 Tax Cas. 738.

A the way in which the employer contributed to the education expenses in this case was not by paying the school bills or part of the school bills out of its own money, but by providing the child with an income out of which the bills or part of them could be met. I can well understand that the provision by an employer of an income for a child of the employee may be a benefit to the employee, the fair value of which to the employee ought to be added to his remuneration for the B purpose of tax; but this is not sufficient for the argument of counsel for the Crown. He must show that the very money which was paid into Michael's account by the trustees became Mr. Cheetham's income when the account was debited with the payment of the school bills for which Mr. Cheetham had incurred a liability.

If this is so, then it must, I think, be by virtue of some principle which has C nothing to do with the relation of employer and employee, but would apply equally to a trust created or a covenant entered into by a grandmother for the benefit of an infant grandchild. Counsel for the Crown did not shrink from this conclusion, and submitted that, if under such a trust the trustees paid a school bill for which the child's parent was legally liable, the money which they expended became income of the parent and ceased to be income of the child. This D is, I think, a novel contention on the part of the Revenue, and I can see no justification for it. If trustees, under a trust of this sort, think that it is for the child's benefit that the income should be expended in paying a school bill for which the child's parent is liable, or if they put the income at the disposal of the parent and he uses it to discharge such a bill, I do not see why the income in question should thereby suddenly lose its character of income of the child and E become income of the parent. Of course, in any given case it may be wrong for trustees to exercise their discretion in that way, or to put the income at the disposal of the parent, but that is quite a different matter. In this case, it has not been suggested that the trust was not a genuine discretionary trust, or that the payment of the income in question into Michael's bank account was not a proper exercise of a genuine discretion.

F In the result, therefore, I think that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. W. Ridsdale* (for the bank); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

A

NOTE.

WHITEHOUSE *v.* BOARD OF CONTROL AND OTHERS.

[HOUSE OF LORDS (Lord Cohen, Lord Keith of Avonholm and Lord Denning), May 9, 1960.]

B

House of Lords—Appeal to—Leave to appeal—Refusal of leave to appeal against refusal of leave to bring proceedings—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 330 (2), *as substituted by Mental Treatment Act*, 1930 (20 & 21 *Geo.* 5 *c.* 23), *s.* 16 (1).

[As to applications for leave to appeal to the House of Lords, see 9 HALSBURY'S LAWS (3rd Edn.) 369, para. 860.

C

As to leave to commence proceedings against persons acting under mental health powers, see 21 HALSBURY'S LAWS (2nd Edn.) 509, para. 923; and for cases on the subject, see 33 DIGEST 271, 272, *1893-1896*.

For the Mental Health Act, 1959, s. 141 (2), the provision comparable to s. 330 (2) of the Lunacy Act, 1890, which it will replace when brought into operation, see 39 HALSBURY'S STATUTES (2nd Edn.) 1075.]

D

Cases referred to:

Housing of the Working Classes Act, 1890, Re, Ex p. Stevenson, [1892] 1 Q.B. 609; 61 L.J.Q.B. 492; 66 L.T. 544; 56 J.P. 501; 11 Digest (Repl.) 308, *2147*.

Hunt v. *Allied Bakeries, Ltd.*, [1956] 3 All E.R. 513; [1956] 1 W.L.R. 1326; 3rd Digest Supp.

E

Lane v. *Esdaile*, [1891] A.C. 210; 64 L.T. 666; sub nom. *Payne* v. *Esdaile*, 60 L.J.Ch. 644; 30 Digest (Repl.) 149, *33*.

Page, Re, Hill v. *Fladgate*, [1910] 1 Ch. 489; 79 L.J.Ch. 482; 102 L.T. 388; 30 Digest (Repl.) 158, *112*.

Petition for leave to appeal.

F

This was a petition by Amy Jane Whitehouse for leave to appeal to the House of Lords and to appeal out of time, from two decisions of the Court of Appeal of June 8, 1959 (MORRIS, ORMEROD and WILLMER, L.JJ.), and Feb. 15, 1960 (ORMEROD and WILLMER, L.JJ.). The respondents were the Board of Control, Dr. Arthur Noel Pearson who was a party to the certification of the petitioner under the Lunacy and Mental Treatment Acts, 1890 to 1930, and the Glamorgan County Council, and Evan John Powell, the duly authorised officer. A

G

respondent, Dr. Cyril John Morgan, had died before the commencement of these proceedings and his personal representatives did not appear and were not represented as they had not been served with the proceedings.

On May 14, 1959, GLYN-JONES, J., refused the petitioner's application by originating summons for leave under s. 330 (2)* of the Lunacy Act, 1890, as substituted by s. 16 (1) of the Mental Treatment Act, 1930, to bring proceedings

H

against the respondents for damages for negligence and breach of statutory duty and false imprisonment, and refused leave to appeal from his decision. The petitioner applied to the Court of Appeal for leave to appeal, and, on June 8, 1959, the Court of Appeal refused such leave. On that occasion the petitioner appeared in person and the Court of Appeal went into the merits. On Feb. 15, 1960, the Court of Appeal dismissed an application by the petitioner for leave to

I

appeal to the House of Lords. The petitioner now sought leave to appeal to the House of Lords from the refusals of the Court of Appeal of leave to appeal to itself and to the House of Lords. On the hearing of the petition, preliminary objection was taken on behalf of the respondents.

* The Lunacy Act, 1890, s. 330 (2), as substituted by the Mental Treatment Act, 1930, s. 16 (1), provides: "No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court . . ."

A *J. F. F. Platts-Mills* for the petitioner.

R. A. Barr for the respondents, the Board of Control.

P. E. Webster for the respondent, Dr. Pearson.

J. G. Wilmers for the respondents, the Glamorgan County Council and Mr. Powell.

R. A. Barr: No appeal lies from the Court of Appeal's refusal of leave to appeal. B Their refusal was not an order or judgment within s. 3 of the Appellate Jurisdiction Act, 1876 (1). By s. 31 (1) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925, no appeal lies without leave of the judge or of the Court of Appeal from any interlocutory judgment made or given by a judge (2). I rely on *Lane* v. *Esdaile* (3), which was followed in *Re Housing of the Working Classes Act, 1890, Ex p. Stevenson* (4), where it was held that no appeal lay. C On the question whether the order of June 8, 1959, was interlocutory or final, I refer to *Re Page, Hill* v. *Fladgate* (5) and *Hunt* v. *Allied Bakeries, Ltd.* (6), particularly the judgment of LORD EVERSHED, M.R., in the latter case (7). The principle of the decision in *Lane* v. *Esdaile* (3) would, however, apply whether the order were or were not interlocutory. I submit, first, that, under s. 330 (2) of the Lunacy Act, 1890, as substituted, the leave required is the leave of the D High Court, and that cannot be the leave of the Court of Appeal (8); and, secondly, that, on the refusal of the leave by the judge in this case, the matter was finished and no appeal lies. If I am wrong on those submissions, then I submit that the order was an interlocutory order and the right of appeal is limited by s. 31 (1) (i) of the Act of 1925 to leave given either by the judge or by the Court of Appeal, but not by your Lordships' House (9).

E *P. E. Webster* and *J. G. Wilmers* adopted the argument of counsel for the Board of Control.

J. F. F. Platts-Mills: The decision in *Lane* v. *Esdaile* (3) is limited by all the speeches, except that of LORD HALSBURY, L.C., within narrow limits and should not be applied to the present case. The order for which I ask is an order to the F effect that the Court of Appeal should have given leave to appeal.

LORD COHEN: In the last paragraph of LORD HERSCHELL'S speech in *Lane* v. *Esdaile* (10) he says:

> "My Lords, I am quite aware that Sir Henry James on behalf of the appellants attempted to distinguish the two cases by reason of a difference of language."

G I read the next sentence (11), altering it as I think it would have to be altered to fit the present case:

---

(1) Section 3 of the Appellate Jurisdiction Act, 1876, so far as material, provides: ". . . an appeal shall lie to the House of Lords from any order or judgment . . . (1) Of Her Majesty's Court of Appeal in England . . ."

H (2) Section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, so far as material provides: "No appeal shall lie— . . . (i) without the leave of the judge or of the Court of Appeal from any interlocutory order . . . made or given by a judge . . ."

(3) [1891] A.C. 210. (4) [1892] 1 Q.B. 609. (5) [1910] 1 Ch. 489.

(6) [1956] 3 All E.R. 513.

(7) [1956] 3 All E.R. at p. 514, letter D, to p. 515, letter F.

(8) Appeals have been heard by the Court of Appeal where leave has been given: see *Buxton* v. *Jayne* ([1960] 2 All E.R. 688), *Re Frost* ([1936] 2 All E.R. 182). Appeal I against a refusal of leave was heard in *Richardson* v. *London County Council* ([1957] 2 All E.R. 330, C.A.).

(9) Counsel also referred to the following cases: *Kay* v. *Briggs* (1889), 22 Q.B.D. 343; *The Amstel*, (1877), 2 P.D. 186; *Boswell* v. *Coates*, (1894), 6 R. 167; *Price* v. *Phillips*, (1894), 11 T.L.R. 86; *Stewart* v. *Royds*, (1904), 118 L.T. Jo. 176; *Hind* v. *Marquis of Hartington*, (1890), 6 T.L.R. 267; *Arnot* v. *Amber Chemical, Ltd.*, (May 19, 1953), "The Times" Newspaper. (10) [1891] A.C. at p. 215.

(11) In the report this reads: "In the present case it is said that no appeal shall lie after a year except by special leave, whilst in the other case it is said that the determination of the appeal shall be final unless special leave to appeal be given. I do not think there is any difference in the meaning of those two expressions."

"In the present case it is said that no suit shall be instituted except by special leave, whilst in the other case it is said that the determination of the appeal shall be final. I do not think that there is any difference in the meaning of those two expressions."

The principle in that last part of the judgment applies also, as I think, to the present case.

J. F. F. Platts-Mills: I submit that, after 1925, when the Supreme Court of Judicature (Consolidation) Act, 1925, was enacted, there should be distinction between cases in which it is enacted that a particular decision is final and cases where proceedings may not be taken without leave of the High Court. Such a provision as the latter means the High Court as controlled by the Court of Appeal, and does not exclude appeal to the latter court. There is a group of cases where an appellate court will not interfere with discretion, but it is a narrow group and, in regard to such circumstances as those of the present case, would relate only, I submit, to a decision on such a question as that of extending time. On the question whether the original order was final or interlocutory, the proper conclusion should be, I submit, that, if leave to commence an action under s. 330 were refused, that would be a final order because it finally disposed of the right of the party to sue. If, however, leave were granted, the order would be interlocutory because the proceedings would be continuing. I submit that the order of June 8, 1959, refusing application for leave to bring proceedings is an order within the Appellate Jurisdiction Act, 1876, and that it would be proper to allow an appeal to be heard (12).

LORD COHEN: We are satisfied that the preliminary objection must be sustained, and that this case is covered by the principle of *Lane* v. *Esdaile* (13). In those circumstances, we think it better to express no opinion on the merits of the appeal, in the interests of the petitioner. The petition is refused.

Leave to appeal to the House of Lords refused.

Solicitors: *Edward Mackie & Co.* (for the petitioner); *Solicitor, Ministry of Health* (for the respondents, the Board of Control); *Hempsons* (for the respondent, Dr. Pearson); *Lewin, Gregory, Mead & Sons*, agents for *Richard John*, Cardiff (for the respondents, the Glamorgan County Council and Mr. Powell).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

(12) Counsel also referred to the following cases: *Evans* v. *Bartlam*, [1937] 2 All E.R. 646; *Griggs* v. *Petts*, [1939] 4 All E.R. 39; *Kay* v. *Briggs*, (1889), 22 Q.B.D. 343; *Bozson* v. *Altrincham U.D.C.*, [1903] 1 K.B. 547; *Salaman* v. *Warner*, [1891] 1 Q.B. 734; *Egerton* v. *Shirley*, [1944] 2 All E.R. 583; *Re Herbert Reeves & Co.*, [1902] 1 Ch. 29.

(13) [1891] A.C. 210.

Re PARISH CHURCH OF ST. GEORGE, BIRMINGHAM.

[Birmingham Consistory Court (The Chancellor (Henry Salt, Esq., Q.C.)), July 21, 1960.]

Ecclesiastical Law—Faculty—Jurisdiction—Demolition of church—Dangerous structure—Urgency—Procedure—Safeguards.

Where a parish church has become a dangerous structure and disproportionate cost has been incurred and would further be required to render it safe and in a condition to be fit for the holding of divine service, the Consistory Court may entertain, and in its discretion accede to, a petition by the incumbent and churchwardens, approved by a resolution of the parochial church council, for a faculty for the demolition of the church.

Observations as to procedure and safeguards in such a case.

[As to the faculty jurisdiction in relation to the use of consecrated ground, see 13 Halsbury's Laws (3rd Edn.) 396, para. 886.

For the Faculty Jurisdiction Measure, 1938, see 7 Halsbury's Statutes (2nd Edn.) 214; and for a summary of the Faculty Jurisdiction Rules, 1939 (S.R. & O. 1939 No. 771), see 6 Halsbury's Statutory Instruments 187.]

Petition for faculty.

The rector and churchwardens of St. George's, Birmingham, with the approval of the parochial church council, signified by resolution, petitioned for a faculty enabling the demolition of the church.

The facts sufficiently appear in the judgment.

Mr. A. G. Davis, solicitor, for the petitioners.

Mr. C. J. James, solicitor, for the Archdeacon of Birmingham.

July 21. **THE CHANCELLOR:** In this case I have allowed the evidence of the petitioners to be given in the form of an affidavit by the incumbent, the Rev. J. A. Carr, with exhibits, and that of the Archdeacon of Birmingham, the Venerable S. Harvie Clark, in whose archdeaconry St. George's Church is situated, to be similarly given by him. Both deponents are present and are represented by their respective solicitors. They have been given the opportunity of supplementing their affidavits by oral evidence, but there has been no need to do so, thanks to the full and clear affidavits. Nor has there been any cross-examination, since the petition, following general citation in due form and time, is unopposed. I wish to express to the parties and their solicitors my obligation to them for the way the case has been prepared and presented to me.

I shall say at once that having listened to the evidence and exhibits read to me, I feel bound, while sharing the reluctance of the petitioners and the archdeacon, to accede to the prayer of the petition and grant the requisite faculty for the demolition of St. George's Church. The order, however, will contain two reservations: first, that the tomb of Thomas Rickman, the architect of the church, shall be left undisturbed in the adjoining graveyard; and secondly that all memorial tablets within the church itself, and affixed to its walls or otherwise, shall be carefully taken down and stored with a view to their use hereafter in any new and perhaps smaller church which may be erected on the present site, or part thereof, or in some neighbouring church if that can be arranged under supervision, in the first instance, by the archdeacon.

It is always a serious matter to authorise the demolition of a parish church. Where it must needs be done, in the interests of the cure or care of souls, which is, of course, a paramount consideration—because, for example, of reorganisation in a diocese to enable the Church to meet the needs of growing population in suburbs and new residential areas while redeploying the ministry where central areas have become substantially less populous—or because a consecrated building has become ruinous past hope of repair, it may be possible, and even desirable to have recourse to the machinery provided by one or more of the

Measures (1) in this behalf. This enables the matter to proceed under what is, in effect, statutory sanction. A

Parallel with this, and in my judgment quite unaffected by it, there remains the ancient jurisdiction of this court to entertain, and in a proper case to accede to, a petition by persons having a proper locus standi, for a faculty to enable the demolition to be carried out.

In the present case, procedure by petition for a faculty is not only suitable but (subject to certain procedural safeguards) preferable to the statutory alternatives. B

In the first place it is in the very nature of it swifter; and there can be no doubt that the urgency of the matter is fully made out. I took a view of St. George's on my way to this court, and even the untrained eye can see that the masonry is in a very dangerous condition. The evidence is that pieces of masonry have fallen from the pinnacles and endangered the children and staff of the church school in the adjoining playground, which has been fenced off. Passing members of the public are also at risk, and there is evidence that in at least one instance there has been what the armed forces of the Crown would term a near miss. Plainly this state of affairs cannot continue, and the provisional arrangements made with a contractor for taking down the structure ought to be authorised so as to take effect under the sanction of this court while the school holidays are current, as they will be within a few days from now. C D

Secondly, I am satisfied that it would be quite unrealistic to expect this church to be preserved or reconstructed. Redevelopment is going on all round it, and the population of the parish has diminished and will further diminish below the present estimate of ten thousand souls. It is not a wealthy parish, or in a wealthy area. The bishop's fund for building churches has gone a substantial way towards its target, but has by no means yet reached it. I am told that this fund is de facto earmarked from the point of view of subscribers towards building new churches where the need is greatest in newly populated districts, and cannot very well be resorted to for repairing such a church as St. George's where the need is less. Moreover, before the present incumbency began in 1954, some £14,000 had already been raised and spent in patching the fabric. A conservative estimate by experts is that to put the church into repair and fit for divine service would require a further sum of no less than £35,000. Manifestly this is beyond the scope of the parishioners, even if outside aid were forthcoming. E F

The church was built about 1820, and is one of the " Waterloo " churches, for which the state provided or contributed funds. It occupies a dominant position in the City of Birmingham and presents a beautiful silhouette as designed by Thomas Rickman. G

In all the circumstances I directed the Archdeacon of Birmingham to be specially cited, over and above the general citation. I also requested the learned registrar to inquire of the Central Council for the Care of Churches whether that body, although having no locus standi to oppose or support the petition as a party, wished to tender any evidence today which would or might assist the court. This I was entitled to do under r. 6 of the Faculty Jurisdiction Rules, 1939. Their secretary writes in reply that they cannot in the circumstances usefully tender any evidence. I adjourned the petition for hearing in open court, in order that, in a matter of this moment, justice should not merely be done but manifestly be seen to be done, and to enable objections to be heard, if any. There is no objector, but the safeguard of a public hearing in such a case as this is in my judgment desirable. H I

The requirements of notification and otherwise of the Ministry of Works and the local authority are satisfied.

(1) See, e.g., the Reorganisation Areas Measure, 1944, s. 20 (1) (e) and the Union of Benefices Measure, 1923, s. 19 (2), as substituted by the Union of Benefices (Disused Churches) Measure, 1952, s. 1.

I therefore accede to the petition and grant the faculty prayed, subject to the two reservations that I have mentioned.

The petitioners must bear their costs and, since the archdeacon's appearance has been helpful to them, must pay those of the archdeacon which cannot be heavy and can perhaps be agreed.

Decree accordingly.

Solicitors: *Johnson & Co.*, Birmingham.

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

NOTE.

ADDISON *v.* ADDISON AND HOLDEN.

[COURT OF APPEAL (Hodson, Ormerod and Harman, L.JJ.), July 18, 1960.]

Court of Appeal—Extension of time for appeal—Legal aid—Notice of appeal not filed in time because appellant awaiting grant of legal aid.

[Editorial Note. Emergency civil aid certificates can be issued where there is urgency (see 30 HALSBURY'S LAWS (3rd Edn.) 515, para. 965).

As to extension of time for filing notice of appeal to the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 464, para. 877, text and note (p).]

Application to extend time for filing notice of appeal.

The appellant instructed his solicitors to appeal, and his solicitors caused a notice of appeal to be prepared, and sent it to the respondents within the time prescribed by R.S.C., Ord. 58, r. 4 (1), but did not file the notice within the prescribed time because the appellant's application for a civil aid certificate for the appeal was not granted within that time. The appellant now applied to the Court of Appeal under R.S.C., Ord. 64, r. 7, to extend that time.

F. S. Laskey for the appellant.

J. A. P. Hazel for the respondents.

HODSON, L.J.: We cannot do other than extend the time, but I should like it to be publicly known that a great deal of money has been wasted in this case.

We give leave, and I would repeat what I have said already. It seems to me a very serious matter that expenditure should have been incurred in the way in which it has been incurred in this case, and indeed has been incurred in other cases. An appellant who has the right to appeal wishes to appeal, and a notice of appeal comes into existence. In this case it was sent to the opposition, but it was not filed in the appropriate registry. The reason for that was that there was delay in seeking and obtaining legal aid, but cost has been incurred today on behalf of both parties in order to secure an extension of time for leave to appeal. If the notice had been filed within the proper time it would have been a matter involving little expense and all this could have been avoided.

I confess I cannot understand why parties are not prepared, if they wish to appeal, to incur the very small expense of giving notice of appeal and filing it in the proper place without waiting to see whether the public purse will bear the cost of their litigation. I do not see why, however, the appellant should suffer for what has happened, and I think that we must therefore extend the time for leave to appeal.

ORMEROD, L.J.: I agree.

HARMAN, L.J.: I also agree.

Solicitors: *Edwin Coe & Calder Woods*, agents for *Simpson & Ashworth*, Accrington (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Sharples, Son & Slinger*, Accrington (for the respondents).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

COMMISSIONER OF ESTATE AND SUCCESSION DUTIES v. BOWRING.

[PRIVY COUNCIL (Lord Reid, Lord Cohen and Lord Keith of Avonholm), June 27, 28, 29, July 27, 1960.]

Privy Council—Barbados—Settlement—Power of revocation—Consent of trustees necessary—Whether donee of power, being settlor, was competent to dispose of property—Estate and Succession Duties Act, 1941 (*Laws of Barbados, No.* 16 *of* 1941), *s.* 3 (*a*).

Estate Duty—Settlement with reservation—Revocation—Power of revocation with consent of trustees—Discretion of trustees to withhold consent absolute—Whether donee of power, being settlor, was competent to dispose of property—Estate and Succession Duties Act, 1941 (*Laws of Barbados, No.* 16 *of* 1941), *s.* 3 (*a*).

By a deed of trust a donor directed that the trustees should pay the income of the trust fund to her during her life "together with such parts of principal as the trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the donor". The settlement further provided that the donor, during her lifetime, should have the right at any time or times to amend or revoke the trust, either in whole or in part, by an instrument in writing, "provided, however, that any such amendment or revocation shall be consented to in writing by the trustees". The deed was executed in the State of Massachusetts and contained a provision that it should be governed by the laws of Massachusetts. By those laws, the court would not control the trustees in the exercise of their power to consent to the revocation or amendment of the trust, provided that they acted honestly and not from an improper motive. On the death of the donor, estate duty and succession duty were claimed in Barbados, and it was argued that the executor of the donor's will was accountable on the footing that the donor was competent to dispose of the property comprised in the deed within the meaning of the Barbados Estate and Succession Duties Act, 1941, s. 3 (a)*.

Held: the restraining power of the trustees under the deed, by virtue of their discretion to withhold consent, amounted to such a fetter on the donor's right to revoke the trust as to render her not competent to dispose as she thought fit, and she was not, therefore, competent to dispose within s. 3 (a).

Re Churston Settled Estates ([1954] 1 All E.R. 725) approved.

Appeal dismissed.

[Editorial Note. Section 3 (a) of the Barbados Estate and Succession Duties Act, 1941, is in the same terms as the English Finance Act, 1894, s. 22 (2) (a).

As to the meaning of competent to dispose, see 15 HALSBURY'S LAWS (3rd Edn.) 12, para. 19.

As to powers of revocation in a settlement, see 29 HALSBURY'S LAWS (2nd Edn.) 593, 594, para. 865; and for cases on the subject, see 40 DIGEST (Repl.) 589, 590, *926-942*.

For the Finance Act, 1894, s. 22, see 9 HALSBURY'S STATUTES (2nd Edn.) 382.]

Cases referred to:

A.-G. v. *Charlton*, (1877), 2 Ex. D. 398; 46 L.J. Ex. 750; 37 L.T. 211; *affd.* H.L. sub nom. *Charlton* v. *A.-G.*, (1879), 4 App. Cas. 427; 49 L.J.Q.B. 86; 40 L.T. 760; 37 Digest 110, *428*.

Churston Settled Estates, Re, Freemantle v. *Churston* (*Baron*), [1954] 1 All E.R. 725; [1954] Ch. 334; [1954] 2 W.L.R. 386; 3rd Digest Supp.

* This provision is printed at p. 189, letter H, post. It is in similar terms to the Finance Act, 1894, s. 22 (2) (a).

A *Dilke, Re, Re Dilke's Settlement Trusts, Verey* v. *Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 Digest 416, *256.*

Joicey, Re, Thompson v. *Duncan*, (1932), 76 Sol. Jo. 459; Digest Supp.

Phillips, Re, Lawrence v. *Huxtable*, [1930] All E.R. Rep. 165; [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178; Digest Supp.

Triffitt's Settlement, Re, Hall v. *Hyde*, [1958] 2 All E.R. 299; [1958] Ch. 852;
B [1958] 2 W.L.R. 927; 3rd Digest Supp.

Appeal.

Appeal by the Commissioner of Estate and Succession Duties from an order of the Federal Supreme Court of Barbados (HALLINAN, C.J., RENNIE and ARCHER, JJ.), dated July 18, 1958, reversing a judgment of the Barbados Court of Chancery (COLLYMORE, V.-C.), dated Oct. 16, 1956. On June 27, 1955, the
C appellant sent a letter to the respondent's solicitors (the respondent being executor of Lady Gilbert-Carter's will) assessing the death duties payable under the Barbados Estate and Succession Duties Act, 1941, on the death of Lady Gilbert-Carter in the sum of $137,723.28, which sum included $120,336.29 in respect of estate duty payable in respect of property comprised in a deed of trust dated June 16, 1936, as amended. The respondent appealed against the assess-
D ment by way of petition to the Barbados Court of Chancery which dismissed his appeal. The Federal Supreme Court of Barbados, reversing this judgment, ordered that the appellant be entitled to recover only $17,386.99 together with interest. The facts are set out in the judgment of the Board.

Peter Foster, Q.C., and *Raymond Walton* for the appellant.

J. S. B. Dear for the respondent.

E

LORD COHEN: The question for the decision of the Board is whether Lady Gilbert-Carter, who died on Nov. 12, 1953, in Boston, Massachusetts, was, at the date of her death, " competent to dispose " (within the meaning of that phrase in the Barbados Estate and Succession Duties Act, 1941), of property comprised in the deed of trust dated June 16, 1936, made between Lady Gilbert-
F Carter as donor of the one part and Old Colony Trust Company and Charles Kane Cobb as trustees of the other part. If she was so competent to dispose, it is common ground that the respondent, as an executor of her will dated Mar. 15, 1952, is accountable under s. 20 (1) of the Act (1) for the estate duty payable in respect of the property comprised in the deed of trust; otherwise he is not so accountable, notwithstanding that there was a passing of property
G within the meaning of s. 6 (1) of the Act (2). There is no dispute between the parties as to the amount of duty exigible if the respondent is accountable for it.

It will be convenient in the first place to refer to those sections of the Act which deal with the questions of competency to dispose. They are s. 3 (a) and s. 7 (a) which read as follows:

H " 3. For the purposes of this Act—(a) a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression ' general power ' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both,
I but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or exercisable as mortgagee."

(1) Section 20 (1), so far as relevant, provides: " The executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death . . ."

(2) Section 6 (1) provides: " In the case of any person dying after the coming into operation of this Act, there shall, except as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, settled or not settled, which passes on the death of such person, a duty called ' estate duty ' at the graduated rates set forth in Sch. ' A ' to this Act."

A

> " 7. Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(a) property of which the deceased was at the time of his death competent to dispose."

In the course of the argument reference was also made to s. 35 of the Act which, so far as material, provides as follows:

B

> " On the death of any person who dies after the commencement of this Act there shall be levied and paid, in addition to the estate duty imposed by this Act, a further duty called succession duty as set out in Sch. B hereto in respect of every interest or absolute power of appointment acquired or possessed by any person as the successor of the deceased in the property passing or deemed to pass on the death of the deceased and chargeable with estate duty."

C

The expression " absolute power " which appears in s. 35 is, perhaps, used in contrast with conditional power, but it is contained in that part of the Act which deals with succession duty, and, in their Lordships' opinion, it throws no light on the meaning of general power in s. 3 (a).

This case really turns on the construction of s. 3 (a), but before dealing with that section their Lordships must consider the terms of the deed of trust. It was executed in the State of Massachusetts, and it contained a provision that it should be governed by the laws of Massachusetts. Under it, in its original form, Lady Gilbert-Carter was entitled to the net income for her life, together with such parts of principal as she might from time to time in writing request. After making provision for certain payments to be made on the death of Lady Gilbert-Carter, the deed of trust provided that, after the death of the donor and after the foregoing payments had been made, the net income, together with such parts of principal as he might from time to time in writing request, should be paid over to Lady Gilbert-Carter's son, with remainder as he should appoint with provisions in default of such appointment. Clause 4 is important and was in the following terms:

D

E

F

> " The donor during her life, and her said son after her death, shall have the right at any time or times to amend or revoke this trust in whole or in part by an instrument in writing, delivered to the trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the instrument in writing to the trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the trustees."

G

Had the power thereby given to revoke the trust in whole without the necessity for anybody's consent been exercised, clearly Lady Gilbert-Carter would have been competent to dispose of the property since there was no obligation on her to resettle it. But she executed a number of deeds of amendment with the consent of the trustees in exercise of the more limited power given her under cl. 4. It is unnecessary to consider these in detail. It is sufficient to say that, prior to her death, cl. 1 had been modified to read as follows:

H

> " To pay the net income to the donor from time to time as long as she shall live, together with such parts of principal as the trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the donor."

I

A more important amendment was made by revoking cl. 4 and substituting the following clause therefor:

> " The donor during her lifetime shall have the right at any time or times to amend or revoke this trust, either in whole or in part, by an instrument in writing, provided, however, that any such amendment or revocation shall be consented to in writing by the trustees."

Thus, at the date of her death, any revocation by her would be ineffective unless the trustees consented in writing to it.

It is common ground between the parties that the settlement must be considered in accordance with Massachusetts law, and that the effect under that law of a provision reserving power to revoke a settlement with the consent of the trustees is correctly set out in s. 330 (1) of the AMERICAN RESTATEMENT OF THE LAW OF TRUSTS. The portion of that section relevant to the decision of the case before their Lordships reads as follows:

"If the settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion (see § 187).

"If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. Thus, if the trustee is authorised to consent to the revocation of the trust if in his judgment the settlor is in need, he cannot properly consent to the revocation of the trust if it clearly appears that the settlor is not in need. So also, if the trustee is authorised to consent to the revocation of the trust if in his judgment the beneficiaries of the trust are not in need, he cannot properly consent to the revocation of the trust if it clearly appears that the beneficiaries are in need.

"There may be a standard by which the reasonableness of the trustee's judgment can be tested even though there is no standard expressed in specific words in the terms of the trust, and even though the standard is indefinite. Thus, it may be provided merely that the settlor can revoke the trust with the consent of the trustee. Such a provision may be interpreted to mean that the trustee can properly consent to the revocation of the trust only if he deems it wise under the circumstances to give such consent. In such a case the court will control the trustee in the exercise of a power to consent to the revocation of the trust where the circumstances are such that it would clearly be unwise to permit the revocation of the trust; as for example where the beneficiaries are wholly dependent upon the trust for their support, and the settlor desires to terminate the trust for the purpose of dissipating the property. So also, the circumstances may be such that it would clearly be unwise not to permit the revocation of the trust, and in such a case the court can compel the trustee to permit the revocation of the trust in whole or in part; as for example where a trust is created to pay the income to the settlor for life and to pay the principal on his death to a third person and it is provided that in the discretion of the trustee a part or the whole of the principal shall be paid to the settlor, and owing to a change of circumstances the income is insufficient for the support of the settlor who has no other resources, and the beneficiary in remainder has acquired large resources.

"On the other hand, the trustee may be authorised to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see § 187 and Comments i-k thereon). The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries."

It was common ground between the parties that the power of revocation in the

amended deed of trust which their Lordships have to consider fell within this last paragraph of the RESTATEMENT.

The learned Vice-Chancellor (SIR ALLAN COLLYMORE) who had already considered the English cases of *Re Dilke*, *Re Dilke's Settlement Trusts*, *Verey* v. *Dilke* (3), *Re Phillips*, *Lawrence* v. *Huxtable* (4), and *Re Churston Settled Estates*, *Freemantle* v. *Baron Churston* (5), proceeded, after making the citation from the RESTATEMENT to which their Lordships have already referred, to consider a number of American cases (6). He then dismissed the appeal saying:

> "I can find no standard of duty expressed or implied in the trust instrument and I think that in these circumstances the trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives. It seems to me that Lady Gilbert-Carter retained a power of control over the property in the Boston Trust. This is my view of the matter according to the law of Massachusetts and according to it Lady Gilbert-Carter had and retained until her death such a power to revoke or amend as would enable her to dispose of the property in the Boston Trust as she thought fit."

From this decision, the respondent appealed, and the appeal was heard by the Federal Supreme Court of Barbados. That court, by a majority (HALLINAN, C.J., and RENNIE, J., ARCHER, J., dissenting), reversed the decision of the Vice-Chancellor. HALLINAN, C.J., said:

> "With respect, I think that the learned judge misdirected himself in finding that the trustees owed any duty to the settlor to give their consent. I can find nothing in the passage he cited from PROFESSOR SCOTT nor in the evidence of the expert witnesses to support this conclusion. All these witnesses agreed that under the terms of the Boston Trust the trustees had a complete discretion to give or withhold their consent provided they acted honestly and from a proper motive."

With this observation their Lordships respectfully agree.

After considering the English cases *Re Phillips* (4) and *Re Joicey*, *Thompson* v. *Duncan* (7), the chief justice came to the conclusion that, having regard to Massachusetts law which governed the interpretation of the deed of trust, Lady Gilbert-Carter could not have disposed of the property comprised therein within the meaning of s. 3 (a) of the Act. Their Lordships will refer later to *Re Phillips* (4). The decision in *Re Joicey* (7) is based on *Re Dilke* (3) and *Re Phillips* (4), and the case is so shortly reported as to be of no assistance to their Lordships in the present case. RENNIE, J., considered the expert evidence as to Massachusetts law, and said:

> "The only conclusion one can come to on the totality of that evidence is that the trustees possessed a wide discretion in relation to their consenting to the revocation of the trust and that the courts of Massachusetts would not compel them to give their consent unless it could be shown that they acted dishonestly and from an improper motive. That restraining power of the trustees amounts in my view to a fetter on Lady Carter's right to revoke the trust and is a sufficient fetter to render her not competent to dispose of the property as she thinks fit."

ARCHER, J., dissented. After a detailed review of the English cases, he said:

> "I think that the criterion should be: 'Was there a way in which she

(3) [1921] 1 Ch. 34. (4) [1930] All E.R. Rep. 165; [1931] 1 Ch. 347.
(5) [1954] 1 All E.R. 725; [1954] Ch. 334.
(6) *Boyden* v. *Stevens*, (1934), 285 Mass. 176; *Berry* v. *Kyes*, (1939), 304 Mass. 56; *Damon* v. *Damon*, (1942), 312 Mass. 268; *Sylvester* v. *Newton*, (1947), 321 Mass. 416; *Higgins* v. *White*, (1937), 93 F 2d 357; (1940), 116 F 2d 312; *Zaltonstall* v. *Treasurer & Receiver General*, (1926), 256 Mass. 519; *Boston Safe Deposit & Trust Co.* v. *Comr. of Corporations & Taxations*, (1936), 294 Mass. 551. (7) (1932), 76 Sol. Jo. 459.

could have made the property once more her own?' Not: 'Was there a way in which the trustee could have frustrated her attempt to regain her property?' If she had obtained the consent of the trustees to a total revocation of the trust, there being no provision for resettlement the revocation would have been unquestionably valid and there could not in that event have been any question as to her competency to dispose. There is no warrant for importing the conception of unreasonable trustees in the matter: there is equally good, if not sounder, reason for assuming that the trustees would have been reasonable persons and I do not believe that the determination of the settlor's competency can be made to depend on any such hypothesis. The weapon of veto was undoubtedly a fetter upon the settlor's power of revocation but so was it upon the power of appointment in *Re Dilke* (8) and *Re Phillips* (9) and yet repeated references to these cases continue to be made in recent decisions. The distinction between the authority of a trustee to give or withhold consent to the exercise of a power where his consent is necessary to the validity of the exercise of the power and his authority where his discretion as to the selection of objects of the power is called into play seems to me to be well recognised. In my judgment, Lady Gilbert-Carter was competent to dispose because she could have made the trust fund her own as if no settlement had ever been made. I am not concerned with what the trustees could, still less might, have done. I think that in popular language she was for practical purposes the owner because by revoking the trust she was free to deal with the trust fund in any way she pleased."

Their Lordships have cited this passage at length because it was on the argument there set forth that counsel for the appellant principally relied. Their Lordships are unable to accept that argument. They agree that the question was, was there a way in which she could have made the property once more her own, but they do not agree that she could be said to have a way to make the property her own since the trustees were empowered to block that way. They prefer the view of RENNIE, J., in the passage that they have cited.

The appellant relied on the provisions in Part 1 of the Finance Act, 1894, which deal with estate duty, and especially on s. 22 (2) (a) thereof which is for practical purposes identical with s. 3 (a) of the Barbados Act. Counsel for the appellant referred in particular to the words "including a tenant in tail whether in possession or not". He pointed out that, under English law, a tenant in tail in remainder could not dispose of the fee simple without the consent of the protector of the settlement, yet for the purposes of Part 1 of the Finance Act, 1894, he was to be deemed competent to dispose of the property. He argued that, by analogy, a person in the position of Lady Gilbert-Carter, who had a general power of revocation subject only to the limitation that the consent of the trustees was required to the revocation, should be deemed competent to dispose of the property comprised in the settlement. Their Lordships are unable to accept this argument. It might be argued with equal if not greater force that the fact that it was thought necessary to make special provision for the case of the tenant in tail in remainder indicates that, in other like cases, the necessity for the consent of another to the exercise of a power would prevent the person entitled to the general power from being held competent to dispose of the property. In any event, the argument from the reference to tenant in tail not in possession cannot be pressed in relation to the Barbados Act since the Barbados law as to estates tail contains no provision for a protector of the settlement.

There appears to be no decision directly in point either under the English Act or the Barbados Act, but counsel for the appellant relied on the English decisions in *Re Dilke* (8) and *Re Phillips* (9). In *Re Dilke* (8), under a settlement made with the approval of the Chancery Division and the Master in Lunacy, Sir Charles Dilke, a person of unsound mind not so found by inquisition, was given

(8) [1921] 1 Ch. 34.

(9) [1930] All E.R. Rep. 165; [1931] 1 Ch. 347.

what would, but for one provision, have indisputably been a general power of appointment. That provision was that the consent and concurrence of the trustees of the settlement or a majority of three out of four of them should be required to an exercise of the power. Sir Charles recovered and, by a deed to which the trustees consented, he appointed that the trustees should after his death stand possessed of the trust funds in trust for such person or purposes as he should by will or codicil appoint. The question arose as to the validity of this appointment. It was argued that, under such a power, before they consent the trustees must know the persons who are to be appointed, if not by name then by description, they must consent to the appointment of those particular persons, and they have no power to consent to the appointment of persons to take under this appointment who were not known to them at the time when they gave their consent. That argument was rejected both by PETERSON, J., and by the Court of Appeal. LORD STERNDALE, M.R., in the Court of Appeal adopted the answer given by PETERSON, J., in the following terms (10):

> " ' On the whole, I am of opinion that on the true construction of this clause the trustees were not required to approve of the persons who are to benefit under the exercise of the power of appointment or of the extent to which they are to benefit, but that the exercise of the general power is conditional upon their consent. In my view the true meaning of the clause is that it is equivalent to a declaration that the trustees are to stand possessed of the trust funds in trust for such person or persons as the testator shall by deed appoint, such appointment to be made with the consent and concurrence of the trustee or trustees. ' "

Applying that decision to the present case, it would be authority for the view that the trustees are not bound to make any inquiry as to the persons who can be entitled under the power of appointment. But if, in the exercise of their very wide discretion, they thought fit to make such inquiry, or if they ascertained what the objects of the appointer in desiring to make the appointment were, it would, their Lordships think, be impossible to maintain that they were not entitled to take the information thus obtained into account in deciding whether or not to consent to the appointment.

In *Re Phillips* (11), under a settlement a fund was given to such persons after the death of A as he should with the consent of the trustees appoint by deed, and the question arose whether, the power having been exercised, the fund was equitable assets for the payment of A's debts notwithstanding that the consent of the trustees to the exercise of the power was necessary. MAUGHAM, J., held that it was. He does not expressly state that the fund would have been equitable assets had the power not been exercised, and their Lordships do not think that the decision in this case which was based on an equitable doctrine is of any assistance to them in deciding the question of construction arising under s. 3 (a) of the Barbados Estate and Succession Duties Act, 1941.

Their Lordships were also referred to *Re Triffitt's Settlement, Hall* v. *Hyde* (12), in which a similar question arose to that which was decided in *Re Dilke* (13), and UPJOHN, J., applying *Re Dilke* (13) and *Re Phillips* (11), came to the conclusion that, under the power then in question, the trustees could consent to an appointment in the widest possible terms and were not under any duty regarding the selection of the objects of the power. That case does not carry the matter any further, specially having regard to the fact that the power of appointment then in question was not a general power but a hybrid power having some attributes of general power and some attributes of a special power. Their Lordships do not question the correctness of the decisions in the cases to which they have referred, but they do not derive any assistance from them in deciding on the true construction of s. 3 (a) of the Barbados Estate and Succession Duties Act, 1941, or of s. 22 (2) (a) of the Finance Act, 1894.

(10) [1921] 1 Ch. at p. 41. (11) [1930] All E.R. Rep. 165; [1931] 1 Ch. 347.
(12) [1958] 2 All E.R. 299; [1958] Ch. 852. (13) [1921] 1 Ch. 34.

The only decision to which their Lordships will refer which contained observations having a direct bearing on that question is *Re Churston Settled Estates* (14). In that case, by a deed of 1895 estates were settled on such trusts as A and B (during C's life with her written consent) should by deed jointly appoint. By a deed of 1898, A and B, exercising that power with C's written consent, appointed the property to such uses and on such trusts as A, B and C should by deed jointly appoint. In each deed there were further provisions in default of appointment. The question that the court had to decide was whether appointments under the powers of 1898 should be read back into the resettlement of 1895 for the purpose of applying the rule against perpetuities to the limitations which they purported to create. In the course of his judgment, ROXBURGH, J., found it necessary to consider whether the joint power of appointment with written consent in the deed of 1895 was a special power or a general power. He held that it was a special power. He had also to consider whether the joint donees of the power of appointment in the deed of 1898 could be treated as owners, and he held that they could not and that such a power was wholly different from a general and absolute power. After observing that a person having a common general power of appointment is treated as though he were for all practical purposes the owner of the property comprised in the settlement conferring that power, he asked himself the question (15): "Ought [that doctrine] to be applied to a joint power of appointment or to a power of appointment to which the consent of somebody is required?" He then proceeded to consider the position where the power of appointment is a joint power, and, basing himself on dicta which he described as of great authority, one in the Court of Appeal and the other in the House of Lords, in *A.-G.* v. *Charlton* (16) which in the House of Lords became *Charlton* v. *A.-G.* (17), he came to the conclusion that a joint donee of a power could not for all practical purposes be treated as an owner. Unfortunately, he did not proceed to consider whether there was any difference for this purpose between a joint power of appointment and a power of appointment to which the consent of somebody is required. But their Lordships think from the form in which he stated the question he may be taken to have regarded the two powers as on like footing for the purpose of deciding the kind of question which their Lordships now have to consider. If that be his intention, their Lordships respectfully agree with him.

As their Lordships have already indicated in expressing their agreement with the passage they have cited from the judgment of RENNIE, J., they are satisfied that, on the true construction of s. 3 (a) of the Barbados Estate and Succession Duties Act, 1941, a person cannot be said to have a general power making him competent to dispose of property within the meaning of that paragraph if the consent of the trustees is required to the exercise of that power, and that provision is so framed that the court will not control the trustees in the exercise of the power if they act honestly and do not act from an improper motive. The Act is a taxing Act, and their Lordships would not be justified in giving to the words used an extension of meaning which, in their Lordships' view, they would not naturally bear.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal to this Board.

Appeal dismissed.

Solicitors: *Charles Russell & Co.* (for the appellant); *Durrant Cooper & Hambling* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

(14) [1954] 1 All E.R. 725; [1954] Ch. 334.
(15) [1954] 1 All E.R. at p. 731; [1954] Ch. at p. 344.
(16) (1877), 2 Ex. D. 398.
(17) (1879), 4 App. Cas. 427.

A

SOWA *v.* SOWA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Marshall, J.), June 21, 22, 1960.]

Magistrates—Husband and wife—Jurisdiction—Potentially polygamous marriage—Marriage by proxy in Ghana valid by local law but potentially polygamous—Failure to have second ceremony before registrar or in church to make marriage monogamous union—Whether wife can obtain matrimonial relief in England—Marriage Ordinance, 1884 (*c.* 127 *of Laws of the Gold Coast* (1951) *Revised*), *s.* 44.

B

The parties were domiciled Ghanaians, though the husband had been living in England for fourteen years. In September, 1955, he returned to Ghana and became engaged to the wife giving her a ring and Bible which the evidence of an expert (accepted in the court below) showed was a symbol of an intention to convert what was potentially a polygamous tribal marriage into a Christian monogamous marriage. In October, 1955, the husband returned to England, and in November, 1955, a marriage by proxy was carried out in Ghana which was valid according to the customs of the tribe of Ga, to which both parties belonged. Under s. 44* of the Marriage Ordinance of 1884, c. 127 of the Laws of the Gold Coast (now Ghana), 1951, Revised, the parties could go before a registrar or could go through a church ceremony, either of which second ceremonies would make the potentially polygamous marriage become a monogamous union. In January, 1956, the wife joined her husband in England. The husband refused to go through a ceremony to convert the potentially polygamous union to a monogamous one. Subsequently, the husband being in desertion, the wife then took proceedings under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, on the ground of the husband's desertion.

C

D

E

F

Held: the marriage according to tribal law in Ghana, being potentially polygamous, did not entitle the wife to relief under the matrimonial law of England, including as part of that law relief under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

Hyde v. *Hyde and Woodmansee* ((1866), L.R. 1 P. & D. 130) and *Baindail* v. *Baindail* ([1946] 1 All E.R. 342) applied.

G

Appeal allowed.

[Editorial Note. This case may be compared with *Ohochuku* v. *Ohochuku*, [1960] 1 All E.R. 253, where a second ceremony in England took place, and it was held that the court had power to dissolve the second ceremony, i.e., the second ceremony made the marriage valid by English law.

H

As to marriages recognised as valid by English law, see 7 HALSBURY'S LAWS (3rd Edn.) 88-90, paras. 161, 162; and for cases on the subject, see 11 DIGEST (Repl.) 455-458, *906-912, 919-924.*]

Cases referred to:

Baindail (*otherwise Lawson*) v. *Baindail*, [1945] 2 All E.R. 374; *affd.* C.A., [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 11 Digest (Repl.) 457, *921.*

I

* Section 44 so far as material reads as follows: " Any person who is married under this ordinance . . . shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but save as aforesaid, nothing of this ordinance shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted ".

A *Hyde* v. *Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest (Repl.) 455, *906*.

Mehta (*otherwise Kohn*) v. *Mehta*, [1945] 2 All E.R. 690; 174 L.T. 63; 11 Digest (Repl.) 456, *910*.

Risk (*otherwise Yerburgh*) v. *Risk*, [1950] 2 All E.R. 973; [1951] P. 50; 11 B Digest (Repl.) 458, *922*.

Srini Vasan (*otherwise Clayton*) v. *Srini Vasan*, [1945] 2 All E.R. 21; [1946] P. 67; 114 L.J.P. 49; 173 L.T. 102; 11 Digest (Repl.) 457, *920*.

Appeal.

The husband, Benjamin Adsete Sowa, appealed against an order of the Liver- C pool stipendiary magistrate dated Jan. 21, 1960, whereby he found that the husband had deserted the wife, Janet Amerly Sowa, and ordered him to pay £4 10s. a week maintenance for the wife and £1 10s. a week maintenance for the child of the marriage, the wife being given custody. The facts are stated at p. 202, letters B to D, post.

D *R. Z. H. Montgomery* for the husband.
W. G. O. Morgan for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from an order made by the learned stipendiary magistrate of Liverpool, who had before him on Jan. 21, 1960, the wife's complaint that she had been deserted as from July 10, E 1959. The learned magistrate found that that complaint was proved, and he ordered sums of money which, as regards amount, I have heard no reason to doubt were perfectly correct amounts, namely, £4 10s. for the wife and £1 10s. in respect of the child of whom she was awarded custody. I have most regretfully come to the conclusion that we have no option but to upset this order, and I say regretfully because the point on which this case falls to be decided was by F common submission never put before the learned magistrate at all. However, it has been put before us, and we have to decide it as a matter of law. I also say regretfully because the husband in question has, in my opinion, no sort of merits whatever. He has behaved, I think (and so did the learned magistrate, and I entirely agree with him) in a most insincere and disgraceful manner towards the complainant woman. I must go to some extent into the facts, and I cannot G find any criticism whatever in the facts found by the learned magistrate, who heard the case most carefully, and, I think, has made an unimpeachable statement of the facts.

The primary fact in this case is that these two persons, whom I will now call without prejudice the husband and the wife instead of having to go through the H formula of talking perpetually about the complainant and the defendant, are domiciled Ghanaians. In September, 1955, the parties became engaged to be married, and in October, 1955, the husband returned to Liverpool, where, apparently, he already owned a house, and, as far as I know, had previously been employed. He plainly left Ghana under promise of marriage, and, indeed, in November, 1955, there was a ceremony of marriage by proxy. We have been I told no more about that than that it is plainly legal under the law of Ghana, and we have not thought it necessary to investigate that question. Before I go further I wish to point out that before he left Ghana for Liverpool the husband had given the wife a ring and a Bible. The significance of that is proved, and the evidence was accepted by the learned stipendiary, quite rightly in my opinion, that that amounted to a promise that the ceremony of marriage according to the proper law of both parties, which ceremony was unquestionably potentially polygamous, could be converted into a monogamous marriage either in a church

or before a registrar, and provision is made in an ordinance of Ghana to that effect. The proper law of both parties was the law of the tribe of which they are both members. This promise was made with the intention that this marriage should be turned from a potentially polygamous into a monogamous one, and that the wife went through the ceremony by proxy under the belief that faith would be kept in that respect. It has not been kept, and the husband has, through his solicitors, rejected her demand that that promise should be kept. To use his words, he does not regard any further ceremony as being necessary, but, in fact, as quite superfluous: I refer to a letter of June 1, 1959, written by his solicitors to her solicitors, and ending with these words:—" He is therefore not prepared to pander to a suggestion on the part of your client which he regards as fatuous and completely whimsical." I regard that as the lowest possible form of deceit on his part. There is nothing whimsical or fantastic about it. It was a promise which, if properly carried out, would have had effect under the ordinance to which I have referred, s. 44 of the Ordinance of 1884 (c. 127 of the Laws of the Gold Coast (1951) Revised) (1).

However, the fact is, that that change in the nature of the marriage has never been effected, from which it follows that it comes within the class of case dealt with in *Hyde* v. *Hyde and Woodmansee* (2) decided in the very early days of the Divorce Court by LORD PENZANCE. In that case a husband petitioned for dissolution of marriage on the ground of adultery. I will read the headnote, and a little of the judgment. The headnote reads:

> " Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English matrimonial court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations."

In the last paragraph LORD PENZANCE said (3):

> " In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

It was never argued before the learned stipendiary that this case was covered by that pronouncement, and that that is so is plainly borne out by the concluding passage in his reasons. After finding " that the defendant had no grounds for refusing to take his wife back " he said " I find that a valid marriage subsists between the complainant and the defendant and that the defendant deserted the complainant as from July 10, 1959 ". There was evidence that this was a perfectly valid marriage in Ghana, and there was evidence that it could be

(1) See footnote * p. 196, ante. (2) (1866), L.R. 1 P. & D. 130.
(3) (1866), L.R. 1 P. & D. at p. 138.

converted into a perfectly valid marriage in England (4); but the point that, for the purposes of enforcement, this marriage was and always remained a potentially polygamous marriage, and, therefore, could not give rise to the " remedies, the adjudication, or the relief of the matrimonial law of England ", was never put to the learned stipendiary at all.

I used some hard words about the husband's conduct, and I will now say why I used them. It does not merely depend on the point that I have already mentioned, that he broke his promise to turn this, as it could have been turned, into a monogamous marriage. It is worse than that. When he deserted this woman, and left her, as the learned stipendiary found, without any subsistence for herself and her child, after having paid her the pitiful sum of £2 10s. a week for some time after the birth of the child, she tried by some means or another to get some money out of him. Apparently she was frustrated because she was told that she could not produce a certificate of her marriage, and ultimately (whether the advice was good or bad she accepted it, and I am not surprised that she did) she brought affiliation proceedings against her husband, who appeared by a solicitor and defended the case on the ground that she could not satisfy the first requisite of a bastardy summons because she was not a single woman; on the contrary, she was married to him. That issue never came to actual decision, for as soon as this point was raised the magistrates adjourned the case. That relieves us of what might otherwise, in regard to what happened afterwards, have raised a question of estoppel per rem judicatam against this husband; but the matter was not adjudicated on that basis.

Then finally, under other advice, she brought this present complaint. The husband, again represented professionally, resisted this time on the ground that

---

(4) Evidence was given by two affidavits before the stipendiary magistrate—(i) by Nii Amuna Kwah II, the Otoblohum Mantse (Divisional Chief) and member of Ga State Council, Accra, Ghana, who was conversant with native law and custom, and who described the ceremonies and formalities which constituted a valid native marriage, viz.—how a man who desired to marry a woman approached her parents through some members of his family; how, if the girl's parents consented the man sent two flasks of rum or its equivalent in cash to the girl's parents, or person in loco parentis which was known as a knocking-fee or " knocking rum "; and how thereafter a sum of money, according to his means and the social status of the girl, was given to the girl's parents in the presence of both families, known as " head-rum ", " consenting-rum " or " yes-money ". The girl was then handed over by her father, or person in loco parentis, to the man and libations were poured invoking the aid and guidance of the ancestors for a happy married life. The sum of money payable by the husband was claimable by him if the marriage was dissolved through the fault of the wife. If the husband intended to convert the customary marriage into a Christian marriage or a marriage under the ordinance, it was usual to send (along with the drinks and money previously mentioned), a Bible and ring. The marriage could not be dissolved by the parties but only by the elders of both wife and husband at a marriage arbitration. The marriage was potentially polygamous. The custom followed was that of the tribe to which the wife belonged.

(ii) by an expert in Ghana customary law, a solicitor, who declared that he was well acquainted with Ghana (formerly Gold Coast) law and especially that of Ashanti (the province where the parties had lived). The customary law in force in Ghana was recognised by the Marriage Ordinance, 1884 (now c. 127 of the Laws of the Gold Coast, Revised, 1951). This customary marriage was polygamous or potentially polygamous but the ordinance provided for the celebration of a monogamous marriage on the English model under the authority, inter alia, of a registrar's certificate. Section 14 of the ordinance provided that the registrar should not issue his certificate until he was satisfied by affidavit that " neither of the parties to the intended marriage is married by native law or custom to any person other than the person with whom such marriage is proposed to be contracted ". Ga and other customary marriages had been subject to the decisions of the Gold Coast courts operating under former ordinances—a Ga marriage was the subject of a reported decision of DEANE, C.J., in 1934. " In the matter of the Marriage Ordinance and in the matter of a caveat in respect of the intended marriage between Thomas Adamah Quaye and Beatrice Kuevi " where he reviewed previous decisions and expressed the opinion that possibly the essential ceremony requisite to a valid marriage was the acceptance of " rum " by the girl's parents in token of their agreement of the man having her to wife, though in that case there was other evidence of customary marriage. The word " rum " was not to be taken literally.

he was not married to her and that she had no rights as a married woman at all, because this had been a potentially polygamous marriage. However right he may be in law I venture to think that I have not been too harsh about his moral conduct in this context. A

That brings me to the only point which I think calls for any doubt or hesitation on our part in this case, and I can deal with it quite shortly. There is a string of cases beginning with *Srini Vasan* (*otherwise Clayton*) v. *Srini Vasan* (5), and there is a case called *Baindail* (*otherwise Lawson*) v. *Baindail* (6), both those decisions being decisions of BARNARD, J. His decision in *Baindail* v. *Baindail* (6), which was founded avowedly on his own decision in *Srini Vasan* v. *Srini Vasan* (5), went up to the Court of Appeal presided over by LORD GREENE, M.R., and BARNARD, J.'s decision in both *Srini Vasan* v. *Srini Vasan* (5) and *Baindail* v. *Baindail* (6) were upheld (7). I do not think that it is necessary to go into great detail about those cases, because BARNARD, J., himself pointed out the distinction between them and the type of case covered by *Hyde* v. *Hyde and Woodmansee* (8), and did so in *Risk* (*otherwise Yerburgh*) v. *Risk* (9), where he said: B C

> "In *Srini Vasan* (*otherwise Clayton*) v. *Srini Vasan* (5) and *Baindail* (*otherwise Lawson*) v. *Baindail* (7), all that the court decided was that a man who was domiciled in a country which permitted polygamy and had contracted a valid polygamous marriage in that country had the status of a married man according to the law of his domicil, and was, therefore, incapable of contracting a subsequent valid marriage in England, and in the latter case LORD GREENE, M.R., referred (10) to the passage from the judgment of LORD PENZANCE [in *Hyde* v. *Hyde* (8) which I have quoted previously, see p. 198, letter G, ante] stating that, rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country." D E

It is unnecessary to say more than that that is the crucial issue in this case. It is manifest that as soon as an attempt to obtain direct matrimonial relief in respect of a marriage which is potentially polygamous is in issue, the decision in *Hyde* v. *Hyde and Woodmansee* (8) is directly in point. F

In none of those cases decided by BARNARD, J., and the Court of Appeal, on the other hand, was there any question of trying to obtain relief in respect of a marriage which was potentially polygamous. What was in question in those cases was whether anyone who had acquired such status as by his own personal law he did acquire as a married man in his own country could validly go through a monogamous form of marriage in this country, and they held that he could not, and that the result was that the other party to the marriage was entitled to a decree of nullity. G

How, then, does the matter stand here? For this purpose I must refer to the foundation of the present jurisdiction of magistrates' courts in connexion with these matrimonial, or, as they are sometimes called, domestic, proceedings. The Summary Jurisdiction (Married Women) Act, 1895, s. 4, begins with these words: H

> "Any *married* woman whose *husband* shall have been convicted summarily [of a certain assault] . . . or whose *husband* shall have deserted her, or whose *husband* shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain . . . may apply to any court of summary jurisdiction . . . in which the cause of complaint shall have wholly or partially arisen, for an order or orders . . . [under s. 5] that I
>
> "(a) . . . the applicant [that is, the married woman] be no longer bound to cohabit with her *husband* ([which order] while in force shall have the

(5) [1945] 2 All E.R. 21; [1946] P. 67.
(6) [1945] 2 All E.R. 374.
(7) [1946] 1 All E.R. 342; [1946] P. 122.
(8) (1866), L.R. 1 P. & D. 130.
(9) [1950] 2 All E.R. at p. 974; [1951] P. at p. 53.
(10) [1946] 1 All E.R. at p. 345; [1946] P. at p. 126.

effect in all respects of a decree of judicial separation on the ground of cruelty):

" (b) . . . that the legal custody of any children of the *marriage* between the applicant and her *husband*, while under the age of sixteen years, be committed to the applicant."

Then there is a provision:

" (c) . . . that the *husband* shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2 as the court shall . . . consider reasonable ";

Twenty-five years later that was supplemented by the Married Women (Maintenance) Act, 1920, which made the provision that maintenance could be given in respect of any child of whom the wife was given the custody, and it extended the scope of the Act as follows (see s. 1 (1)):

" An order under s. 4 [of the Act of 1895] . . . made on the application of a *married woman*, which contains a provision committing the legal custody of any children of the *marriage* to the applicant, may, in addition to any other provision authorised by the Act, include a provision that the *husband* shall pay to the applicant . . . a weekly sum not exceeding 10s. for the maintenance of each such child until such child attains the age of sixteen years."

These maximum sums have been altered by subsequent statute and further alteration is proposed (11).

The whole matter is governed from first to last by this being a provision made in favour of a married woman against her husband, and in respect of people who can be described as children of the marriage. It is impossible, therefore, in my opinion, to resist the conclusion that this complaint attempts, contrary to the concluding words of LORD PENZANCE in *Hyde* v. *Hyde and Woodmansee* (12), to obtain, as between the parties, " the remedies, the adjudication, or the relief of the matrimonial law of England ".

At the time of the decision in *Hyde* v. *Hyde and Woodmansee* (13) [in 1866] the magistrates' courts had no jurisdiction similar to that which they now enjoy. There was some provision in the Act of 1857 (14) about a wife's property in case of desertion which was in force at the time, and it is quite true that later on a remedy in respect of aggravated assault on the one hand and desertion on the other was added, together with the proviso against making any order in favour of an adulterous wife, and the rest of it, all of which eventually was embodied in the Act of 1895 (15). But the mere fact that Parliament has extended the matrimonial jurisdiction to magistrates' courts has in my opinion nothing whatever to do with the matter. It still is part of the matrimonial law of England, and those who are, and remain, as in this case, able to put forward a marriage of a potentially polygamous character only are not, in my opinion, having regard to LORD PENZANCE'S judgment in *Hyde* v. *Hyde and Woodmansee* (13), entitled to take advantage of the reliefs so provided.

In my opinion, but, as I repeat, very much to my regret, we have no option but to allow this appeal and set aside this order.

MARSHALL, J.: I agree, also with deep regret, for in my judgment the appeal in this case, apart from one legal point, is an appeal without any merits whatsoever. It is an appeal from an order dated Jan. 21, 1960, which was made by the stipendiary magistrate at Liverpool, whereby he ordered the appellant husband to pay in respect of his desertion of his wife the sum of £4 10s. per week,

(11) By the Married Women (Maintenance) Act, 1949, and the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, which received the royal assent on July 29, 1960. (12) (1866), L.R. 1 P. & D. at p. 138. (13) (1866), L.R. 1 P. & D. 130.
(14) The Matrimonial Causes Act, 1857.
(15) The Summary Jurisdiction (Married Women) Act, 1895.

and a further sum of £1 10s. maintenance in respect of the child of the marriage. The notice of motion sets forth the grounds of appeal under three heads:—(i) That the said decision was wrong in law, (ii) That the said decision was against the weight of evidence, and (iii) That the appellant had not deserted the respondent as alleged by her or at all. It was conceded in the course of the argument by counsel for the husband that having regard to the findings of the stipendiary magistrate he was not prepared to continue to advance the second and third grounds as being valid, and the appeal ultimately came down entirely to the question of law which is raised by the first ground.

The parties in this case are natives of Ghana. They are both educated, and they are both members of a tribe named Ga, which inhabits Teshie, a suburb of Accra. In September, 1955, the appellant husband having returned from a stay in England of many years to see his mother who was ill, became engaged to the respondent wife, who at that time was engaged as a teacher in Ghana. At the time of the engagement the future husband presented to his future wife a ring and a Bible, and it is quite clear from the evidence that presentations of that kind form in the customs of the tribe in question a symbol of an intention to convert what by tribal custom is a marriage which was potentially polygamous into a Christian and therefore a monogamous marriage. A month later, in October, 1955, the appellant husband sailed again for England, and there was carried out in the month of November, 1955, a marriage by proxy according to the customs of the tribe of Ga. It is not necessary for me to go into the detail ceremonially involved in the carrying out of a marriage ceremony by such tribal custom. Suffice it to say that from affidavits that were before the stipendiary magistrate, one from a divisional chief of the tribe and the other from an English lawyer well versed in the ordinances of Ghana, the ceremony and customs necessary to make the marriage valid in the eyes of the tribe were properly carried out, and accordingly, under the law of the tribe in question, a valid marriage by proxy was in fact performed. One also should say this, that under a Ghana Ordinance it is possible under the general law of Ghana, by s. 44 of the Marriage Ordinance of 1884 (c. 127 of the Laws of the Gold Coast (1951) Revised) for persons who have gone through the tribal ceremony to go before a registrar and have another ceremony, whereby the potentially polygamous marriage would be recognised and certified under the general law of Ghana, and would also become a monogamous marriage.

In January, 1956, the respondent wife came to England, and unfortunately for her, before insisting, in accordance with the promise implicit in the presentation of the ring and the Bible, that a ceremony should be gone through converting the marriage into a Christian and monogamous one, she began to live with him as man and wife at 19, Amberley Street, Liverpool. From that time she made many requests to convert this marriage into a Christian and monogamous one in accordance with the promise, and those requests were all consistently refused. I have no doubt whatever that that fact contributed greatly to the strained and unhappy relationship that grew up between the two of them, and which involved a child, a girl, who had been born to them.

On Oct. 22, 1958, following a quarrel, the appellant husband removed the child, and it was only through the intervention of the police that the child was returned. He had paid no maintenance to his wife for some time, and only limited moneys were paid to her throughout the time they lived together. As a result, on Nov. 1, 1958, the wife left. She, being destitute, consulted the National Society for the Prevention of Cruelty to Children, and proceedings were at once taken under the Affiliation Proceedings Act, 1957, which, when the hearing began, was met with the defence put forward by the advocate for the appellant husband that the respondent wife was not a single woman, an essential requisite to being able to proceed under that Act. Accordingly no adjudication was made.

The wife, again under advice, took proceedings next under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. The ground of opposition to any claim

A that she was advancing was changed. Having argued before that she was not a single woman, but validly married to him according to the tribal custom, when the case came before the stipendiary the point was taken that she was not validly married at all; not, be it made clear, the point that though the marriage was valid in Ghana according to tribal custom, yet being potentially polygamous it was not marriage such as is recognised by the general marriage laws of this B country. That point not having been argued, and the stipendiary's attention not having been brought to the real issue in that form, it is not surprising that he reached the decision that the marriage was a valid one in Ghana.

It was against his order, made as I have already indicated, that this appeal was brought, and if it were possible by any proper legal rule to uphold this order, I should have upheld it with the greatest satisfaction. But it is not possible, C having regard to the law which binds us. That law has been gone into in detail by my Lord. It stems primarily from *Hyde* v. *Hyde and Woodmansee* (16) in which, as my Lord has already indicated, LORD PENZANCE made it perfectly clear that a polygamous marriage is not such as is recognised by the law of this country. He accordingly decided that as between parties to such a marriage they are not entitled to the remedies, the adjudication, or the reliefs of the matrimon- D ial law of England. That decision has formed the foundation of subsequent decisions, three of which, at least, have been decided by BARNARD, J. Two cases only need be referred to. The first is *Baindail* (*otherwise Lawson*) v. *Baindail* (17), which went to the Court of Appeal, and it is only necessary to state that the extract which my Lord read from LORD PENZANCE's judgment in *Hyde* v. *Hyde and Woodmansee* (16) was specifically assented to by the Court of Appeal in the E decision which they gave in *Baindail* v. *Baindail* (18). As this basic proposition has already been underwritten by the decision of the Court of Appeal, this court must quite clearly be bound by it.

The final case to which I should make any reference is a case which I think answers quite clearly the only argument that was primarily advanced, with great discretion, by counsel for the wife, who was left standing on a very narrow legal F ridge indeed. It is *Risk* (*otherwise Yerburgh*) v. *Risk* (19), in which BARNARD, J., said this (20):

> " If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court saying so, for the decree would be declaratory. This would mean, however, that a successful petitioner would have the right to apply G for maintenance and for custody, and this would also mean that if the present petitioner were the second, third or fourth wife of the husband the court would still have to entertain her petition, for under Moslem law the first wife is no more the wife than the remaining three. In the case now before me, although the ceremony was in Arabic, which language the wife did not understand, I am satisfied that she realised that it was a ceremony of H marriage according to Moslem rites and that those rites permit of other wives. The wife entered into this marriage contract with a full knowledge of its polygamous character, and now on that very ground she seeks to have it set aside. On this aspect of the matter the words of LORD PENZANCE in *Hyde* v. *Hyde and Woodmansee* (16) are very much to the point, [and he again there quotes the extract which my Lord has already quoted in *Hyde* v. I *Hyde and Woodmansee* (16) and goes on] LORD PENZANCE concludes his judgment . . . ' All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England ' (21).

---

(16) (1866), L.R. 1 P. & D. 130.
(17) [1945] 2 All E.R. 374; *affd.* C.A., [1946] 1 All E.R. 342; [1946] P. 122.
(18) [1946] 1 All E.R. 342; [1946] P. 122. (19) [1950] 2 All E.R. 973; [1951] P. 50.
(20) [1950] 2 All E.R. at p. 975; [1951] P. at p. 53.
(21) (1866), L.R. 1 P. & D. at p. 138.

"LORD GREENE, M.R., in *Baindail (otherwise Lawson)* v. *Baindail* (22) referred with approval to this passage. Although in *Hyde* v. *Hyde and Woodmansee* (23) LORD PENZANCE was dealing with a petition for dissolution, I feel satisfied that he advisedly used the word 'adjudication' and, therefore, this court has no jurisdiction to entertain this petition, and the petition must, accordingly, be dismissed."

The final argument put forward by counsel for the wife as I understand it, was this: that whereas these decisions applied to the administration of the law in the High Court, they did not apply with that same strictness to matters coming before magistrates under the Summary Jurisdiction (Married Women) Act, 1895—that it is possible for us to regard a married woman there as any woman married in a valid sense, whether the marriage was polygamous or whether it was monogamous. Again, I would have liked to be able to accede to that argument, but I am quite satisfied that all that the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, have done is to enable a cheaper process to be available to parties in a suit who are married, and to enable the magistrates to adjudicate, but they involve the same rights, responsibilities and liabilities as are involved in the administration of the general divorce law in the High Court.

Finally I will mention *Mehta (otherwise Kohn)* v. *Mehta* (24). Suffice it to say that what was found, and adjudicated on, in that case was a marriage that was monogamous in its inception, and a marriage that could only become polygamous on the happening of certain events, which events never did occur.

As I said before, with the deepest regret I agree that this appeal should be allowed.

LORD MERRIMAN, P.: Then the result is that the appeal is allowed, and the magistrate's order set aside. We do not await any application. We give leave to appeal to the Court of Appeal, and I do that because this is such an important question that it is one which ought to be decided in the Court of Appeal. I say that for this additional reason, without going back on anything that I have already said: if the same law did not apply in matrimonial issues in magistrates' courts as applied in the High Court we should arrive at the absurd position that in a cruelty case a petition could be brought the next day for divorce, and in a desertion case after three years a petition could be brought for divorce on the ground of desertion supported by magistrates' court orders made in the jurisdiction which would be peculiar to them, though denied to the Divorce Court. Leave to appeal.

Appeal allowed.

Solicitors: *Michael Kramer & Co.*, agents for *Canter, Levin & Mannheim*, Liverpool (for the husband); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(22) [1946] 1 All E.R. at p. 345; [1946] P. at p. 126.
(23) (1866), L.R. 1 P. & D. 130.
(24) [1945] 2 All E.R. 690.

LINCOLN *v.* DANIELS.

[QUEEN'S BENCH DIVISION (Salmon, J.), June 24, 1960.]

Libel—Privilege—Absolute privilege—Qualified privilege—Communications to Bar Council—Libel alleged contained in letters of complaint against Queen's Counsel addressed to secretary of Bar Council—No complaint made to Benchers of Inn of Court—Letters not protected by absolute privilege but by qualified privilege.

Complaints made to the General Council of the Bar concerning the conduct of a member of the Bar are protected in proceedings for defamation by qualified privilege, but not by absolute privilege, since that body have no power to carry out judicial or quasi-judicial functions and, accordingly, any document addressed to them cannot be regarded as setting in motion judicial or quasi-judicial proceedings.

Lilley v. *Roney* ((1892), 61 L.J.Q.B. 727) distinguished.

[As to the nature of absolute privilege and its application to the administration of justice, see 24 HALSBURY'S LAWS (3rd Edn.) 48-52, paras. 86-92. As to the nature of qualified privilege and what is a privileged occasion, see 24 HALSBURY'S LAWS (3rd Edn.) 54-62, paras. 97-108.]

Case referred to:

Lilley v. *Roney*, (1892), 61 L.J.Q.B. 727; 32 Digest 109, *1406*.

Action.

In this action the plaintiff, Fredman Ashe Lincoln, a Queen's Counsel carrying on professional practice as such, claimed damages for alleged libel contained in two letters of complaint addressed to the General Council of the Bar by the defendant, David Daniels. The plaintiff alleged that the defendant falsely and maliciously wrote and published or caused to be printed and published to the secretary of the General Council of the Bar of and concerning the plaintiff in the way of his profession the words complained of in the two letters. In the course of the action counsel for the defendant submitted that the letters, being addressed to the General Council of the Bar, were absolutely privileged and the trial judge, SALMON, J., ruled on this submission as appears in this report.

Neville Faulks, Q.C., *Joseph Dean* and *Miss K. D. Phillips* for the plaintiff.
A. R. Campbell and *J. M. Bowyer* for the defendant.

SALMON, J.: It is argued on behalf of the defendant that the letters of complaint which the defendant addressed to the Bar Council in February, 1958, were absolutely privileged. There can be no doubt in my view that those communications were certainly privileged to the extent that they were qualified by privilege; that is to say, the defendant would be protected completely unless he made the complaint maliciously. Counsel for the defendant argues, however, that the privilege goes further than that; that the occasion was an occasion of absolute privilege; that is to say, whatever the state of the defendant's mind was when he wrote the letters, the letters cannot be made the subject of an action for libel.

There is no doubt that any member of the public may make a complaint about a member of the Bar to the Bar Council, who may come to the conclusion that the complaints are groundless, in which event the Bar Council do nothing further. If, however, the Bar Council consider that the complaint raises a prima facie case against the barrister in respect of whom the complaint is made, the practice of the Bar Council is to send the papers to the Benchers of the Inn of Court to which the barrister belongs. The Bar Council itself has no judicial function, and no quasi-judicial function. The Bar Council itself does not adjudicate on the matter of the complaint.

As I have said, a member of the public may send his complaints to the Bar Council. There is nothing, if he so chooses, to prevent him from addressing

his complaint direct to the Inn of Court to which the barrister concerned belongs. I do not propose to decide whether, if a complaint were addressed to an Inn of Court, or to the treasurer of an Inn of Court, it would or would not be absolutely privileged. The Inn of Court has quasi-judicial functions, and can pronounce on the complaint, and take the steps in relation to it which they deem appropriate. It is conceded by counsel for the plaintiff, I think rightly, that a strong argument could be made in favour of the view that a complaint directed to the benchers of the Inn would be absolutely privileged.

This branch of the law is necessarily somewhat technical. There is no doubt here that no complaint was addressed by the defendant to the benchers of the plaintiff's Inn; and as I say I do not decide what the position would be (nor do I desire to express any view as to what the position would be) if that had been done, because the point does not arise for decision in this case. In my view, no absolute privilege attaches to the communication addressed to the Bar Council.

Counsel for the defendant relies on *Lilley* v. *Roney* (1). In that case a letter of complaint was addressed to the Law Society by the defendant, Mr. Roney and others; and it was held that that letter of complaint was absolutely privileged. It is to be observed, however, that at the date of this case, the Law Society (or the disciplinary committee of the Law Society) had, and were vested under the Solicitors Act, 1888, with, quasi-judicial functions. The letter of complaint was in a form prescribed by the rules which were laid down under the Act for setting in motion the quasi-judicial proceedings. That is made quite plain in a passage in the judgment of CAVE, J., who gave the leading judgment, when he said (2):

> "The letter with affidavit is the form given for setting in motion what are admittedly judicial proceedings."

He might have said that the rules which were made under the statute provided the form for setting in motion judicial proceedings.

In this case the Bar Council, so it is rightly conceded, is not the agent of the benchers. The council have no power to carry out any judicial or quasi-judicial functions; so that this case is quite different from *Lilley* v. *Roney* (1). Complaints fortunately are very rare, but, when these rare complaints are made, they are commonly passed to the Bar Council, and, if the Bar Council think that there is anything in them, they pass them on to the benchers. The essence of the rule about absolute privilege in this field is, however, that the document must be addressed to a body which has judicial functions, or quasi-judicial functions, and the document must be a step in setting in motion judicial or quasi-judicial proceedings.

For the reasons which I have stated, the letters of complaint in this case are not of that character. It therefore follows, in my view, that if a complaint is made to the Bar Council, the member of the public concerned has this limited protection that, providing he is not misusing the privileged occasion, the publication is covered by the privilege. If, however, he is malicious, he has no defence on the ground of privilege.

For these reasons, in my judgment the submission by counsel for the defendant fails.

Rule for the plaintiff.

Solicitors: *A. Kramer & Co.* (for the plaintiff); *Basil Greenby & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

(1) (1892), 61 L.J.Q.B. 727. (2) (1892), 61 L.J.Q.B. at p. 727.

A

ATTORNEY-GENERAL (on the relation of MANCHESTER CORPORATION) *v.* HARRIS AND OTHERS.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), June 16, 17, 20, July 18, 1960.]

B *Injunction—Contravention of statute—Relator action for injunction after repeated contraventions—Scope of court's discretion in relator action for an injunction.*

The Manchester Police Regulation Act, 1844, s. 102*, created certain street offences and prescribed a penalty of not more than forty shillings for any offence committed contrary to the section. The defendants, a husband and wife, who were registered street traders, had a greengrocery and florist C shop outside Manchester. On most Sundays since the middle of 1955 they had sold flowers and fruit from stalls placed close to the gate of a cemetery in Manchester. Between February, 1956, and early in 1959, the husband had been convicted of 142 offences against s. 102, seventy-four of the convictions being for using a stall on the footway contrary to the section, and sixty-eight being for exposing flowers for sale and thereby obstructing the D footway contrary to the section. The wife had been convicted ninety-five times during the same period. These prosecutions were probably brought as a result of complaints from shopkeepers carrying on the same type of business in the neighbourhood. The defendants paid the fines imposed on them and continued to commit the offences. On appeal by the Attorney-General, suing in an action on the relation of the local authority, from the E refusal of an injunction to restrain the defendants from contravening the Act of 1844, as, in the special circumstances of the case, the defendants had caused no injury to the public,

Held: (i) where an individual (or public body) persistently broke the law and there was no sufficient sanction to prevent the breach, the court might, in its discretion, grant at the suit of the Attorney-General, as representing F the whole public, an injunction to secure obedience to the law (see particularly p. 215, letter A, post).

Dictum of FARWELL, L.J., in *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board* ([1910] 1 Ch. at p. 61) approved.

(ii) in the present case, though the court had a discretion and each particular offence against the statute was trivial, yet it was desirable that the G defendants should be stopped from deliberately flouting the law, and an injunction would be granted.

Dicta of LAWRENCE, L.J., in *A.-G.* v. *Sharp* ([1930] All E.R. Rep. at p. 746) and of EVE, J., in *A.-G.* v. *Premier Line, Ltd.* ([1932] 1 Ch. at p. 313) applied.

Decision of SALMON, J. ([1959] 2 All E.R. 393) reversed.

H [As to the granting of an injunction for the protection of public rights and the administration of justice, see 21 HALSBURY'S LAWS (3rd Edn.) 403, 404, paras. 844-846; and for cases on relator actions, see 16 DIGEST 486, 487, *3681-3692.*]

Cases referred to:

A.-G. (*on the relation of Hornchurch U.D.C.*) v. *Bastow*, [1957] 1 All E.R. 497; [1957] 1 Q.B. 514; 121 J.P. 171; [1957] 2 W.L.R. 340; 28 Digest I (Repl.) 744, *39.*

A.-G. v. *Birmingham, Tame & Rea District Drainage Board*, [1910] 1 Ch. 48; 79 L.J.Ch. 137; 101 L.T. 796; 74 J.P. 57; *varied*, H.L., [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; 16 Digest 483, *3652.*

A.-G. v. *Ely, Haddenham & Sutton Ry. Co.*, (1869), 4 Ch. App. 194; 38 L.J.Ch. 258; 20 L.T. 1; 10 Digest (Repl.) 1260, *8889.*

A.-G. v. *Kerr & Ball*, (1914), 79 J.P. 51; 16 Digest 487, *3690.*

---

* The relevant provisions of the section are printed at p. 209, letters B to E, post.

A.-G. v. *London & North Western Ry. Co.*, [1900] 1 Q.B. 78; 69 L.J.Q.B. 26; 81 L.T. 649; 63 J.P. 772; 16 Digest 487, *3689*. A

A.-G. v. *Premier Line, Ltd.*, [1932] 1 Ch. 303; 101 L.J.Ch. 132; 146 L.T. 297; 28 Digest (Repl.) 744, *38*.

A.-G. v. *Sharp*, [1930] All E.R. Rep. 741; [1931] 1 Ch. 121; 99 L.J.Ch. 441; 143 L.T. 367; 94 J.P. 234; 28 Digest (Repl.) 743, *37*.

A.-G. v. *Shrewsbury (Kingsland) Bridge Co.*, (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 16 Digest 487, *3688*. B

A.-G. v. *Westminster City Council*, [1924] All E.R. Rep. 162; [1924] 2 Ch. 416; 93 L.J.Ch. 573; 131 L.T. 802; 88 J.P. 145; 38 Digest 227, *586*.

London County Council v. *A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 16 Digest 482, *3637*.

C

Appeal.

This was an appeal by the plaintiff, the Attorney-General, from a judgment of SALMON, J., dated May 4, 1959, and reported [1959] 2 All E.R. 393, whereby he refused to grant an injunction perpetually restraining each of the defendants, Robert Harris, his wife Audrey Harris, and Jack Ferst, from placing or using any stall or other article on any footway in the City of Manchester and from D exposing for sale on or near any such footway any flowers or other article so as to obstruct or incommode the passage of such footway contrary to s. 102 of the Manchester Police Regulation Act, 1844. SALMON, J., held that, although the defendants had contravened the statute, in the special circumstances of the case their acts had not caused injury to the public, and that, therefore, in the exercise of the court's discretion, the injunction should be refused.

E

The third defendant, Jack Ferst, did not file a defence in the action but gave an undertaking in view of which the action was not proceeded with against him.

Fenton Atkinson, Q.C., and *J. M. Lever* for the plaintiff, the Attorney-General.

Rose Heilbron, Q.C., and *I. R. Taylor* for the defendants, Robert Harris and Audrey Harris.

Cur. adv. vult. F

July 18. The following judgments were read.

SELLERS, L.J.: This is an appeal from the judgment of SALMON, J., refusing to grant an injunction to restrain the defendants from placing or using any stall or other article on any footway in Manchester and from exposing for sale on or near any footway therein any flowers or other article so as to obstruct G the footway. The defendants, Robert Harris and his wife, Audrey Harris, live, and trade during weekdays, at Dukinfield outside Manchester where they have a greengrocery and florist shop. On most, if not all, Sundays since about the middle of 1955 they have come into Manchester and sold flowers and fruit from stalls placed close to the gate of the Manchester Southern Cemetery. The learned judge has found that the defendants were carrying on a business which H was to the advantage of the public as well as profitable to themselves, and that may well be so. It is, I think, not uncommon to find vendors of flowers and fruit somewhat similarly placed outside cemeteries, hospitals and nursing homes, and they provide a facility and a reminder to those who wish to visit these various places. At first sight such a service might well appear to be useful and not harmful, and to be one which it would be unnecessary to curtail or prohibit. SALMON, I J., no doubt, felt the force of such considerations. He was satisfied that, in offering flowers for sale in the manner in which the defendants did, they were not causing any nuisance or inconvenience to the public using the footway. I, too, feel the force of these matters, but the difficulties of this case arise when it has to be accepted, as it has, that the defendants, in doing what they did, were breaking the law. One of the arguments for the defendants was that it was an old law and that it was completely out of date, at least in respect of the matters involved here. Of that I am far from satisfied.

A The Manchester Police Regulation Act, 1844, is still in force, subject perhaps to some amendments which are not material to this appeal. The Manchester Corporation Act, 1950, s. 1 (2), recognises this. By s. 1 (2) of that Act it is provided:

> "The Manchester Corporation Acts 1844 to 1846 and this Act may be cited jointly as the Manchester Corporation Acts 1844 to 1950."

B The Act of 1844 is entitled "An Act for the good Government and Police Regulation of the Borough of Manchester". It appears to control a multitude of activities, wayward or otherwise, of the citizens of Manchester. By s. 102:

> "... every person shall be liable to a penalty of not more than forty shillings, who in any street shall commit any of the following offences ..."

C Innumerable matters are made offences by this section alone, amongst which there are included, about the middle of this long section:

> "Every person who shall place or leave any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or other article whatsoever, or place or use any standing place, stool, bench, stall, or show-board on any footway ..."

D Then, in the next two paragraphs of the section:

> "Every person who shall place, hang up, or otherwise expose to sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same shall project into or over any footway or area, or beyond the line of any house, shop, or building at which the same shall be so exposed:
>
> E "Every person who shall slide upon any footway, or by standing, loitering, or remaining together with other persons on any footway without reasonable cause, or by hawking or exposing for sale any shell or other fish, green-grocery, meat or other article, on or near any footway, or by any other means shall obstruct or incommode the free passage of any such footway, or who shall insult, jostle, or annoy any inhabitant or passenger."

F Under that section of the Act two separate offences were charged against both the defendants. One is the offence that "by exposing flowers for sale did thereby obstruct the footway ..." and the other is "for using a stall on the footway contrary to s. 102 of the Manchester Police Regulation Act, 1844". Mr. Robert Harris was convicted a total of 142 times, seventy-four of which were for erecting a stall and sixty-eight for selling flowers. His wife has been G convicted ninety-five times. The fines over the years have varied. For eleven consecutive weeks from Feb. 16, 1958, to May 20, 1958, Mr. Harris was fined 40s. for using a stall and 10s. for obstructing the footway, and after that the fines dropped to 20s. and 2s. 6d. respectively. Mrs. Harris generally seems to have been fined less. The fines were paid each week and the law similarly infringed the following week. The matter was eventually referred to the Attorney-H General and the writ was issued on July 4, 1958.

Paragraph 5 of the statement of claim reads as follows:

> "Notwithstanding the said prosecutions convictions and fines each of the defendants continues to commit the aforesaid breaches of the said enactment. In the premises the penalties imposed by the said enactment have proved insufficient to secure compliance therewith and unless restrained by this I Honourable Court the defendants and each of them intend to continue to trade in breach thereof either by themselves or by their respective servants or agents or otherwise."

On that the plaintiff claimed an injunction.

The defence was drawn personally by the defendants and it states that they are registered street traders. It admits (1) that stalls have been erected and flowers exposed for sale, but goes on to say:

---

(1) An amendment to the defence, settled by counsel, was put in on Mar. 19, 1959.

"It is denied that the matters hereinbefore admitted were such as to obstruct or incommode the passage of the footway as alleged or at all and if, which is denied, the said matters were such as to obstruct or incommode the passage of the footway, then these defendants aver that the obstruction or incommoding of the passage of the footway [was] such as to cause no real inconvenience to members of the public."

SALMON, J., carefully reviewed the law and the cases cited to him, which were by no means all of those cited in this court. The learned judge expressed himself in various passages as follows. He said (2):

"The present case, however, in my view depends on whether what the defendants are doing in any way injures the public; and this is not a matter on which the discretion of any officer of the Crown can have any influence on the court. I have no hesitation in holding on the special circumstances of this case that the defendants have caused no injury to the public. I do not, however, hold that there are any means available other than an injunction to prevent these defendants from doing what they are doing."

Later in his judgment he said (3):

". . . in my judgment it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public."

The question is whether the learned judge was right in the statement of the law and the application of it to this case. He also said (4) that he was uneasy about the circumstances in which the prosecutions were originally launched, and he seems to have taken that in part into consideration in holding that an injunction should not be granted.

The judgment does not find that there was a lack of good faith which, if established, might well justify no order for an injunction. Although such complaint as is made is clearly not against the Attorney-General but against those who prosecuted in the magistrates' court, I am not sure to what the learned judge was referring. The defendants, Mr. and Mrs. Harris, apparently were not the first to use the site adjacent to the entrance gates of the cemetery for selling flowers. There may have been long, though perhaps desultory, user. The objection to the defendants' activities there came initially from shopkeepers who carried on the same type of business in the immediate neighbourhood and who, apparently, were open on Sunday and found that their trade was wholly unprofitable because of the defendants' intervention on a site free from rent and rates. Not unnaturally the shopkeepers brought their complaint to various city councillors and the matter was discussed in the appropriate committee. The town clerk originally expressed the view in letters, to some of which the judgment refers, that no action could justifiably be taken against the defendants. Reference was made to the Highway Act, 1835, but apparently it was the police who invoked the local Act of 1844 and launched the first of these many prosecutions in February, 1956.

I agree with the judge that the mischief aimed at by any part of s. 102 could not have been unfair competition, though some of the provisions would interfere, perhaps only to a minor extent, in the freedom of trading. But I cannot see anything sinister in what was done. In more than one of the reported cases interested parties have raised objections and sought means of redress. If there was no breach of the law, the magistrates would have so found. But they found infringements under both charges. There was an unsuccessful appeal to the recorder of Manchester, and thereafter the defendants frequently, if not invariably, pleaded guilty to the offence of erecting a stall on the footpath but not to obstruction. I do not think on this evidence that it could properly be held that

(2) [1959] 2 All E.R. at p. 396; [1960] 1 Q.B. at p. 39.
(3) [1959] 2 All E.R. at p. 398; [1960] 1 Q.B. at p. 42.
(4) [1959] 2 All E.R. at p. 399; [1960] 1 Q.B. at p. 43.

A some wrong motive had improperly caused the police to launch prosecutions under an Act, or sections of it, which had become obsolete or dead. The Attorney-General obviously regarded the Act of 1844, so far as relevant, as law which should be obeyed and enforced, and I do not feel able to hold otherwise.

The main argument has centred round the learned judge's decision that the injunction should be refused as no injury from the defendants' conduct has been B shown but rather a public advantage proved, and as the subject of complaint is trivial and not even inconvenience to the public has been shown. It is urged in support of the judgment that that view could properly be taken and that the refusal was well within the judge's discretion, and should stand.

It cannot, in my opinion, be anything other than a public detriment for the law to be defied week by week and the offender to find it profitable to pay the C fine and continue to flout the law. The matter becomes no more favourable when it is shown that, by so defying the law, the offender is reaping an advantage over his competitors who are complying with it. The penalty of 40s. established in 1844 has not proved an effective sanction. The two charges, so often made concurrently, arise from the same circumstances, and, no doubt, it would have been regarded as inappropriate to impose two fines to the full extent and this D does not seem to have been done. There is, however, no indication that, if the magistrates had fined to the maximum, it would have been effective to stop the offending. The effort of the corporation in 1958 to increase the penalty was apparently defeated by sufficient interested opposing parties attending a town meeting which had to give its approval for the increase to be made.

It was not, I think, seriously submitted before this court that, in a suit of E this character by the Attorney-General, the court had no discretion but had peremptorily to make the order for which he asked. In *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board* (5), FARWELL, L.J., said:

> " It is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation F shall be . . . That is to say, the court cannot say: ' You ought never to have instituted these proceedings ': it must listen to his application, and then adjudicate whether there should be an injunction granted or not."

That, in my view, succinctly expresses the result of the authorities and it has recently been emphasised by the passages quoted by the learned judge (6) from the judgment of DEVLIN, J., in *A.-G.* (*on the relation of Hornchurch U.D.C.*) v. G *Bastow* (7).

I agree with SALMON, J., that it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General, but, with respect, I think that the learned judge went too far when he said further (6) that the Attorney-General is

> " in no better position to obtain judgment in his favour than any other H litigant claiming an injunction."

The Attorney-General represents the public interest and acts accordingly, as SIR ERNEST POLLOCK, M.R., pointed out in his judgment in *A.-G.* v. *Westminster City Council* (8), to which I shall briefly refer later.

Leading counsel for the Attorney-General summarised his argument in sub- I mitting that, on the authorities, when a man is persisting in a course of illegal conduct and the Attorney-General comes to the court in a relator action asking for an injunction as the only means of securing obedience to the law, the court will at least pay great heed to his intervention and, while retaining a discretion to grant or refuse the relief which he seeks, it will normally grant relief in the absence of some exceptional circumstances. Leading counsel for the defendants, in her

(5) [1910] 1 Ch. at p. 61. (6) [1959] 2 All E.R. at p. 396; [1960] 1 Q.B. at p. 39.
(7) [1957] 1 All E.R. 497; [1957] 1 Q.B. 514.
(8) [1924] All E.R. Rep. 162; [1924] 2 Ch. 416.

argument, submitted that the cases followed two lines. She sought to distinguish the cases where the Attorney-General had intervened to prevent public bodies, statutory or otherwise, from exceeding their powers or not complying with their obligations and the cases, which had developed more particularly since the beginning of this century, where the Attorney-General had intervened to enforce general or local laws or bye-laws. She submitted, in effect, that the principles properly applied in the former have been improperly invoked in the later and different type of cases. In the case of public bodies, the intervention of the Attorney-General seeking an injunction was the only remedy to prevent infringement of powers, whereas, in the second class of case, penalties were provided to enforce the statutory obligations.

In *A.-G.* v. *Westminster City Council* (9), one of the latest cases in the first category, SIR ERNEST POLLOCK, M.R., in supporting the injunction granted by TOMLIN, J., said:

> "Having regard to the position which the Attorney-General occupies before this court, it does not seem to me to be possible to be questioned, as a matter of discretion, whether or not he is entitled to the redress which he asks in the public interest, in reference to matter upon which a public authority has exceeded its powers."

That is, of course, after the court has been satisfied that the powers have been exceeded.

WARRINGTON, L.J., said (10):

> "With regard to the injunction, it was contended on behalf of the city council that the court ought not, in its discretion, to grant an injunction, even at the suit of the Attorney-General, unless the Attorney-General makes out that that which the public body concerned is doing unlawfully is of injury to the public . . . If the Attorney-General, acting on behalf of the public, in the exercise of his discretion as a public officer, comes to the conclusion that he is justified in asking the court to restrain an illegal act on the part of a public body, I do not think this court is entitled to refuse the injunction merely because it is said that there is no evidence of any public wrong being done. The real result, if that argument were to be acceded to, would be that in such a case there would be no means of preventing that kind of illegal act on the part of the public body in question."

Likewise a railway company has been stopped from exceeding a speed limit of four miles an hour over a level crossing, imposed by statute, notwithstanding that the substituted speed of ten miles an hour meant less delay over the crossing and to that extent at least benefited the public who might otherwise be longer delayed (see *A.-G.* v. *London & North Western Ry. Co.* (11)).

The cases cited where the injunction has been granted to prevent public and statutory bodies from exceeding their powers are not strictly applicable to the present case. Further *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (12), where an injunction was granted to restrain interference with a public highway and a public navigable stream by illegal acts of obstruction, was a case where damage to the public was clearly to be inferred. But, if such types of cases are disregarded, I do not think that it follows that conduct which is not shown to be an injury to the public (in the sense used) cannot be restrained even if it involves persistent and deliberate disregard of the law. I would turn to cases more directly in point.

A.-G. v. *Sharp* (13) was decided in this court. It also arose under the Manchester Police Regulation Act, 1844. The defendant, who was the owner or proprietor

(9) [1924] All E.R. Rep. at p. 165; [1924] 2 Ch. at p. 421.
(10) [1924] All E.R. Rep. at p. 166; [1924] 2 Ch. at p. 423.
(11) [1900] 1 Q.B. 78. (12) (1882), 21 Ch.D. 752.
(13) [1930] All E.R. Rep. 741; [1931] 1 Ch. 121.

of motor omnibuses, had applied for and had been refused a licence by the corporation. He had nevertheless continued to ply for hire in the city with his motor omnibuses, and he and his employees had been repeatedly fined for offences under the Act. In an action brought by the Attorney-General at the relation of the corporation for an injunction to restrain the defendant from continuing to ply for hire in the city without a licence, it was held that an injunction would lie. This court rejected the argument, advanced again here on behalf of the defendants in the present case, that the court had no jurisdiction to grant an injunction or any other remedy if the Act imposed, as it does, a fine for the offence. I quote LORD HANWORTH, M.R. (14):

> ". . . we must hold that there is a remedy by injunction, and that the mere fact that the imposition of a fine is available under the statute does not exclude the right which is sought by the Attorney-General."

LAWRENCE, L.J., said (15):

> " If the learned judge had jurisdiction, it cannot, I think, be reasonably open to doubt that it was rightly exercised in the circumstances of the present case. The defendant has deliberately and persistently committed breaches of the statutory obligations imposed on him for the benefit of the public. Before this action was brought, the defendant and his employees had, at the instance of the Corporation of Manchester, been summoned and fined no less than sixty times for breaches of these obligations, and it is plain that the defendant intends to pursue his illegal course of conduct unless restrained by injunction."

Those words fit precisely the present case.

Then in *A.-G.* v. *Premier Line, Ltd.* (16), there had been offences committed under the traffic regulations imposed by the Road Traffic Act, 1930. The headnote reads :

> " The defendants commenced to operate a service of express coaches over a route between London and Aylesbury on Feb. 26, 1931, and applied in the prescribed manner for the grant of a road service licence from the Commissioners of the Eastern Area through which the route passed before Mar. 31, 1931, but their application was refused and an appeal to the Minister from the refusal dismissed. The defendants were later prosecuted and convicted at petty sessions for running their service without a road service licence, but, notwithstanding the conviction, continued to do so."

The Attorney-General took proceedings. EVE, J., who tried that case, dealt with the matter very fully in finding in favour of the Attorney-General, and I propose to read a substantial part from his judgment (17):

> " The Attorney-General has been invoked, and he has intervened in order to assert, not only the rights of the three relators [in that case, they were the competitors who were interested] joined with him as co-plaintiffs, but of the public at large. The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land. The point is concluded against the defendants by the recent decision of the Court of Appeal in *A.-G.* v. *Sharp* (18).

---

(14) [1930] All E.R. Rep. at p. 745; [1931] 1 Ch. at p. 133.
(15) [1930] All E.R. Rep. at p. 746; [1931] 1 Ch. at p. 133.
(16) [1932] 1 Ch. 303. (17) [1932] 1 Ch. at p. 313.
(18) [1930] All E.R. Rep. 741; [1931] 1 Ch. 121.

" This conclusion drives Mr. Carr back to his second line of defence, which is that the remedy by way of injunction is a discretionary one and ought not to be imposed in this case. I cannot accept that view. This is not the case of a trivial or solitary invasion of the plaintiff's rights. In such cases the granting of an injunction in the absence of any indication on the part of the defendant to repeat the offence might well be regarded as an excessive punishment to inflict, but here I have to deal with defendants, who, notwithstanding frequent warnings, the refusal of their licence and a conviction recorded against them for the offence of operating their vehicles without a licence, nevertheless continued to commit day by day, and many times a day, the same offence, and even now, although they have in fact discontinued the service for the time being, have so far given no indication of their intention to abandon it permanently, and in such a case the only proper remedy is obviously an injunction."

Then in *A.-G.* v. *Bastow* (19), DEVLIN, J., said:

" The Attorney-General, as I say, is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective way is to ask this court for a mandatory injunction—and I am satisfied that the very nature of a relator action means that he has surveyed those ways and has come to that conclusion—then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances."

A.-G. v. *Bastow* (20) was cited to the learned judge, but it does not appear that either *A.-G.* v. *Sharp* (21) or *A.-G.* v. *Premier Line, Ltd.* (22) was referred to. The former, as I have pointed out, is a decision of this court.

The learned judge expressed the view (23) that the circumstances here were most exceptional, I think on the grounds that, as he held, there was no injury to the public and that, indeed, no member of the public had been in the slightest degree inconvenienced. That view is disregarding the complaining shopkeepers and, more particularly, the effect on the administration of and respect for the law if the defendants can continue in the future on the same lines as in the past, to laugh at the law, and say that they are immune from its restraints so long as they pay recurringly a small price for their immunity.

In *A.-G.* v. *Kerr & Ball* (24), LUSH, J., expressed a view which was relied on by the judge and the defendants:

" Obedience to bye-laws even as to the construction of a dwelling-house is, I think, a public duty, and disobedience to their instruction is prima facie a public wrong, but the granting of an injunction is discretionary as was admitted, and I have to consider whether a public injury has been done by continued contravention of the bye-laws, and whether it is desirable under all the circumstances that an injunction should be granted."

He did not grant an injunction because he found that the bungalows were healthy and fit for occupation, and that, if he ordered them to be removed, tents would be erected in their place. It was clearly a case where an injunction could properly be refused.

In all the circumstances of the present case, my view is that it is desirable that the defendants should be stopped from deliberately flouting the law, and I think that the Attorney-General has adopted a course, suited to the circumstances, which the courts should uphold. I would allow the appeal and grant an appropriate injunction.

(19) [1957] 1 All E.R. at p. 502; [1957] 1 Q.B. at p. 522.
(20) [1957] 1 All E.R. 497; [1957] 1 Q.B. 514.
(21) [1930] All E.R. Rep. 741; [1931] 1 Ch. 121. (22) [1932] 1 Ch. 303.
(23) [1959] 2 All E.R. at p. 399; [1960] 1 Q.B. at p. 43.
(24) (1914), 79 J.P. at p. 53.

A **PEARCE, L.J.:** I agree. In very full and fair arguments many old cases have been cited that show the development of the views taken by the courts in relator actions. It is now firmly established that, where an individual or public body persistently breaks the law and where there is no person or no sufficient sanction to prevent the breaches, these courts, in an action by the Attorney-General, may lend their aid to secure obedience to the law. They may do so B whether the breaches be an invasion of public rights of property or merely an invasion of the community's general right to have the laws of the land obeyed. In *A.-G.* v. *Ely, Haddenham & Sutton Ry. Co.* (25), LORD HATHERLEY, L.C., said:

> ". . . the Attorney-General . . . represents the whole public in this sense, that he asks that right may be done and the law observed . . . The question is, whether what has been done has been done in accordance with the law; if C not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

The defendants contended that, where the Act that created the offence provided the penalty, the general rule applied, that the only remedy was that provided by the statute, and, therefore, an injunction could not, or, at the least, should not, be D granted in this case. But, as EVE, J., pointed out in *A.-G.* v. *Premier Line, Ltd.* (26), the Attorney-General is asserting the rights of the public in general which is concerned in seeing that Acts of Parliament are obeyed, and the general rule, therefore, no longer operates. The dispute is not between the individuals but between the law-breaker and the public. In *A.-G.* v. *Sharp* (27) similar arguments were put forward without success. In that case, which has certain similarities E to the case before us, it was held that the court had jurisdiction to grant an injunction to prevent the defendant from plying for hire with his omnibuses without a licence. LAWRENCE, L.J., said (28):

> " The defendant has deliberately and persistently committed breaches of the statutory obligations imposed on him for the benefit of the public. Before this action was brought, the defendant and his employees had, at the instance F of the Corporation of Manchester, been summoned and fined no less than sixty times for breaches of these obligations, and it is plain that the defendant intends to pursue his illegal course of conduct unless restrained by injunction."

Later in his judgment LAWRENCE, L.J., said (29):

> G " In the present case, moreover, the defendant is wilfully persisting in an illegal course of conduct which has become, and if no injunction is granted will continue to be, a permanent habit. In these circumstances I think that the only appropriate remedy is by way of injunction at the instance of the Attorney-General."

The same is true of the defendants in the present case. Between them they had, H at the date of the trial, been convicted and fined on 237 summonses, and they admitted their intention to continue their course of action: for the profits derived from their breaches of the law exceed the penalties which can be inflicted on them. If, therefore, no injunction is granted, the law must (unless and until Parliament intervenes by amending the statute) confess itself defeated and leave them free to break the law, merely levying on their profits the small toll that the I existing penalties allow.

It is not, of course, desirable that Parliament should habitually rely on the High Court to deter the law-breaker by other means than the statutory penalties instead of taking the legislative step of making the penalties adequate to prevent the offence which it has created. Especially is this so where the offences are of

---

(25) (1869), 4 Ch. App. at p. 199.
(26) [1932] 1 Ch. at p. 313.
(27) [1930] All E.R. Rep. 741; [1931] 1 Ch. 121.
(28) [1930] All E.R. Rep. at p. 746; [1931] 1 Ch. at p. 133.
(29) [1930] All E.R. Rep. at p. 748; [1931] 1 Ch. at p. 137.

a trivial nature. Yet it is, on the other hand, highly undesirable that some member of the public should with impunity flout the law and deliberately continue acts forbidden by Parliament, and in cases where, under the existing law, this court alone can provide a remedy, it should, in general, lend its aid to enforce obedience to the law when that aid is invoked by the Attorney-General on behalf of the public.

It was argued for the Attorney-General that, once the breach had been proved, this court must order an injunction, or, at the least, ought to do so because the Attorney-General has brought the action in the exercise of his discretion. In its extreme form the argument is untenable. For although the bringing of the action is a matter for the discretion of the Attorney-General, the decision of it is for the courts (see per FARWELL, L.J., in *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board* (30)). When the Attorney-General decides to bring the action, he has not heard both sides of the matter and he has perforce to exercise his discretion ex parte. It is for the court to hear both sides and, having done so, to exercise its own discretion. Many things may have appeared by evidence, many cogent arguments may have been adduced, that may not have been within the contemplation of the Attorney-General when the proceedings were launched. It could be that in some cases, had he known of these, he would not have brought the proceedings. Be that as it may, it is for the court in its discretion, having heard both sides, to decide whether to grant an injunction.

The observations of the EARL OF HALSBURY, L.C., in *London County Council* v. *A.-G.* (31), dealt with the Attorney-General's jurisdiction. The Attorney-General exercises an administrative discretion in deciding whether the action should be brought. The court does not inquire into the rightness of that decision. The bringing of the proceedings has shown that in the opinion of the Attorney-General the acts warrant an injunction. This opinion, though ex parte, will obviously carry weight with the court. Where (as in this case) deliberate and still continuing breaches of the law have been proved, the court will, in the exercise of its discretion, normally grant an injunction, unless after hearing both sides it comes to the conclusion that the matter is too trivial to warrant it or that an injustice will be caused by it or that there is some other good reason for refusing to enforce the general right of the public to have its laws obeyed. I do not, with all respect, agree with the learned judge when he says that the Attorney-General is in no better position than any other litigant. For the Attorney-General represents the community which has a larger and wider interest in seeing that the laws are obeyed and order maintained.

It is this wider element that is apt to be overlooked or undervalued when one considers injury to the public merely in terms of immediate injury. In *A.-G.* v. *Sharp* (32) there was no injury to the public in this sense. In that case probably some extra omnibuses were, on the short view, a convenience rather than otherwise; yet an injunction was granted. There are many statutes and bye-laws whose breach by one man only, even though repeated, would do no injury (in the narrower sense) to the public. Indeed, it is one of the difficult problems of administration to decide what acts, harmless in themselves in isolated instances, must be forbidden in the interest of public order and well-being. And a breach with impunity by one citizen leads to a breach by other citizens or to a general feeling that the law is unjustly partial to those who have the persistence to flout it. Moreover, a breach of one law leads to a breach of another. It is in this respect that I find myself unable to agree with the learned judge in his finding that the acts done by the defendants do not tend to injure the public.

The administration of the city wishes to enforce this particular law on all alike and to prevent stalls from projecting into the footways of the city. I see no reason to doubt the sincerity of that wish. No doubt, the agitation of those

(30) [1910] 1 Ch. at p. 61. (31) [1902] A.C. at p. 168.
(32) [1930] All E.R. Rep. 741; [1931] 1 Ch. 121.

whose pockets were affected had had an effect in stirring up the authorities, but that has been so in many successful relator actions. I have considerable sympathy with the judge's feeling that the defendants' acts are trivial in themselves and insufficient to justify an injunction; in one sense and from one point of view they are. But, on the wider view of the matter, the public ought not, in this case, I think, to be denied their general and not unimportant right to put an end to continuing and deliberate breaches of the statute. I would, therefore, allow the appeal.

SELLERS, L.J.: The judgment of DEVLIN, L.J., is " I agree with both the judgments which have been delivered."

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Manchester (for the plaintiff); *E. F. Iwi*, agent for *Julian S. Goldstone & Co.*, Manchester (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*

SLATER *v.* SLATER.

[COURT OF APPEAL (Hodson, Pearce and Upjohn, L.JJ.), June 1, 2, July 20, 1960.]

Divorce—Alimony—Pendente lite—Wife receiving national assistance—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (1).

On an application for alimony pending suit a judge or registrar is not bound to take into account national assistance benefit received by the wife, although he may in his discretion do so (see p. 220, letter F, post).

Sterne v. *Sterne* ([1957] 1 All E.R. 792) explained.

Per CURIAM: cases in which the national assistance benefit received by a wife is taken into account are likely to be the exception and not the rule, but that is a matter for the court in each particular case (see p. 221, letter B, post).

Appeal dismissed.

[As to the consideration of a wife's means on application for alimony pending suit, see 12 HALSBURY'S LAWS (3rd Edn.) 350, para. 744, note (b); and for cases on the subject, see 27 DIGEST (Repl.) 489, *4279*, *4280*.

For the Matrimonial Causes Act, 1950, s. 19 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

For the National Assistance Act, 1948, s. 42 (1) (a), s. 43 (1), (2), see 16 HALSBURY'S STATUTES (2nd Edn.) 968, 969.]

Cases referred to:

Bass v. *Bass*, [1915] P. 17; 84 L.J.P. 53; 112 L.T. 70; 27 Digest (Repl.) 499, *4415*.

Coombs v. *Coombs*, (1866), L.R. 1 P. & D. 218; 14 L.T. 294; 27 Digest (Repl.) 489, *4282*.

Eaton v. *Eaton*, (1870), L.R. 2 P. & D. 51; 21 L.T. 733; 27 Digest (Repl.) 489, *4283*.

Rees v. *Rees*, (1821), 3 Phillim. 387; 161 E.R. 1361; 27 Digest (Repl.) 492, *4310*.

Sherwood v. *Sherwood*, [1929] P. 120; 98 L.J.P. 66; 140 L.T. 230; 27 Digest (Repl.) 633, *5937*.

Sterne v. *Sterne*, [1957] 1 All E.R. 792; [1957] P. 168; [1957] 2 W.L.R. 544; 3rd Digest Supp.

Interlocutory Appeal.

A husband appealed from the decision of MARSHALL, J., sitting as the judge in chambers at Gloucester on Jan. 12, 1960, affirming an order of a district registrar that the husband should pay his wife alimony pending suit at the weekly rate of £2 5s. The facts are stated in the judgment of PEARCE, L.J.

Ingram Poole and *Mrs. Glynne Bremner* for the husband.
B. H. Anns for the wife.

Cur. adv. vult.

July 20. The following judgments were read.

PEARCE, L.J.: An order for alimony pendente lite at the weekly rate of £2 5s. was made in the district registry in favour of a petitioning wife. The learned judge on appeal affirmed the order and the husband now appeals to us against his decision. The wife's petition is based on adultery. The husband's answer admits that he has been living in adultery since 1936 and relies on the wife's delay as a defence. It also alleges desertion by her from 1929 and contains a cross-prayer for divorce on that ground. Up to 1947 the husband had made weekly payments in respect of a child of the marriage but thereafter he paid nothing. The wife has £36 in a savings account and no other resources at all. She receives £2 19s. weekly from national assistance benefit. The husband earns just over £500 a year and has some small capital assets.

The sole point in the appeal is whether the order is wrong in principle in failing to take into account the national assistance benefit received by the wife and failing in consequence to refuse any order for alimony. The learned judge in the exercise of his discretion dismissed the appeal, holding that *Sterne* v. *Sterne* (1), which is the only relevant case, did not compel him to take the wife's benefit into account and to refuse any order for alimony.

Counsel for the husband contends that the logical inference from *Sterne* v. *Sterne* (1) is that national assistance benefit must in all cases be taken into account and that the court has no discretion to disregard it. He relies on dicta from *Coombs* v. *Coombs* (2); *Eaton* v. *Eaton* (3) and *Bass* v. *Bass* (4), as establishing that it is only the wife's necessity that justifies an order for alimony pendente lite. In this case, he argues, the wife is in no necessity since she has national assistance benefit and the sole effect of the order will be to impose on the husband the burden which is at present being borne by the community. He concedes that, if his argument is correct, no order will ever be made against a husband whose wife is receiving an equivalent amount of national assistance benefit, or even, it may be, whose wife could on application to the National Assistance Board receive an equivalent amount of benefit. But it is, he argues, more proper that the community should bear the maintenance of a wife pendente lite, since, if the wife is shown at the trial not to have forfeited her marital right to maintenance, the National Assistance Board can recover from the husband retrospectively the amounts which it has paid to the wife, whereas if the wife is shown to have forfeited her rights to maintenance, it is proper that the community should bear a loss for which the husband is proved at the trial to have had no legal liability.

That argument, although it has its attractions, is, as I think, too great a simplification of the matter and omits various considerations. The court rightly has a wide discretion in awarding alimony. The ecclesiastical courts had wide powers (see *Rees* v. *Rees* (5)). Under the joint effect of s. 17 and s. 32 of the Matrimonial Causes Act, 1857, the court had power at the wife's suit to make any interim order for alimony " which shall be deemed just ". The power to make interim orders " as the court thinks just " was later contained in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. It now derives from the Matrimonial Causes Act, 1950, s. 19 (1), which reads:

(1) [1957] 1 All E.R. 792; [1957] P. 168. (2) (1866), L.R. 1 P. & D. 218.
(3) (1870), L.R. 2 P. & D. 51. (4) [1915] P. 17. (5) (1821), 3 Phillim. 387.

A " On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just."

Thus, the court has always been given a wide and unfettered discretion to do what it thinks just. The paucity of reported cases on a jurisdiction which has involved the making of innumerable orders pendente lite shows that the courts B have wisely been reluctant to impose on this wide discretion any fetters of legal principle.

It is inevitable and convenient that the courts should develop some practice in these as in other matters. This has the advantage, inter alia, that litigants may be able to make arrangements with an approximate knowledge of what is likely to result from recourse to a court of law. It has always been made clear, C however, that the allowance is entirely in the discretion of the court (see *Sherwood* v. *Sherwood* (6)), and it is desirable that it should remain so. When that discretion is wrongly used in a particular case, a superior court will correct it; but it would be unfortunate if that correction of discretion on particular facts should be used to impose fetters on all subsequent use of the discretion in other cases.

D The view held by the court has been that during the pendency of its litigation wives must be so far as possible relieved from necessity, even where it seems probable that they are guilty, until such time as the law formally releases the husband from his matrimonial obligations. In a court concerned amongst other things to prevent collusion it is particularly desirable that wives should not be subject to the pressure of financial stringency pendente lite. In rare E cases, even when the wife has been found guilty and the husband obtains a dissolution, the court may order him to continue his payment of maintenance. The vast majority of orders for alimony pendente lite are made in favour of wives who are in fact innocent and many are made in favour of wives who, though accused, are found at the trial to be innocent. The argument that in all these cases national assistance must for the time being bear the cost of F alimony pendente lite and that the wives must have recourse to national assistance rather than to their husband's resources is not attractive. It may well be preferable that the occasional hardship to a husband who finds himself compelled pendente lite to support a guilty wife, should be regarded as being but one of the misfortunes of an unhappy marriage, one of the penalties paid by those who are the unfortunate losers in a venture that more often brings G rich rewards.

It would be undesirable that some hard cases should produce a fetter on a wide discretion and a practice that is inconvenient and unfair to a large majority. For there is great inconvenience in many cases in allowing the national assistance benefits to be taken into account or to take the place of alimony from the husband. Inconvenience becomes impossibility in cases where the alimony that would be H ordered is greater than the national assistance benefit. Let us assume that the proper subsistence for a wife in the court's view is £3 per week and that she is receiving £2 per week from national assistance. On the husband's argument the court should order the husband to pay only £1 per week. A week or at most a fortnight later as an inevitable result of such an order the national assistance benefit would be reduced by £1 per week. The wife must then apply to the court I for her order to be increased to £2 per week. Inevitably the national assistance benefit would again be reduced accordingly. She must then come back a third time in order to get an order of £3 per week—the order which she would have got originally if the national assistance benefit had been disregarded:—and thus in the end the national assistance benefit *cannot* be taken into account.

This difficulty was not pointed out to the court in *Sterne* v. *Sterne* (7). In that case the judge had in his discretion refused to make any order for alimony

(6) [1929] P. 120. (7) [1957] 1 All E.R. 792; [1957] P. 168.

pendente lite in favour of a wife who was in receipt of national assistance benefit. HODSON, L.J., pointed out (8) that the only point which emerged in that case was

> "... whether as a matter of law the learned judge was wrong in taking into account the receipt of public assistance by the wife in reaching the result which he did."

Having considered how far the husband's general liability to maintain his wife had been affected by the passing of the National Assistance Act, 1948, and having referred to certain cases on that point in the Divisional Court, he concluded that if the husband were ultimately found to be in the right he would not have to reimburse the National Assistance Board for their payments to his wife, but that if he were found to be in the wrong he would have to do so. He ended with these words (9):

> " So far as the present position is concerned, it seems to me impossible to say that the court, in the exercise of its discretion, is not entitled to look at the facts as they are now. Taking those facts, [the wife] is in receipt of an income which the husband may in the future be compelled to reimburse because it comes from the National Assistance Board; but the court in the exercise of its discretion is entitled to say that there is not here a case in which an order should be made in favour of the wife."

ORMEROD, L.J., concluded a short judgment by the words (10):

> " She has therefore those means of subsistence, and I cannot find that there was any error in principle on the part of the learned judge in exercising his discretion as he did."

HALLETT, J., agreed. Thus the learned lords justices were clearly saying that they would not interfere with the judge's discretion in taking national assistance benefit into account in that particular case. We are bound by that case, which rightly, as I respectfully think, holds that it would be wrong to remove from the area of the judge's discretion any consideration of the national assistance benefit. There may be many occasions when it is valuable for a judge in exercising his discretion in a case of particular hardship to be able to take into account the national assistance benefit paid to the wife. That is a very different matter from laying down the principle that a judge must always take it into account. *Sterne* v. *Sterne* (11) certainly does not compel us to impose such an undesirable fetter.

Admittedly, although the learned lords justices made it clear that they were merely refusing to interfere with discretion in that particular case, there are observations that, taken out of that context, would lend support to the view that as a general practice it was desirable to take national assistance benefit into account. As a result of those judgments the practical difficulties to which I have referred occurred to those more nearly concerned with the making and administering of alimony orders and in consequence the Registrars' Circular dated May 8, 1958, was issued to the registrars in the following terms:

> " Where a wife is in receipt of national assistance for herself or a child, the registrar will: (i) express any initial order for ancillary relief to take effect from a stated date fourteen days after the drawing up of the order (a maintenance order following an alimony order, or a modification order, need not be post-dated in this way); (ii) give *immediate* notice of the making of *any* order to the central office of the National Assistance Board. The fact that national assistance is being paid should normally appear from the evidence. It may be assumed that in all probability any wife who has a civil aid certificate on a nil contribution is in receipt of assistance.

(8) [1957] 1 All E.R. at p. 793; [1957] P. at p. 171.
(9) [1957] 1 All E.R. at p. 794; [1957] P. at p. 173.
(10) [1957] 1 All E.R. at p. 795; [1957] P. at p. 174.
(11) [1957] 1 All E.R. 792; [1957] P. 168.

A On receipt of notice of the order, the board will instruct its local office to adjust the date of national assistance. The registrars are of opinion that with this arrangement there is no necessity for them to take into account as wife's income any assistance which is being received at the time of making the order."

B In the light of these practical difficulties and considerations which were not put before the court in *Sterne* v. *Sterne* (12) it seems that cases in which the national assistance benefit received by a wife is taken into account are likely to be the exception and not the rule; but that is a matter for the court in each particular case and I would wish to say nothing that could be taken as fettering its wide discretion.

C It would certainly be wrong to interfere with the discretion of the learned judge in this case.

I would dismiss the appeal.

UPJOHN, L.J.: I agree with the judgment which has been delivered.

D **HODSON, L.J.:** I agree with the judgment of PEARCE, L.J., and only add a few words of my own because I recognise that my own observations in *Sterne* v. *Sterne* (12) which have been quoted by PEARCE, L.J., lay a foundation for the argument which has been addressed to the court to the effect that national assistance benefit must be treated as if it were the wife's independent income when an application by her for alimony pendente lite falls for consideration. My intention was not to lay down a general rule or to fetter the discretion of the

E court but to say no more than that on the facts of that particular case there was no ground for interfering with the exercise by the learned judge of the discretion vested in him.

Experience has shown that the practice initiated by the Registrars' Circular of May 8, 1958, is workable and convenient and not open to objection as a guide in such cases.

F I have had the opportunity of speaking to ORMEROD, L.J. (13), who concurs in what I have said.

The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *B. A. Greenwood & Co.*, Poole (for the husband); *Oswald Hickson, Collier & Co.*, agents for *Thursfield & Adams*, Kidderminster (for the wife).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

(12) [1957] 1 All E.R. 792; [1957] P. 168.
(13) ORMEROD, L.J., was party to the decision in *Sterne* v. *Sterne*.

Re PEARCE, DUFF & CO., LTD.

[CHANCERY DIVISION (Buckley, J.), July 25, 1960.]

Company—Reduction of capital—Special resolutions—Less than twenty-one days' notice given—Consent of every shareholder to treatment of resolutions as valid—Petition prosecuted on basis of validity—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 141.

A special resolution for reduction of capital by returning paid-up capital to preference shareholders was passed at a meeting of a company which was convened on less notice than the twenty-one days' notice required by the Companies Act, 1948, s. 141 (2). At the meeting the members present, representing more than ninety-five per cent. of the ordinary shares of the company (which shares alone carried voting rights) consented in writing to the proposal of an additional special resolution, notwithstanding that statutory notice thereof had not been given. This resolution, which was duly passed at the meeting, was to the effect that, contingently on the reduction of capital taking place, the preference shareholders should be paid a premium on each preference share. After a petition for confirmation of the proposed reduction of capital had been presented, the consent in writing of all ordinary shareholders to the resolutions being treated as valid was obtained.

Held: (i) the consent of all ordinary shareholders having been obtained to the special resolution for reduction of capital being treated as valid, and the petition being prosecuted on that footing, the court ought not to hear any such shareholder to say that the resolution was invalid; accordingly the resolutions would be treated as valid and the reduction would be confirmed (see p. 224, letter F, post).

(ii) the proviso to s. 141 (2) of the Companies Act, 1948, regarding a special resolution being passed on short notice required that the consents should be those of persons who appreciated that the resolution was passed on short notice; accordingly the passing of the additional special resolution by consent in the present case did not validate the special resolution for reduction of capital, because the persons agreeing to the additional resolution did not appreciate that the notice given for the resolution for reduction of capital was short notice (see p. 224, letter D, post).

[As to special resolutions on short notice, see 6 HALSBURY'S LAWS (3rd Edn.) 346, para. 677; and for cases on the subject, see 9 DIGEST (Repl.) 618, 619, *4112-4127*.

As to insufficient notice to convene a meeting, see 6 HALSBURY'S LAWS (3rd Edn.) 335, para. 658; and for cases on the subject, see 9 DIGEST (Repl.) 600, 601, *3978-3982*.

For the Companies Act, 1948, s. 141, see 3 HALSBURY'S STATUTES (2nd Edn.) 570.]

Cases referred to:

Oxted Motor Co., Re, [1921] 3 K.B. 32; 90 L.J.K.B. 1145; 126 L.T. 56; 9 Digest (Repl.) 601, *3991*.

Parker & Cooper, Ltd. v. *Reading*, [1926] All E.R. Rep. 323; [1926] Ch. 975; 96 L.J.Ch. 23; 136 L.T. 117; 9 Digest (Repl.) 506, *3334*.

Petition.

This was a petition, dated May 25, 1960, and presented by Pearce, Duff & Co., Ltd. for confirmation by the court of the reduction of its capital under the Companies Act, 1948, s. 66. The capital of the company consisted of £150,000 divided into 30,000 preference shares of £1 each (of which 22,500 had been issued and were fully paid up and 7,500 had not been issued) and 120,000 ordinary shares of £1 each (of which 112,500 had been issued and were fully paid up and 7,500 had not been issued). By art. 5 (ii) of the company's articles of association preference shares did not confer on the holders any right to receive notice of or

to attend or vote at any general meeting unless dividend remained unpaid at the end of six months from the close of the company's financial year. On Mar. 8, 1960, notice dated Mar. 7, 1960, was posted to ordinary shareholders stating that an extraordinary general meeting was to be held on Mar. 29, 1960, for the purpose of passing the special resolution therein set out for a proposed reduction of capital by returning to preference shareholders the amount paid up on their shares. Thus the twenty-one days' period of notice required in the case of special resolutions by the Companies Act, 1948, s. 141 (2), was not satisfied. A separate meeting of the preference shareholders was convened by notice dated Mar. 10, 1960, to be held immediately before the extraordinary general meeting, and at this meeting an extraordinary resolution was passed by the preference shareholders approving the adoption of the resolution for reduction of capital. On the morning of Mar. 29, 1960, the directors agreed that an additional special resolution should be put before the extraordinary general meeting of the company for the payment to the preference shareholders, contingently on the reduction of capital taking effect, of a premium of one shilling on each preference share repaid. The special resolution for reduction of capital and the additional special resolution were passed at the extraordinary general meeting of Mar. 29 by the members then present, who were the holders of more than ninety-five per cent. of the ordinary shares. The shareholders were unaware at the time that the statutory twenty-one days' notice of the special resolution for reduction of capital had not been given. All members present at this meeting signed a written consent (the terms of which are set out at letter I, infra), to the additional special resolution being put to the meeting and considered thereat. After the petition for confirmation of the reduction had been presented, attention was drawn to the fact that the notice given by posting the notice dated Mar. 7, 1960, on Mar. 8 was insufficient. The consent of every ordinary shareholder was then obtained to the resolutions being treated as valid special resolutions.

P. R. Oliver for the company.

BUCKLEY, J.: This is a petition presented to the court for confirmation of the company's reduction of its capital. The company purported to pass a resolution as a special resolution on Mar. 29, 1960, for the purpose of effecting the proposed reduction. The notice convening that meeting was dated Mar. 7, 1960, but was not in fact despatched by post to the shareholders until the following day, Mar. 8, 1960, and accordingly it is conceded that the necessary twenty-one days' period of notice was not in fact observed. After the notice had been sent out, the board of directors formed the opinion that it would be right and proper that the preference shareholders who were being paid off should not only receive repayment of their capital, but should also receive a premium distributed out of the available accumulated profits of the company, and accordingly a further resolution was proposed to be submitted to the meeting to be held on Mar. 29, providing for that payment. The directors appreciated that they could not give the proper period of notice in respect of this last-mentioned resolution, and accordingly when the meeting was held, at which shareholders holding upwards of ninety-five per cent. of the shares of the company were present, they were required to sign a document in the following terms:

> " We, the undersigned, being a majority in number of the members of the above-named company entitled to attend and vote at the extraordinary general meeting of the company convened for this day and the holders of more than ninety-five per cent. of the ordinary shares giving that right, hereby consent to the following additional special resolution being proposed and considered at that meeting notwithstanding that the statutory notice of meeting has not been given in regard to such resolution, viz.: (3) That contingently upon the said reduction taking effect the holders of the said 22,500 issued preference shares be paid out of the general reserves of the company available for distribution among the shareholders a premium of

1s. on each such preference share payable at the same time as the return of the capital paid up thereon." A

It is contended in the first place that the fact that shareholders holding more than ninety-five per cent. of the shares entitled to attend and vote at the meeting signed that consent was sufficient to get over the difficulty with regard to the inadequate notice given in relation to the resolutions set out in the original notice of the meeting. It is pointed out that the resolution which is set out in the form of consent is a resolution which is expressed to be contingent on the reduction taking effect, the reduction being the subject-matter of the earlier resolutions referred to in the original notice of the meeting. It is contended that by inference, therefore, all the shareholders who signed the consent consented not only to the resolution No. 3 being passed as a special resolution notwithstanding short notice, but consented to all the other resolutions also being passed as special resolutions notwithstanding short notice. B C

In my judgment, that is not the effect of the consent. The Companies Act, 1948, s. 141 (2), requires twenty-one days' notice in the case of a special resolution, with the proviso as to resolutions being passed on short notice which is to be found in that subsection which I need not read at length. In my judgment, that proviso requires the persons who agree to a resolution being passed on short notice to appreciate that the resolution is being passed on short notice and to agree to its being so passed with that consideration in their minds. I think that it is clear that in the present case the shareholders who signed the consent did not have it in their minds at all that the initial notice was defective in point of time. So, in my judgment, this consent does not cure the matter in that way. D

However, since the date of the meeting, the consent of every ordinary shareholder has been obtained to these resolutions being treated as valid special resolutions, and this petition has been presented on that footing. I have been referred to *Re Oxted Motor Co.* (1) and *Parker & Cooper, Ltd.* v. *Reading* (2) which show that in certain circumstances all the corporators, if they agree, can bind the company. Those cases relate to a rather different subject-matter from that which I have to consider, because I have to consider not whether these resolutions bound the company as special resolutions, but whether any shareholder could now say that the resolutions were not properly passed as valid special resolutions. Having regard to the one hundred per cent. consent which has been obtained to the resolutions being treated as valid and to the fact that the petition has been presented on that footing, I do not think that this court ought to hear, or be ready to hear, any of the shareholders to say that those resolutions were not validly passed. E F G

In those circumstances the case being a rather exceptional one, I am entitled to regard this special resolution as sufficient basis for the reduction which the court is asked to confirm; and accordingly, being satisfied by the evidence of excess of wants, I will confirm the reduction, approve the minute, and direct the usual advertisements. H

Order accordingly.

Solicitors: *Kingsford, Dorman & Co.* (for the company).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

---

(1) [1921] 3 K.B. 32. (2) [1926] All E.R. Rep. 323; [1926] Ch. 975.

FOX *v.* GENERAL MEDICAL COUNCIL.

[PRIVY COUNCIL (Lord Radcliffe, Lord Tucker and Lord Cohen), June 14, 15, 16, 20, July 26, 1960.]

Privy Council—Medical Act appeal—Appeal from determination of disciplinary committee of General Medical Council—"Due inquiry" by committee—Nature of appeal to Privy Council—Medical Act, 1956 (4 & 5 *Eliz.* 2 *c.* 76), *s.* 33 (1) (*b*).

Evidence—Statements on other occasions—Previous statements by witness to same effect as his evidence given at trial—Disciplinary proceedings before committee of General Medical Council.

The general rule is that previous statements by a witness to the same effect as the evidence that he is giving are not admissible in confirmation of his evidence, but there is an exception to this rule where in cross-examination a witness's account of some incident or set of facts is challenged as being a recent invention; the application of this exception depends on the nature of the challenge offered and the relative cogency of the evidence tendered to repel it and must be, within limits, a matter of discretion (see p. 230, letters F to I, post).

The appellant was charged before the Disciplinary Committee of the General Medical Council with having for a period of some three years ending in April, 1959, improperly associated with a patient of his, Mrs. T., and with having committed adultery with her on numerous occasions. On Apr. 16, 1959, Mrs. T. was found dead as a result of taking an overdose of a drug. At the hearing before the disciplinary committee, the appellant, in evidence, said that two days previously, on Apr. 14, there had been an emotional scene between himself and Mrs. T., as a result of which he went, on Apr. 15, to see an old friend, F., to discuss the position and to take advice. The appellant's solicitor later tendered F. as a witness to speak of what the appellant had said to him at their meeting, but, on the advice of the legal assessor, F.'s evidence was not allowed to be given.

Held: the committee had rightly held F.'s evidence to be inadmissible, because in the circumstances evidence that the appellant had on Apr. 15 told an old friend substantially the same story as he was telling at the hearing could not have made any contribution to the disciplinary committee's judgment of the veracity of the account which the appellant gave in evidence.

Appeal dismissed.

Observations on the position of the Judicial Committee when hearing appeals under s. 36 of the Medical Act, 1956, on analogy with the position of the Court of Appeal hearing an appeal from a judge alone, and on fulfilment of the disciplinary committee's statutory duty under s. 33 (1) (b) to make "due inquiry", on which the validity of the disciplinary committee's determination depends, and on such duty not being fulfilled merely by an observance of the rules of natural justice (see p. 227, letter B, to p. 228, letter F, post).

[Editorial Note. What a man said on a former occasion may be evidence against him as, for example, in civil cases as being an admission, but, in general, his statements on former occasions are not admissible when tendered in support of his own evidence, for they are then of no probative value and are inadmissible owing, it seems, to the risk of the fabrication of evidence by this means: see 15 HALSBURY'S LAWS (3rd Edn.) 295, para. 536, and *Corke* v. *Corke and Cooke* ([1958] 1 All E.R. 224), applying *Jones* v. *South Eastern & Chatham Ry. Co.'s Managing Committee* ((1918), 87 L.J.K.B. 775). Different considerations may arise where a state of mind is in issue (see [1958] 1 All E.R. at p. 229); and at the trial of certain criminal charges, such as offences against women and girls, evidence of recent complaints may be admissible to negative consent.

As to re-establishing the credit of a witness, see 15 HALSBURY'S LAWS (3rd Edn.) 449, para. 810. A

As to appeals from the General Medical Council, see 9 HALSBURY'S LAWS (3rd Edn.) 377, para. 882; cf. 26 HALSBURY'S LAWS (3rd Edn.) 72, para. 149, note (t).

For the Medical Act, 1956, s. 33, s. 36, see 36 HALSBURY'S STATUTES (2nd Edn.) 597, 600.] B

Cases referred to:

Flanagan v. *Fahy*, [1918] 2 I.R. 361; 22 Digest (Repl.) 344, *1819*.

General Medical Council v. *Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 2nd Digest Supp.

R. v. *Benjamin*, (1913), 8 Cr. App. Rep. 146; 22 Digest (Repl.) 486, *5378*. C

R. v. *Coll*, (1889), 24 L.R. Ir. 522.

R. v. *Roberts*, [1942] 1 All E.R. 187; 28 Cr. App. Rep. 102; 2nd Digest Supp.

Appeal.

Appeal by Kenneth Merrall Fox from a determination of the Disciplinary Committee of the respondents, the General Medical Council, made on Nov. 27, 1959, that he had been guilty of infamous conduct in a professional respect and D that his name should be erased from the Medical Register. The appellant had been charged " that, being registered under the Medical Acts, during a period beginning in or about March, 1956, and ending on Apr. 17, 1959, you improperly associated with the late Mrs. Kathleen Margery Thomas, who was a patient of yours at all material times, and on numerous occasions you committed adultery with her; and that in relation to the facts alleged you have been guilty of infamous E conduct in a professional respect ". The facts are stated in the judgment of the Board, p. 228, letters G and H, post.

John Hobson, Q.C., and *J. D. A. Fennell* for the appellant.

P. T. S. Boydell and *J. M. Drinkwater* for the respondents.

LORD RADCLIFFE: This is an appeal against a decision of the General F Medical Council, acting by its Disciplinary Committee, that the appellant, Dr. Kenneth Merrall Fox, had been guilty of infamous conduct in a professional respect and that his name should be erased from the Register of Medical Practitioners. The decision of the council was arrived at on Nov. 27, 1959, after a three-day hearing. The charge preferred against the appellant was that, for a period of some three years ending in April, 1959, he had improperly associated G with a patient of his, the late Mrs. Kathleen Margery Thomas, and committed adultery with her on numerous occasions. The course of proceedings before the committee and on the appeal before this Board made it plain that the charges of improper association and of adultery were to be considered as interdependent, and that the decision to remove the appellant's name from the register must stand or fall according to the view taken of the relevance and cogency of the H evidence on the adultery charge.

It is necessary at the outset to say something as to the nature of an appeal to the Board in a matter of this kind, because on that depends to some extent the Board's approach to questions that relate to the evidence taken at the hearing and the treatment of it before the committee during the course of the hearing. The appeal in this case lies as of right and by statute—see s. 36 of the Medical I Act, 1956. The terms of the statute that confers the right do not limit or qualify the appeal in any way, so that an appellant is entitled to claim that it is in a general sense nothing less than a re-hearing of his case and a review of the decision. Nevertheless, an appellate court works under certain limitations which are inherent in any appeal that does not take the form, as this does not, of starting the case all over again and hearing the witnesses afresh. In the High Court, where appeals to the Court of Appeal are by function by way of re-hearing, there are well-recognised principles which give some measure of precedence to the

A decisions of the tribunal that has seen and heard the witnesses over what might otherwise be the view of the facts preferred by the appellate court which has only the record of the evidence to study. Moreover, if the trial at first instance has been by judge and jury, only misdirection by the judge or such special cases as a perverse verdict or a verdict wholly contrary to the weight of the evidence are allowed to justify a reversal of the finding of the jury.

B It does not seem to their Lordships that it is possible to find an exact analogy between the position of the Board on an appeal under the Medical Act and the position of an appellate court dealing with an appeal either from a judge sitting with a jury or from a judge sitting alone to decide both law and fact. With the former, there is no useful analogy. The decision arrived at in a hearing before the Medical Council is, indeed, that of a body of persons, but there is no distinction C between their responsibility for deciding on the law and their responsibility for deciding on the facts. There is no judge to conduct the proceedings, to direct the jury on matters of law or to sum up for them on issues of fact. Although the Disciplinary Committee has the assistance of a legal assessor at its hearing, as required by the Act, it is the President of the court and not he who is in charge of the proceedings, and his duties are confined to advising on questions of law D referred to him and to interventions for the purpose either of informing the committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made. There is, no doubt, a much closer and more useful analogy between the Board's position and that of a Court of Appeal hearing an appeal from a judge sitting alone without a jury, E and for many purposes this analogy will suffice. But, even here, there is a distinction which may be important in some instances. A judge delivers a reasoned judgment; he puts on record his findings where there is material conflict of evidence and the conclusions that he has formed as to the credibility or reliability of the witnesses he has heard; he indicates his views on the law and the bearing of those views on the conclusion that he comes to. It is with this judgment before F it that the appellate court proceeds to its hearing of the appeal. But, in the case of hearings before the Medical Council, no judgment is, of course, delivered. There is only a finding such as we have here that " the committee have determined that the facts alleged . . . in the charge have been proved to their satisfaction ". It is not possible to tell, except by inference, what has been the weight given by the committee to various items or aspects of the evidence, or what considerations G of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole and endeavour to form its own conclusion whether a proper inquiry was held and a proper finding made on it, having regard to the rules of evidence under which the committee's proceedings H are regulated.

The validity of any determination by the committee is, certainly, dependent on the performance of its statutory duty to hold a " due inquiry " into the matter, and the Board will need to be satisfied as to this if it is challenged on an appeal. But to say that there must be due inquiry does not greatly elucidate the question unless there is some exhaustive definition of the conditions which such an inquiry I postulates. It has been said in an earlier case (see *General Medical Council* v. *Spackman* (1)) that there can have been no due inquiry if the rules of natural justice have not been observed, and this is true. At the same time it must be remembered that, before there was a statutory right of appeal (2) to the Board under the Medical Act, the only way of attacking a decision of the council was by way of certiorari proceedings or, at any rate, one of the other prerogative orders.

(1) [1943] 2 All E.R. 337; [1943] A.C. 627.

(2) The right of appeal was introduced by the Medical Act, 1950, s. 20, which was replaced by the Medical Act, 1956, s. 36.

Such proceedings are not truly by way of appeal. The court, in granting or refusing the order, does not investigate the merits of the decision; its only concern is to satisfy itself that certain essential rules of procedure, which are treated by it as constituting the requirements of natural justice, have been duly observed. Their Lordships think, therefore, that it would be an undue limitation of their duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of what are known as the rules of natural justice.

There are now detailed rules governing many aspects of the proceedings of the Disciplinary Committee—see the General Medical Council Disciplinary Committee (Procedure) Rules Order of Council, 1958, (3). An important provision of these rules is that which deals with the reception of evidence: see r. 43 (2):

> "The committee may receive as evidence any such oral, documentary or other matter as, after consultation with the legal assessor, they may think fit; Provided that, where any matter is tendered as evidence which would not be admissible as such if the proceedings were criminal proceedings in England, they shall not receive it unless, after consultation with the legal assessor, they are satisfied that their duty of making due inquiry into the case before them makes its reception desirable."

There is also a separate set of rules laying down the functions and duties of the legal assessor—see the Medical Disciplinary Committee (Legal Assessor) Rules, 1951, (4). The Board is bound to consider complaints made on any appeal to it against the background of these special regulatory provisions. It may be that, in some cases, an appellant will be able to show in positive terms that there has been a departure from what the rules required. In any such case, the departure will be a matter for comment and, in the absence of any actual indication of the significance or bearing that it had on the ultimate decision, their Lordships cannot well escape the responsibility of assessing for themselves what that significance or bearing should be taken to be. It is sufficient at this stage to guard themselves from the assumption that, merely because something inconsistent with the rules can be shown to have taken place, there can have been no "due inquiry" and the decision appealed from must necessarily be reversed.

With these considerations in mind, their Lordships turn to the circumstances of the present appeal. The relevant facts that appeared at the inquiry were few, and there is, in effect, no dispute about them. The appellant carried on a medical practice in the Reading area, having surgeries at Earley, Woodley and Winnersh. In 1956 he was a married man, with two children, a girl aged fourteen and a boy aged nine. Among his patients were a Mr. Leslie Thomas, his wife, Kathleen Margery Thomas, and their three small children. A fourth child, Anne, was born in July, 1957. The home of the Thomas family was at 508, Wokingham Road, Earley. The appellant became a friend of both Mr. and Mrs. Thomas and was a frequent visitor to their house. About February, 1958, he and his wife agreed to separate, and in June of that year she went to live in the North of England, their intention being that the two children's school holidays should be divided between them. In January, 1959, however, the appellant's wife died. Before her departure, the appellant and the Thomases had arranged that, when she went, he should take up residence with them as a paying guest at 508, Wokingham Road. In fact, from the month of March, 1958, Mrs. Thomas had been providing the appellant with lunch on working days at her home and his motor car was frequently to be seen parked on the grass verge or on the road opposite the house. According to the appellant, this was a business arrangement for which she was paid; but Mr. Thomas in his evidence said that he did not know that these lunches took place. The appellant has one of his surgeries in the vicinity as well as patients in the neighbourhood. From June, 1958, to March,

(3) S.I. 1958 No. 1805. (4) S.I. 1951 No. 1918.

1959, the appellant lived as a paying guest in the Thomas household. In March, he and they moved into a pair of semi-detached houses, 51 and 49, Avalon Road, Earley. They had come to an agreement, the general effect of which was that Mrs. Thomas was to supervise the running of No. 51, the appellant's house, provide him with lunch, do his washing and laundry, and help in looking after his children when they were with him; he, on the other hand, was to pay the rates of No. 49, the Thomas house, allow a bedroom in his house to be used, if needed, by one of the Thomas children, and, for this purpose, to open a communicating door between the upper floors of the two houses. Mr. Thomas was a government inspector of armaments, and his work involved very long hours. He seems to have been away at work from 7.30 a.m. until 8.0 p.m. on five days each week, and from 7.30 a.m. until 4.0 p.m. on the other two days. With his knowledge and without any objection from him, the appellant took Mrs. Thomas out on numerous occasions, sometimes to a country club of which he was a member, other times to the theatre. Occasionally Mr. Thomas himself accompanied them on outings. On the evening of Apr. 16, 1959, Mrs. Thomas left her home, took a bedroom at a hotel in Reading and the next morning was found there dead in bed, having taken an overdose of Seconal tablets. She left behind on a sideboard in the room two letters, one addressed to a woman friend at Earley, Mrs. Monck-Mason. There was argument at the inquiry whether the contents of these letters should be placed before the committee and, in the end, the legal assessor advised that they should not be admitted. Her departure from home had been preceded by more than one interview with the appellant, and their Lordships will refer to the circumstances of one of these, on Apr. 14, when they come to deal with the legal submission that was made on the appellant's behalf as to the admission of evidence in connexion with it.

Taking the recited facts by themselves, it is plain that they amount to no evidence of adulterous intercourse. They show an intimate association between the appellant and Mrs. Thomas, an association, it may be said, of a somewhat unusual character. They show, too, that there were numerous occasions of opportunity for adultery, if adultery took place. But any interpretation of these facts that supported the charge brought against the appellant must have depended entirely on certain things said or admitted by him in the course of several conversations which he had with Mrs. Monck-Mason during the months that followed Mrs. Thomas's death. Here again, with the exception of two points, neither of which appears to their Lordships to be of any crucial importance, there is no conflict of evidence between the appellant and Mrs. Monck-Mason as to what was actually said. The conflict arises in the significance to be attached to certain remarks, in the bearing which they are thought to have on what had gone before and in the relative plausibility of the explanations offered by the appellant as to his meaning or purpose in saying them. Having no guidance as to the view formed by members of the tribunal on these matters, their Lordships can only proceed by setting out the essential passages of each conversation and assessing their weight as evidence before a tribunal of fact. [HIS LORDSHIP reviewed the evidence as to the conversations and of an interview between the appellant and Mrs. Monck-Mason, whose evidence he found the committee must have accepted, on which basis the committee had before them a clear admission by the appellant that he regarded Mrs. Thomas' last child as his own and that, therefore, adultery had taken place between them, and continued:] The tribunal was, therefore, fully entitled to make the finding that it did on the evidence before it, and it would be impossible for an appellate court to reverse the finding on any contrary view of the facts. It follows that the appeal must fail unless there was some defect in the conduct of the inquiry, by way of admission or rejection of evidence or otherwise, that may fairly be thought to have been of sufficient significance to the result to invalidate the committee's decision. It is to this that their Lordships now turn.

Four points were raised on behalf of the appellant which were said to involve breaches of the Disciplinary Committee rules of procedure or otherwise to amount to misconduct of the proceedings. [HIS LORDSHIP referred to three of these: (i) that, whereas r. 18 (a) of the General Medical Council Disciplinary (Procedure) Rules, 1958, required that, in a case such as the present, the respondent's solicitor should " present the facts on which the complaint or information is based ", a breach of the rule was committed in that the solicitor in his opening did not give an account of the substance of a telephone conversation that took place on Apr. 20 between the appellant and Mrs. Monck-Mason, (ii) that, though the letters left by Mrs. Thomas had been excluded on the advice of the legal assessor, material obtained from them was used in cross-examination of the appellant, and (iii) that, on the " direction " or advice of the legal assessor, inadmissible evidence had been admitted on the issue of adultery. HIS LORDSHIP found that no weight could be attached to these points and continued:] The remaining objection taken relates to what was said to be the wrongful refusal to admit a piece of relevant evidence for the appellant. It will shorten the discussion of this point if it is assumed (i) that the appellant in his evidence testified that, on the day after Mrs. Thomas' outburst to him on Apr. 14, he went to see an old friend, a Mr. Frampton, to discuss his position and to take advice, (ii) that his solicitor later tendered Mr. Frampton as a witness to speak of what the appellant had said to him at their meeting, and (iii) that, on the advice of the legal assessor, Mr. Frampton's evidence was not allowed to be given. These assumptions are favourable to the appellant for Mr. Frampton's evidence was not tendered in a proper or satisfactory way, and it is doubtful whether the legal point that was taken before the Board was ever clearly presented to the committee. It was, however, sufficiently apparent that the appellant's solicitor wished to call Mr. Frampton to confirm that, on Apr. 15, the appellant had told him the same general story about his relations with Mrs. Thomas, in particular that her outburst of the previous day was not induced by any improper conduct of his, that constituted his defence to the charge before the committee. The purpose of such evidence of a witness's previous statements is and can only be to support his credit, when his veracity has been impugned, by showing a consistency in his account which adds some probative value to his evidence in the box. Generally speaking, as is well known, such confirmatory evidence is not admissible, the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence on what is capable of being cogent and, as was remarked by HUMPHREYS, J., in *R.* v. *Roberts* (5), it does not help to support the evidence of a witness who is the accused person to know that he has frequently told other persons before the trial what his defence was. Evidence to that effect is, therefore, in a proper sense immaterial.

There are, however, certain special exceptions, or at any rate one head of exception, from this general rule. If, in cross-examination, a witness's account of some incident or set of facts is challenged as being a recent invention, thus presenting a clear issue whether, at some previous time, he said or thought what he has been saying at the trial, he may support himself by evidence of earlier statements by him to the same effect. Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within limits, a matter of discretion, and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked. Thus, in *R.* v. *Coll* (6), a police witness who identified an accused in his trial evidence as being present at and party to the crime charged, being cross-examined on an earlier information sworn by him that did not mention the name of that accused, was allowed to give evidence to the effect that he had mentioned

(5) [1942] 1 All E.R. at p. 191. (6) (1889), 24 L.R. Ir. 522.

the name in an information of still earlier date. The admission of his evidence seems to have been treated by the court as coming within the " recent invention " exception. That apart, it seems to have been little more than a permissible exercise of the right of re-examination to ask him, in effect, whether or not the second of the two informations may not have been due to inadvertence and thus to displace the inference which the cross-examination had sought to draw from its contents. *R.* v. *Benjamin* (7) is often referred to in this connexion. A police witness, whose account of what he saw in certain premises was challenged in cross-examination, was allowed to refer to a contemporary entry in his official note-book showing that he had immediately made a report to the same effect to his superior in the police force. Perhaps the best example of the way in which the exception can be properly invoked and applied is offered by *Flanagan* v. *Fahy* (8). There a witness who had testified to the forging of a will was cross-examined to the effect that he had invented his story because of enmity between him and the accused, the beneficiaries under the propounded will. He was allowed to call confirmatory evidence to show that, before the cause of this enmity had arisen, he had told a third party the story he was now telling. In that situation, the issue raised by the cross-examination was clearly defined; a recent invention due to a specified cause, and, if the witness could show that his account had been the same before the cause existed, he was certainly adding a relevant fact in support of his credibility.

Did Mr. Frampton's evidence, as tendered, come within the exception? In their Lordships' opinion, it did not. It is impossible to say that its exclusion was wrongful in the legal sense. The cross-examination of the appellant on behalf of the respondents had not, in fact, challenged his account of what had passed between him and Mrs. Thomas on Apr. 14. It did not need to, since nearly everything that, according to him, was said could have been said consistently with either view of the case. What was, no doubt, challenged was his whole story that there had been no adulterous relation between them, and that her outburst of Apr. 14 had come as a complete surprise to him. According to him, he was " appalled " by the predicament in which this placed him; he had become " more and more worried by the turn of events ". In that state, he went to seek advice from an old friend. Could it have made any contribution to the committee's judgment on the veracity of his whole account for them to know that, in such a situation, he had told the old friend substantially the same story as to his innocence of the matters charged as he was now telling at the hearing? Their Lordships do not think that it could. In their view, the challenge to the appellant's evidence that was raised by the cross-examination was not of the order that could be affected by proof of statements made by him of that kind at that date. No tribunal that was not otherwise prepared to accept the appellant's general story could have been led to do so by hearing what he had told Mr. Frampton on Apr. 15. So regarded, the evidence rejected is no more than the previous assertion of the defence story told at the trial which HUMPHREYS, J., pointed out in *R.* v. *Roberts* (9) is clearly inadmissible.

As already announced, their Lordships have humbly advised Her Majesty that the appeal ought to be dismissed. The respondents have asked for their costs of the appeal and their Lordships know of no ground on which they can refuse the application.

Appeal dismissed.

Solicitors: *Hempsons* (for the appellant); *Waterhouse & Co.* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(7) (1913), 8 Cr. App. Rep. 146.
(8) [1918] 2 I.R. 361.
(9) [1942] 1 All E.R. at p. 191.

KELLY *v.* KELLY AND BROWN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), July 20,27, 1960.]

Divorce—Costs—Death of petitioner after decree nisi but before decree absolute —Whether his executors can enforce an order for taxation of costs against co-respondent—Attorneys' and Solicitors' Act, 1870 (33 & 34 *Vict. c.* 28), *s.* 19—*Law Reform (Miscellaneous Provisions) Act*, 1934 (24 & 25 *Geo.* 5 *c.* 41), *s.* 1 (1).

On Dec. 10, 1959, the husband was granted a decree nisi of divorce on the ground of the wife's adultery with the co-respondent, the co-respondent being ordered to pay the costs of the suit, which was defended. On Jan. 9, 1960, the decree not having been made absolute, the husband died. No taxation of costs had then taken place. On May 26, 1960, probate of the husband's will was granted to his executor, the W. Bank, Ltd. On an application by the bank that the order for costs of Dec. 10, 1959, should proceed to taxation,

Held: the order for costs should proceed to taxation because—

(i) there was jurisdiction so to order under s. 19 of the Attorneys' and Solicitors' Act, 1870*, notwithstanding any abatement of the matrimonial cause on the husband's death, and the bank, as personal representative of the husband, was a "person interested" under the order within s. 19 (*Hawks* v. *Hawks & Fenwick* (1876), 1 P.D. 137 followed); and,

(ii) an order for costs which has not proceeded to taxation was a cause of action within s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934†, and by virtue thereof survived for the benefit of the husband's estate (dictum of DENNING, L.J., in *Sugden* v. *Sugden*, [1957] 1 All E.R. at p. 302, applied; *Richards* v. *Richards & Flockton* (1940), 111 L.J.P. 20, n., followed).

[As to the effect of death of parties and recovery of costs thereafter, see 12 HALSBURY'S LAWS (3rd Edn.) 380, 381, paras. 833, 834, 835 and Supplement; and for cases on the subject, see 27 DIGEST (Repl.) 535-537, *4819*, *4827*, *4829-4834*; 672, *6384*.

For the Attorneys' and Solicitors' Act, 1870, s. 19, see 18 HALSBURY'S STATUTES (2nd Edn.) 467.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 792.]

Cases referred to:

Brown v. *Feeney*, [1906] 1 K.B. 563; 75 L.J.K.B. 494; 94 L.T. 460; 24 Digest (Repl.) 777, *7656*.

Brydges v. *Brydges & Wood*, [1909] P. 187; 78 L.J.P. 97; 100 L.T. 744; 27 Digest (Repl.) 674, *6424*.

Dipple v. *Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 27 Digest (Repl.) 611, *5729*.

Hawks v. *Hawks & Fenwick*, (1876), 1 P.D. 137; 45 L.J.P. 41; 34 L.T. 659; 27 Digest (Repl.) 535, *4819*.

Maconochie v. *Maconochie*, *Maconochie* v. *Maconochie & Blake*, [1916] P. 326; 86 L.J.P. 10; 115 L.T. 790; 27 Digest (Repl.) 536, *4832*.

Richards v. *Richards & Flockton*, (1940), 111 L.J.P. 20, n.; 27 Digest (Repl.) 573, *5291*.

Stanhope v. *Stanhope*, (1886), 11 P.D. 103; 55 L.J.P. 36; 54 L.T. 906; 50 J.P. 276; 27 Digest (Repl.) 535, *4818*.

Sugden v. *Sugden*, [1957] 1 All E.R. 300; [1957] P. 120; 121 J.P. 121; [1957] 2 W.L.R. 210; 3rd Digest Supp.

Summons adjourned into court.

Westminster Bank, Ltd., as executors of the estate of the petitioner husband,

* Printed at p. 234, letter I, post.

† The material part of s. 1 (1) is printed at p. 235, letter D, post.

Leslie Gordon Kelly, who had died on Jan. 9, 1960, applied by summons that an order for payment of costs by the co-respondent, Lorenzo Brown, made on Dec. 10, 1959, by Mr. Commissioner FLOWERS, Q.C., on granting the husband a decree nisi of divorce on the ground of the adultery of the wife, Vera Laura Kelly, with the co-respondent, should proceed to taxation. The summons was opposed by the co-respondent on the ground that, as the husband petitioner had died before the decree nisi in his favour had been made absolute, the suit had abated, and, therefore, so had the order for costs against the co-respondent. The matter came before Mr. Registrar FORBES on July 1, 1960, who adjourned it for hearing before a judge in open court. The case subsequently came before MARSHALL, J., on July 20, 1960, on which date he reserved judgment. The facts are stated in the judgment. The case cited below* was quoted in argument in addition to those cited in the judgment.

Victor Williams appeared for Westminster Bank, Ltd., sole executors of the deceased husband.

W. Kee appeared for the co-respondent.

Cur. adv. vult.

July 27. **MARSHALL, J.,** read the following judgment: This summons seeks an order that the taxation of the husband's costs against the co-respondent pursuant to the decree nisi herein dated Dec. 10, 1959, should proceed, notwithstanding that since the making thereof the husband has died; and that such costs when taxed be certified payable to Westminster Bank, Ltd., the husband's personal representatives. It further asks " that the costs of and occasioned by this application be paid by the co-respondent and added to the costs to be taxed pursuant to the decree nisi."

It came before Mr. Registrar FORBES on July 1, 1960, who, seeing that it raised points on which no direct decision has been yet given, referred it to a judge for hearing in open court, and the case came before me on July 20, 1960.

The facts are as follows. On Dec. 17, 1958, Leslie Gordon Kelly filed a petition for the dissolution of his marriage with Vera Laura Kelly on the ground of her adultery with Lorenzo Brown who was made the co-respondent in the suit. The prayer of the petition asked that Lorenzo Brown be condemned in the costs of the suit. Both the wife and the co-respondent filed answers denying that they had been guilty of the adultery alleged in the petition.

The suit came on for hearing before Mr. Commissioner FLOWERS, Q.C., on Dec. 9, 10, 1959. He found that the husband had sufficiently proved the contents of his petition and pronounced a decree nisi and made an order condemning the co-respondent " in the costs incurred on behalf of the husband in this cause and such further costs to be incurred on behalf of the husband as the court shall direct to be costs in the cause, such costs incurred and to be incurred to be taxed as between party and party."

On Jan. 9, 1960, no decree absolute having been made, Leslie Gordon Kelly, the husband, died. On May 26, 1960, probate of the husband's will was granted to Westminster Bank, Ltd., the sole executors thereunder. Prior to the husband's death no taxation of his costs against the co-respondent had taken place.

It is well settled that a marriage remains in existence until the making of the decree absolute is pronounced. The effect, therefore, of the husband's death before the making of a decree absolute was to put an end to a marriage which still subsisted and the divorce suit which at the time of the death is still without a final judgment is thereby abated. The argument of counsel for the co-respondent, was that with the abating of the suit the order for costs against the co-respondent abates with it, and is no longer, on the facts of this case, enforceable against him. The argument is not one of any merit.

On the learned commissioner's findings the co-respondent's adultery with the

* I.e., *Beaumont* v. *Beaumont*, [1932] All E.R. Rep. 615; [1933] P. 39.

wife must be taken to have caused the breakdown of this marriage. The husband before his death had incurred most, if not all, the costs necessary to prove the truth of the facts set out in his petition and to obtain a dissolution of his marriage. His estate has been diminished to the extent of such costs and the learned commissioner has with full knowledge of the facts exercised his discretion in condemning the co-respondent in the costs of the suit. But the law does not always underwrite the meritorious, nor always fail to support that which is without merit.

Had this been an action other than a matrimonial cause, I have little doubt that the issue would be covered by the terms (1) of R.S.C., Ord. 17. But in *Stanhope* v. *Stanhope* (2) and *Brydges* v. *Brydges & Wood* (3), the Court of Appeal have held that R.S.C., Ord. 17, does not apply to divorce proceedings seeing that matrimonial relief is a purely personal cause of action and is not a transmissible interest within the meaning of that order.

In *Maconochie* v. *Maconochie* (4) SHEARMAN, J., held that on the death of a husband, a party in a consolidated matrimonial suit, he had no jurisdiction to entertain an application against the legal personal representative of the deceased husband in respect of taxation and payment of the wife's cost of suit, where no taxation or order for security of those costs had been applied for or made by the wife against the husband during his lifetime. In the course of his judgment he said (5):

> " No authority has been cited to show me that these proceedings, which are founded on statute or rest upon the old ecclesiastical practice, are not personal actions. The result then is that when one of these parties dies the action abates: it comes to an end; it is dead and done with. These personal actions then having abated, no one can come to the court and make an application in these actions. There is one exception to the rule, and that is where there are funds already in court [HIS LORDSHIP then quoted *Brown* v. *Feeney* (6) and went on] . . . The result in the present instance being that the actions have come to an end, the wife, the surviving party, cannot bring anybody here to listen to her application for costs incurred in these actions, and there is no power to make an order . . ."

There is, however, on the facts one important difference between *Maconochie* v. *Maconochie* (4) and the case now before me. Whereas in *Maconochie* v. *Maconochie* (4) the suit had not proceeded to a stage where any order as to the costs had been sought or obtained from the court, in this case the suit had been heard and an order made against the co-respondent to pay the petitioner's costs. Is the death of the petitioner before taxation of the costs and decree absolute a complete bar to any attempt to recover them for the benefit of his estate? I have come to the conclusion that it is not a complete bar first of all because of a provision that still exists in the Attorneys' and Solicitors' Act, 1870. Most of the provisions of that Act have been repealed but s. 19 still stands and reads as follows.

> " 19. Revival of order for payment of costs:—Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen."

I know of no reason why I should not apply this section to this case and hold that the executor of the husband's estate " being a person interested in the

(1) See ANNUAL PRACTICE, 1960, p. 411 et seq. (2) (1886), 11 P.D. 103.
(3) [1909] P. 187. (4) [1916] P. 326. (5) [1916] P. at p. 328. (6) [1906] 1 K.B. 563.

A order made against the co-respondent in respect of the costs " is entitled to an order that the costs be taxed and then proceed to enforce it. This course was followed by the Judge Ordinary (SIR JAMES HANNEN) in *Hawks* v. *Hawks & Fenwick* (7).

The facts in that case were somewhat different in that the petitioner died after the decree absolute but before the costs had been taxed. If, however, B the order for costs in that case was covered by this section I see no reason in principle or on the facts why the order for costs in the present case is not equally covered. It is to be noted that towards the end of his judgment the Judge Ordinary said (8):

> " This statute was passed to remedy a difficulty which arose by reason C that in the common-law courts a suit could not be revived for the purpose only of enforcing an order for costs. The words of the statute are very general, and I know no reason why they should be limited in their operation, or not made applicable to all Divisions of the High Court. I shall therefore direct that the representative of the petitioner be at liberty to enforce the order for costs made against the co-respondent."

D I think that there is a further ground for acceding to this application in the terms of s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, the material part of which reads as follows:

> " . . . on the death of any person after the commencement of this Act all causes of action . . . vested in him shall survive . . . for the benefit of, his estate."

E

Is an order for the payment of costs which has not proceeded to taxation a cause of action within this section? Apart from STROUD'S JUDICIAL DICTIONARY in which a cause of action is defined as " the entire set of circumstances giving rise to an enforceable claim . . ." (9) which definition appears to me to cover an order for costs, there is authority for saying that it is within the above section.

F In *Sugden* v. *Sugden* (10) DENNING, L.J., giving the first judgment of the Court of Appeal, had this to say about s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934 (11):

> " The subsection only applies to ' causes of action ' which subsist against the deceased at the time of his death . . . ' Causes of action ' in the sub-section means, I think, rights which can be enforced, or liabilities which G can be redressed, by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. ' Causes of action ' are not, however, confined to rights enforceable *by action*, strictly so called—that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, H a sum payable for costs under an order of the Divorce Court . . ."

Although this opinion was obiter it must none the less carry great weight.

In *Dipple* v. *Dipple* (12) HODSON, J., referred (13) to an unreported decision of his given in chambers in 1940 in *Richards* v. *Richards & Flockton* (14) in which he

---

(7) (1876), 1 P.D. 137. (8) (1876), 1 P.D. at p. 138.
(9) STROUD'S JUDICIAL DICTIONARY (3rd Edn.), Vol. 1, p. 424.
(10) [1957] 1 All E.R. 300; [1957] P. 120.
(11) [1957] 1 All E.R. at p. 302; [1957] P. at p. 134.
(12) [1942] 1 All E.R. 234; [1942] P. 65.
(13) [1942] 1 All E.R. at p. 235; [1942] P. at p. 68.
(14) (1940), 111 L.J.P. 20, n., referred to, but not by name, in [1942] 1 All E.R. at p. 235; [1942] P. at p. 68, footnote (4). In *Richards* v. *Richards & Flockton* the husband had been granted a decree nisi on Jan. 11, 1940, and an order for costs was made against the co-respondent, who died before the decree was made absolute. HODSON, J. (as stated at p. 236, post), ordered the costs to be taxed against the estate of the co-respondent, and an order was subsequently drawn against his administratrix.

made an order for the taxation of costs to proceed against the personal representative of a co-respondent who had died after decree and continued (15): A

> " The order for costs having been made against the co-respondent in his lifetime, there was an enforceable claim against him which was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934."

If such an order for costs is kept alive against the estate of a person who has died it must by the same token be kept alive in favour of the estate of a person who has died. B

A second point taken by counsel for the co-respondent was that Westminster Bank, Ltd. could not be made parties to a suit for the dissolution of marriage and accordingly could not succeed in this summons in this suit which was abated. Whilst it is true that the main suit is at an end I have no doubt that this does not preclude applications in ancillary matters. There are numerous cases in which this had been done. C

I think that counsel for the co-respondent was right in his contention that on any view Westminster Bank, Ltd. should have obtained leave to intervene in the cause before bringing this summons. But full notice of the application was given to the co-respondent and he was represented before me. It is a proper matter in the circumstances in which I should give counsel for the bank leave for the bank to intervene and to amend the summons by adding them as parties. D

I accordingly order that the order for costs made by Mr. Commissioner FLOWERS, Q.C., dated Dec. 10, 1959, be allowed to proceed to taxation and the amount found to be due be paid to Westminster Bank, Ltd. as the personal representatives of the husband, the late Leslie Gordon Kelly.

Solicitors: *Forsyte, Kerman & Phillips* (for Westminster Bank, Ltd., as executors of the estate of the deceased husband); *Miller, Parris & Cornwell* (for the co-respondent).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(15) [1942] 1 All E.R. at p. 236; [1942] P. at p. 68.

Re HARPUR'S WILL TRUSTS, HALLER AND ANOTHER *v.* ATTORNEY-GENERAL AND OTHERS.

[CHANCERY DIVISION (Cross, J.), July 8, 21, 1960.]

Charity—Uncertainty—Gift to institution whose main object charitable but whose other objects might or might not be charitable—Charitable Trusts (Validation) Act, 1954 (2 & 3 *Eliz.* 2 *c.* 58), *s.* 1 (1), *s.* 2.

Charity—Validation by Charitable Trusts (Validation) Act, 1954—*Imperfect trust provision—Gift to institution whose main object charitable but whose other objects might or might not be charitable—Whether trust validated—Preservation of rights of adverse claimants—Unascertained class of next-of-kin—Date when rights accrue—Charitable Trusts (Validation) Act*, 1954 (2 & 3 *Eliz.* 2 *c.* 58), *s.* 1 (1), *s.* 3 (1), (2), (3).

By her will dated Oct. 19, 1945, a testatrix bequeathed the residue of her personal estate on the usual trusts for conversion and investment and directed that her real estate should be retained for ten years and that the income thereof and the income of her residuary personal estate should be accumulated during that period. At the end of that period the whole estate was to be sold and, subject to the payments of legacies, the testatrix directed her trustees to pay and divide her residuary trust estate "between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen, and other members of H.M. Forces who have been wounded or incapacitated during the recent world wars" in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate. The will also provided that the receipts of the treasurers or honorary treasurers of the charitable and other associations which benefited should be a good discharge to her executors and trustees for the payment over to such associations of the shares of residue bequeathed to them by the will. On Aug. 12, 1946, the testatrix died. The court accepted that the care of wounded soldiers, sailors and airmen was a charitable object. The class of the testatrix' next-of-kin had not been ascertained. There was no evidence that none of the institutions or associations which had main objects within the description specified by the testatrix had no subsidiary objects which were not charitable. In April, 1960, proceedings were begun to determine whether the residuary trust estate was held on valid charitable trusts.

Held: the residuary trust estate was not held on charitable trusts for the following reasons—

(i) the trust for division of the residuary estate was a trust in favour of institutions and associations not all of which were necessarily charitable, as some might have subsidiary objects which were not charitable; moreover the trust was one in favour of a class of beneficiaries, each of which would take absolutely as part of its general funds the money paid to it, and would not hold that money in trust to promote only its main object, which object was admittedly charitable (see p. 240, letters A to F, post).

Re Ogden ([1933] All E.R. Rep. 720) applied.

(ii) the trust of the residuary estate was not validated as a charitable trust by the Charitable Trusts (Validation) Act, 1954, because a trust for the division of a fund among institutions or associations (which this trust was), as opposed to a trust for the promotion of purposes, did not fall within the validation provision, s. 1 (2)*, of that Act as it was not "an imperfect trust provision" within s. 1 (1)* (see p. 243, letters E and A, post).

Decision of HARMAN, J., in *Re Gillingham Bus Disaster Fund* ([1958] 1 All E.R. 37) applied.

---

* The relevant terms of s. 1 (1), s. 1 (2) and s. 2 (1) are printed at p. 241, letters A-E, post.

Per CURIAM: if the trust for division of the residuary estate were within s. 1 and s. 2 of the Act of 1954, the rights of the next-of-kin would not be saved by s. 3 of the Act of 1954, because, notwithstanding that the class of next-of-kin had not been ascertained, their rights accrued, prima facie, on the death of the testatrix, viz., on Aug. 12, 1946, which was more than six years before Dec. 16, 1952, so that the saving provision of s. 3 (1)* was inapplicable; and even if, in view of the trust for accumulation, the rights of the next-of-kin did not accrue (having regard to s. 3 (3)) until Aug. 12, 1956, proceedings to enforce the rights would be barred by s. 3 (2)* of the Act of 1954 after the expiration of one year from the latter date (see p. 243, letters F to I, post).

[As to charitable trusts and the requisites for creating them, see 4 HALSBURY'S LAWS (3rd Edn.) 267-272, paras. 562-564; and for cases on the subject, see 8 DIGEST (Repl.) 387-397, *804-892*, and Supplements.

For the Charitable Trusts (Validation) Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 68.]

Cases referred to:

Diplock's Estate, Re, Diplock v. *Wintle*, [1948] 2 All E.R. 318; [1948] Ch. 465; [1948] L.J.R. 1670; *affd. on other grounds* sub nom. *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137; [1951] A.C. 251; 8 Digest (Repl.) 470, *1713, 1714*.

Gestetner, Re, Barnett v. *Blumka*, [1953] 1 All E.R. 1150; [1953] Ch. 672; [1953] 2 W.L.R. 1033; 3rd Digest Supp.

Gillingham Bus Disaster Fund, Re, Bowman v. *Official Solicitor*, [1958] 1 All E.R. 37; [1958] Ch. 300; *affd.* C.A., [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; 3rd Digest Supp.

Inland Revenue Comrs. v. *Broadway Cottages Trust, Inland Revenue Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; [1954] 3 W.L.R. 438; 3rd Digest Supp.

Ogden, Re, Brydon v. *Samuel*, [1933] All E.R. Rep. 720; [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.

Oxford Group v. *Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 2nd Digest Supp.

Adjourned Summons.

The plaintiffs, Eric Haller and Bernard Haller, as the surviving executors and trustees of the will of the testatrix, Mary Jane Harpur, deceased, applied by originating summons dated Apr. 1, 1960, for it to be determined whether on the true construction of the will of the testatrix any property representing the real and residuary personal estate and accumulations of income of the real estate of

---

* Section 3 (1)-(3) of the Charitable Trusts (Validation) Act, 1954, provides, so far as is material: " (1) Subject to the next following subsection, where a disposition to which this Act applies was made before, and is not confirmed after, the commencement of this Act, the foregoing sections shall not prejudice a person's right, by reason of the invalidity of the disposition, to property comprised in, or representing that comprised in, the disposition as against the persons administering the imperfect trust provision or the persons on whose behalf they do so, unless the right accrued to him or some person through whom he claims more than six years before Dec. 16, 1952; . . .

" (2) No proceedings shall be begun by any person to enforce his right to any property by virtue of the foregoing subsection after the expiration of one year beginning with the date of the passing of this Act or the date when the right first accrues . . . and if the period prescribed by this subsection for any person to bring proceedings to recover any property expires without his having recovered the property or begun proceedings to do so, his title to the property shall be extinguished . . ."

" (3) For the purposes of the foregoing subsections, a right by reason of the invalidity of a disposition to property comprised in, or representing that comprised in, the disposition shall not be deemed to accrue to anyone so long as he is under a disability or has a future interest only, or so long as the disposition is subject to another disposition made by the same person, and the whole of the property or the income arising from it is held or applied for the purposes of that other disposition."

A the testatrix (a) was held on valid charitable trusts for such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen and other members of H.M. Forces who had been wounded or incapacitated during the recent world wars in such manner and in such proportions as the plaintiffs might determine, or (b) was not effectively disposed of by the will and two codicils thereto, or (c) was held on some other and what B trusts. The facts appear in the judgment.

R. Cozens-Hardy Horne for the trustees.
B. J. H. Clauson for the Attorney-General.
J. E. Vinelott for defendants representing the next-of-kin.

Cur. adv. vult.

C

July 21. **CROSS, J.,** read the following judgment: By her will dated Oct. 19, 1945, Mary Jane Harpur appointed Eric Haller, Bernard Haller and John Cyril Babington to be executors and trustees; and, after giving a number of legacies and annuities, bequeathed the residue of her personal estate to her trustees on the usual trusts for conversion, payment of debts, funeral and testa- D mentary expenses, and investment. She directed that her real estate should be retained for a period of ten years from her death and that the income derived from it and also the income of her residuary personal estate should be accumulated during that period. At the end of that period her real estate and the investments representing her personal estate were to be sold and the proceeds applied in the first place in the payment of a number of legacies to various named E associations, most of which were undoubtedly charities but one at least of which, namely, the Hull Subscription Library, was probably not a charity. Finally, she directed her trustees to pay and divide the remainder of her trust estate, after providing for any outstanding annuities,

> "between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen, and other mem- F bers of H.M. Forces who have been wounded or incapacitated during the recent world wars"

in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate. The will contained an express direction that the receipts of the treasurers or honorary treasurers, as the case G might be, of the charitable and other associations which benefited under it should be a good discharge to her executors and trustees for the payment over to such associations of the legacies or shares of residue bequeathed to them by the will. The testatrix made two codicils in June and July, 1946, to which it is not necessary for me to refer, and died on Aug. 12, 1946. Her will and codicils were proved on Mar. 8, 1947, by the executors therein named. All the legacies given H by the will, including the legacies payable at the expiration of the ten-year period accumulation which ended on Aug. 12, 1956, have been paid. There is one subsisting annuity of £7 a week, and the fund which is distributable under the ultimate gift, subject to that annuity, is of the value of about £65,000. This summons has been taken out by Eric Haller and Bernard Haller (John Cyril Babington having died in 1953) against the Attorney-General and two persons I who are believed to be members of the class of next-of-kin of the testatrix to determine whether or not the ultimate gift is valid. There is no doubt that the care of wounded soldiers, sailors and airmen is a charitable object; and counsel for the Attorney-General first submitted that the institutions and associations described by the testatrix as possible recipients of the trust fund must necessarily be charitable institutions or associations and that therefore the gift was good.

I cannot accept this submission. As the Court of Appeal pointed out in *Oxford*

Group v. *Inland Revenue Comrs.* (1), the fact that the main object of an institution or association is charitable does not mean that it is necessarily established for charitable purposes only. It may have subsidiary objects which are not charitable, and which are not merely in the nature of powers ancillary to the main object. In the absence of any evidence to show that none of the bodies who have the main objects specified by the testatrix have any subsidiary non-charitable objects, I cannot hold that the residuary estate must be paid exclusively to charitable institutions or associations. I would add that the form of the receipt clause in the will shows that that was also the view of the testatrix or the draftsman of her will.

Counsel for the Attorney-General next argued that, on the true construction of the gift, any money which was paid to any institution which had subsidiary objects of a different character from the main objects described in the will would be held by such institutions on trust to promote the main objects and not as part of its general funds.

I cannot accept this argument either. The words in question appear to me to be merely descriptive of the character of the recipients of the gift and not to be declaratory of any trust. This was the view taken by LORD TOMLIN of a somewhat similar disposition in *Re Ogden, Brydon* v. *Samuel* (2). There a share of the residuary estate was given to Lord Samuel to be distributed amongst such political federations or associations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as he should in his absolute discretion select and in such shares and proportions as he should in like discretion think fit. There, as here, it was argued that a trust was attached to the subject-matter of the gift, but LORD TOMLIN said (3):

> "The reference to Liberal principles is a reference to the characteristic by which those in the field of selection are to be identified. I can find no trust at all."

I could say the same here. The trust of residue in this case is therefore for a class of institutions or associations which will take anything which they do take absolutely as part of their general funds. Such a trust is perfectly good, whether or not the institutions or associations are charities, if all the members of the class of potential beneficiaries are ascertainable (see *Re Ogden* (1)). If, on the other hand, the class of possible beneficiaries is not ascertainable and they are not all necessarily charities, the gift is void for uncertainty, since the court would have no means of executing it if the trustees refused to do so (see *Re Gestetner, Barnett* v. *Blumka* (4), and *Inland Revenue Comrs.* v. *Broadway Cottages Trust, Inland Revenue Comrs.* v. *Sunnylands Trusts* (5)). The evidence before me does not show whether or not it would be possible to compile a list of all the associations who are potential beneficiaries in this case, though as the class is not confined to bodies established in the United Kingdom it may well be that in fact no such list could be compiled with any approach to accuracy. In these circumstances, it was agreed between counsel that I should deal with the case on the footing that no such list could be compiled, but on the understanding that the question can be raised for decision hereafter if necessary.

On that footing, having regard to the views which I have already expressed on the construction of the gift, it is clear that the gift must be void unless it is validated by the Charitable Trusts (Validation) Act, 1954. That Act is described in its title as

> "An Act to validate . . . and restrict to charitable objects, certain

(1) [1949] 2 All E.R. 537. (2) [1933] All E.R. Rep. 720; [1933] Ch. 678.
(3) [1933] All E.R. Rep. at p. 722; [1933] Ch. at p. 683.
(4) [1953] 1 All E.R. 1150; [1953] Ch. 672.
(5) [1954] 3 All E.R. 120; [1955] Ch. 20.

A instruments taking effect before Dec. 16, 1952, and providing for property to be held or applied for objects partly but not exclusively charitable . . ."

Section 1 (1) and (2), and s. 2 (1) are in the following terms:

"1. (1) In this Act, 'imperfect trust provision' means any provision
B declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

"(2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952,
C shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and (b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable
D purposes.

"2. (1) Subject to the next following subsection, this Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision, and to any covenant to make such a disposition, where apart from this Act the disposition or covenant is invalid under the law of England and Wales, but would be valid if the objects were
E exclusively charitable."

In *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor* (6), the question was raised whether the Act applied only to a gift which was expressed to be for charitable purposes as well as for other non-charitable purposes or also to gifts, such as, for example, a gift for public purposes, in which charity was not expressly mentioned, although the trustees might in fact apply the whole or
F any part of the property for charitable purposes. Harman, J., held that the former view was right. In rejecting the latter argument, he said (7):

"This is a very far-reaching submission. If it be right, a bequest 'for such objects as my trustees think fit' will be validated although nothing whatever about charity is mentioned in the will. The vaguer the words are, the better they will do. In my judgment, the Act was not intended to produce
G any such result. It was, as the long title shows, intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague."

The case went to the Court of Appeal, which affirmed (8) the decision of the judge
H on another ground not material to this case. Ormerod, L.J., said (9) that in his opinion the view which the judge had expressed as to the scope of the Act was wrong and that a trust for public purposes simpliciter would be within it. Lord Evershed, M.R. (10), and Romer, L.J. (11), on the other hand, refrained from expressing any concluded view on this point and both indicated that they felt the force of what the judge had said on the matter. In these circumstances,
I I must clearly treat the view of Harman, J., on the point as binding on me.

Counsel for the Attorney-General submitted, however, that even on this view of the scope of the Act this case falls within it. This gift, he argued, is equivalent

(6) [1958] 1 All E.R. 37; [1958] Ch. 300.
(7) [1958] 1 All E.R. at p. 40; [1958] 1 Ch. at p. 306.
(8) [1958] 2 All E.R. 749; [1959] Ch. 62.
(9) [1958] 2 All E.R. at p. 758; [1959] Ch. at p. 80.
(10) [1958] 2 All E.R. at p. 755; [1959] Ch. at p. 75.
(11) [1958] 2 All E.R. at p. 756; [1959] Ch. at p. 77.

to a trust to distribute a fund between charitable or benevolent institutions or associations. There is, he says, a sufficient reference to charity to bring the Act into play, and the gift can be cured under s. 1 (2) (b) by confining the possible recipients to wholly charitable institutions having the prescribed main objects. Counsel for the next-of-kin, on the other hand, submitted that this gift is not equivalent to a gift for charitable or benevolent institutions, and that, even if it is, the Act does not apply to trusts to distribute a fund among institutions to be received by them as part of their general funds, as opposed to trusts for the promotion of objects or purposes.

I cannot accept the first contention of counsel for the next-of-kin. It is true that the will in terms only describes a single class of potential beneficiaries, but I have already held, in accordance with the submission of counsel for the next-of-kin, that this class is divisible into two sub-classes, viz., institutions or associations with the requisite main objects whose other objects, if any, are charitable, and institutions or associations with the requisite main objects whose other objects are not charitable or not wholly charitable. If this sub-division had been expressed, the trust would have been completely analogous to a trust for distribution between charitable or benevolent institutions and it would, I think, be altogether too narrow a view to hold that the fact that the sub-division is not expressed but only implicit in the gift makes any difference. The contention that the Act does not apply at all to a trust for distribution among institutions or associations, as opposed to a gift to promote objects or purposes, is much more formidable. The Act is concerned with provisions in instruments which declare the objects—i.e., the purposes—for which property is to be held or applied. As LORD TOMLIN pointed out in *Re Ogden* (12), to describe the character of a body which is to take whatever it takes absolutely as part of its general funds is not the same thing as to declare the purposes for which the property is to be used. Take, for example, a trust to divide a fund between such bodies having partly charitable and partly non-charitable objects as the trustees think fit to select. Under such a trust (if it were valid) the whole of the fund might in fact be used for charitable purposes, since each body which received a share of the fund might in fact in its discretion apply what it received for charitable purposes, but it would be an abuse of language to describe the original gift as a provision describing the objects for which the trust property was to be held or applied. If such a trust fell within the Act, then so equally would a trust for division of a fund between an unascertainable class of individuals described by reference to their charitable proclivities—e.g., " charitably minded citizens of London "—be within the Act. Counsel for the Attorney-General was, I think, disposed to agree that the Act might not apply to such as these, but he pointed out that whatever a body established for purely charitable purposes receives as part of its general funds must necessarily be used by it for charitable purposes and that therefore a trust to divide a fund between charitable institutions can reasonably be called a provision declaring the objects for which the property is to be held or applied, even though it takes the form of a description of the donees. That may be so; but the form of gift which I am considering is not a trust to divide among charitable institutions—which is plainly outside the Act altogether—but a trust for division among charitable institutions and institutions which are not charitable or not wholly charitable. If such a trust falls within s. 1 (1) of the Act where the institutions are not named, it must logically follow that a trust to divide between a number of named institutions, some with wholly charitable objects, others with partly charitable objects, and others with no charitable objects, is within the terms of s. 1 (1); yet such a trust is perfectly good, since the class of donees is not uncertain and it would be ridiculous to describe it as an " imperfect trust provision ". The terms of s. 2 (1) of the Act, of course, make it clear that only dispositions of property which would

(12) [1933] All E.R. Rep. at p. 722; [1933] Ch. at p. 681.

otherwise be invalid fall within the scope of the Act; but the fact that this point is not made in s. 1 (1) and that the type of provision there referred to is called an " imperfect trust provision " shows that the legislature cannot have intended to include in the scope of s. 1 (1) trusts for division among institutions, not all of which are wholly charitable, which may be valid trusts, as opposed to trusts for the promotion of non-charitable purposes which must necessarily be bad.

It was urged on me that there is no evident reason for drawing a distinction between a trust for the promotion of charitable or benevolent objects and a trust for division between an unascertained class of charitable or benevolent institutions. This argument would have more weight with me if I knew what the Act was intended to achieve. If the legislature considered that the old-established principles of law applied in *Re Diplock's Estate, Diplock* v. *Wintle* (13) led to results which were generally unsatisfactory, it would presumably have enacted that all gifts for the promotion of objects or the benefit of unascertainable bodies described by such adjectives as " benevolent ", " public ", " philanthropic " or the like should henceforth be treated as equivalent to gifts for the promotion of charitable objects or the benefit of charitable institutions. The legislature has, however, done no such thing. The Act leaves the law untouched for the future but, for some reason which I do not pretend to understand, validates retrospectively a limited number of dispositions which had already failed. I do not know on what principle these particular dispositions were selected for favourable treatment, and so I see no reason for construing this Act liberally.

For the reasons which I have tried to give, I think that it is only by doing great violence to the words used that s. 1 (1) of the Act can be made to include trusts for division among institutions or associations as opposed to trusts for the promotion of purposes. I shall, therefore, declare that the residuary estate is not held on charitable trusts, leaving open the question whether, even on that footing, the disposition is nevertheless valid.

Counsel for the next-of-kin submitted that, even if this gift fell within the terms of s. 1 and s. 2 of the Act of 1954, it was taken out of the operation of the Act (14) by s. 3. It is not strictly necessary for me to express any view on this point; but, as this case may well go higher, it is perhaps desirable that I should do so. The class of next-of-kin has not yet been ascertained, and the argument is that until one knows for certain who the next-of-kin are, or at least who some of them are, no rights have accrued to anyone. I cannot accept this argument. I think that prima facie the rights of the next-of-kin accrue on the death of the person who dies intestate or partially intestate whether or not the personal representatives or anyone else knows who they are or that the estate or any part of it is undisposed of. In this case it may well be that, having regard to the trust for accumulation and payment of legacies at the end of the ten-year period, s. 3 (3) applied and that the rights of the next-of-kin did not accrue until Aug. 12, 1956. Even so, however, they became barred under s. 3 (2) on Aug. 12, 1957, since neither of the exceptions to that subsection applies here. Had I been against counsel for the next-of-kin on the main point, I should therefore have held that he failed on his submissions under s. 3.

Order accordingly.

Solicitors: *Freshfields* (for all parties other than the Attorney-General); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

---

(13) [1948] 2 All E.R. 318; [1948] Ch. 465. This case was consequent on the decision in *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson* ([1944] 2 All E.R. 60) where a residuary gift for charitable institutions " or other charitable or benevolent object or objects " was held to be void for uncertainty.

(14) The relevant terms of s. 3 are set out in footnote * on p. 238, ante.

ANGLO OVERSEAS AGENCIES, LTD. *v.* GREEN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Salmon, J.), July 19, 20, 1960.]

Company—Memorandum of association—Object clauses—Construction—Numerous objects set out in separate paragraphs—Concluding words of clause providing that objects specified in any one paragraph not to be limited by reference to terms of any other paragraph or by name of company—Main object of company export and import of goods—Whether scope of subsequent object clauses limited so as to be ancillary to main object—Whether proposed acquisition of building lease for a venture in land development ultra vires.

By the objects clause, paras. (A) and (B), of its memorandum of association the main object of the plaintiff company, Anglo Overseas Agencies, Ltd., was to act as exporters and importers of a wide variety of goods. By para. (E) of the objects clause the company were empowered to "acquire any concessions, contracts, rights . . . and to perform and fulfil the terms and conditions thereof, and to carry the same into effect, operate thereunder, develop and turn to account, maintain and sell, dispose of and deal with the same". The concluding words of the objects clause provided that "the objects specified in any paragraph of this clause shall, except where otherwise specified in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company".

The plaintiff company engaged the first defendant, an architect, and the second defendants, a firm of estate agents, to assist in obtaining for the company the building lease of a valuable site offered for sale by a local authority. Later, the plaintiff company brought an action against the defendants alleging that by reason of the defendants' conspiracy and breach of contract the building lease went to a competitor of the company and the company lost the profits that it would otherwise have made. On a preliminary issue to decide whether the acquisition of the building lease would have been ultra vires the plaintiff company,

Held: the rule of construction whereby paragraphs of a company's objects clause subsequent to those declaring main objects were limited so as to confer only powers ancillary to the main objects was excluded by the concluding words of the objects clause; and para. (E) of the objects clause was wide enough to cover the project on which the plaintiff company engaged the defendants, which accordingly was intra vires the plaintiff company.

Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd. ([1902] 1 Ch. 745) not followed.

Cotman v. *Brougham* ([1918] A.C. 514) considered and applied.

[As to the objects of a company, and the construction of the object clauses of the memorandum of association, see 6 HALSBURY'S LAWS (3rd Edn.) 413, 414, paras. 799, 800.]

Cases referred to:

Cotman v. *Brougham*, [1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162; 9 Digest (Repl.) 76, *303*.

Stephens v. *Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; 71 L.J.Ch. 295; 86 L.T. 221; 9 Digest (Repl.) 81, *343*.

Preliminary issue.

In an action by the plaintiff company, Anglo Overseas Agencies, Ltd., claiming damages for conspiracy and breach of contract against the defendants, Andre Green, an architect, and Pepper, Angliss and Yarwood, a firm of estate agents, surveyors and valuers, in connexion with the engagement of the defendants' services by the plaintiff company to assist them in obtaining the building lease of a valuable site, the defendants raised the point in their defence that the action was not sustainable by the plaintiff company since the acquisition of a building lease was ultra vires the company. This point was ordered to be tried as a

A preliminary issue. The pleadings, and the relevant terms of the plaintiff company's memorandum of association, are referred to in the course of the judgment of SALMON, J., on the issue, post.

C. A. Settle, Q.C., and *F. Hallis* for the plaintiff company.

Neville Faulks, Q.C., and *M. Finer* for the defendants.

Cur. adv. vult.

B July 20. **SALMON, J.**, read the following judgment: The plaintiff company in this action claims damages for conspiracy and breach of contract against the defendants. It appears from the statement of claim that in the spring of 1959 the plaintiff company engaged the first defendant, who is an architect, and the second defendants, a firm of estate agents, to assist the plaintiff company on certain agreed terms to obtain from the Merton and Morden Urban District C Council the building lease of a valuable site in a key position in the Morden Shopping Centre. The statement of claim alleges, in effect, that thereafter the defendants, with intent to defraud the plaintiff company, conspired together to assist a competitor of the plaintiff company to obtain the building lease to which I have referred. The plaintiff company alleges that, by reason of the defendants' conspiracy and breach of contract, the building lease went to a competitor of D the plaintiff company and the plaintiff company lost the large profit which it would otherwise have made out of the development of the site in question. The defendants by their amended defence deny the alleged conspiracy and breach of contract, but also take the point that the acquisition of the building lease which I have mentioned would have been ultra vires the plaintiff company. It has been ordered that this point shall be tried as a preliminary issue, and it is this issue E that I now have to decide.

The defendants rely on what is sometimes referred to as the " main objects " rule of construction, namely, that where a memoradum of association expresses the objects of the company in a series of paragraphs, and one paragraph, or the first two or three paragraphs, appear to embody the " main object " of the company, all the other paragraphs are treated as merely ancillary to this " main F object ", and as limited or controlled thereby. The principal purpose of this rule is for the protection of shareholders, so that they may know how the money that they invest is to be used. The defendants as champions of this rule have cast themselves in a novel and perhaps not overwhelmingly attractive role. They say, in effect—" Even if we have caused the plaintiff company, and accordingly their shareholders, serious damage by conspiracy to defraud them, yet we can G escape all liability by reason of this very rule designed for the protection of the shareholders ". Nevertheless, whatever the merits may be, if the " main objects " rule does in law apply in this case, then the piece of business in respect of which the plaintiff company purported to engage the defendants was ultra vires the plaintiff company, and the defendants would in law clearly be entitled to succeed in the action.

H The objects for which the plaintiff company was established are to be found in cl. 3 of its memorandum of association. The following are the opening words of the clause, " The objects for which the company is established are: "—then are set out a number of paragraphs from (A) to (S). Paragraphs (A) and (B) of this clause (1) make it plain that the plaintiff company's main object was to act as

(1) Paragraphs (A) and (B) provide as follows:—

I " (A) To carry on business as importers, exporters, buyers and sellers of, and dealers in merchandise of all descriptions, including metals, machinery, plant, tools and metal goods generally, cotton, wool, worsted, silk, flax, hemp, jute, mesta, balata, fibrous material, rubber, sponges, cloth, clothes, leather and leather goods, furniture, electrical goods, ivory, jewellery, gold, silver, precious stones and gems, skins, fur, corn, hay, straw, hops, liquors, foods, provisions, wood and timber, coal, coke, patent fuel, oils, household goods and fittings, waste goods and offal, and generally any articles or goods of any kind, whether manufactured or not.

" (B) To carry on business as exporters and importers of, and dealers in, and agents for, home and foreign and colonial goods and produce of all descriptions, and particularly of and in goods and produce exported from or imported into the colonies."

exporters and importers of a wide variety of goods. It is plain that the business of property development per se cannot be regarded as ancillary to this " main object ". Accordingly, the paragraphs of cl. 3 relied on by counsel for the plaintiff company as being wide enough, if looked at alone, to empower the plaintiff company to engage in the business of property development, cannot so empower the plaintiff company if the " main objects " rule is to be applied to them, that is to say, if these paragraphs are merely ancillary to, and limited by, paras. (A) and (B). Counsel for the plaintiff company, however, relies on the concluding words of cl. 3 as excluding the application of the " main objects " rule. I will read those words:

> ". . . the intention is that the objects specified in any paragraph of this clause shall, except where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company."

Counsel for the defendants, on the other hand, contends that in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2), SWINFEN EADY, J., considered this very form of words, and held that it did not exclude the " main objects " rule. Counsel for the plaintiff company replies that *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2) must be regarded as overruled by the decision of the House of Lords in *Cotman* v. *Brougham* (3), but that, even if he is wrong in this, *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2) ought not to be followed. If, as counsel for the plaintiff company suggests, SWINFEN EADY, J., decided *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2) on the basis that no clause could effectively enact that each paragraph of the objects clause was to be read in isolation, then clearly *Cotman* v. *Brougham* (3) overrules this decision. If, on the other hand, he was merely construing the words before him, *Cotman* v. *Brougham* (3) leaves his decision standing.

The text-books support the argument that *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2) is no longer law; see, for example, PALMER'S COMPANY LAW (16th Edn.), p. 59; and 6 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 414. I must confess that I find it difficult to ascertain precisely the basis on which SWINFEN EADY, J., did decide *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2). I incline to the view that he was merely deciding that the form of words before him (which is precisely the same as that before me) was not apt to exclude the " main objects " rule. I doubt whether he intended to convey that no form of words could exclude the rule. If this be so, *Cotman* v. *Brougham* (3) leaves SWINFEN EADY, J.'s decision untouched, since the House of Lords was considering a different form of words, which I will read. The words before the House of Lords read as follows (4):

> " ' The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause '."

In that case the House of Lords held that those words were sufficient to exclude the " main objects " rule; whereas in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (2) SWINFEN EADY, J., had held that the words before him were

(2) [1902] 1 Ch. 745. (3) [1918] A.C. 514. (4) [1918] A.C. at p. 517.

not sufficient to exclude the " main objects " rule. Had it been the intention of the House of Lords to overrule *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (5), it is strange that it did not expressly do so. It appears to me that the House of Lords considered it unnecessary to express any opinion about the correctness of SWINFEN EADY, J.'s decision, and accordingly it was not referred to in any of the speeches save that of LORD PARKER OF WADDINGTON (6), who expresses no concluded view on it.

If the words in this case, and in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (5) do not mean that each paragraph of the objects clause is to be read in isolation and is not to be limited or restricted by any other paragraph, I do not know what they do mean. Nor is any other meaning suggested by SWINFEN EADY, J. Any decision of this judge, of course, carries the greatest weight, and he speaks with especial authority on this branch of the law. Nevertheless, his decision in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (5) for the last forty-two years has been generally regarded as no longer law. Even if that case is not overruled by the House of Lords in *Cotman* v. *Brougham* (7) I do not think that I should regard it as preventing me from giving effect to what, in my view, is the plain meaning of the words before me. In my view, the form of words used in *Cotman* v. *Brougham* (7) was merely an amplification of the form of words used here and in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (5). I hold that these words do exclude the " main objects " rule.

The principal argument has centred round the points with which I have already dealt. Counsel for the defendants, has, however, also argued, with his usual skill, that, even if the " main objects " rule is excluded, yet no paragraph in cl. 3 is sufficiently wide to empower the plaintiff company to carry on the business of property development. Counsel for the plaintiff company relies principally on para. (E) of cl. 3, the material words of which read as follows:

> " To . . . acquire any concessions, contracts, rights . . . and to perform and fulfil the terms and conditions thereof, and to carry the same into effect, operate thereunder, develop and turn to account, maintain and sell, dispose of and deal with the same."

In my judgment, these words are wide enough to cover the project on which the plaintiff company engaged the defendants.

I accordingly hold that this project was not ultra vires the plaintiff company, and I decide the issue before me against the defendants.

Order accordingly.

Solicitors: *Kaufman & Seigal* (for the plaintiff company); *D. J. Freeman & Fraser* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

(5) [1902] 1 Ch. 745. (6) [1918] A.C. at p. 520. (7) [1918] A.C. 514.

DAVIES *v.* DAVIES.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), July 20, 21, 1960.]

Divorce—Practice—Confession—Respondent interviewed by petitioner's solicitor who took statement—Propriety of solicitor's conduct—Costs.

Solicitor—Costs—Professional conduct—Petitioner's solicitor interviewing respondent to obtain confession of adultery—Exclusion of these costs from order for costs on granting decree nisi—Whether a judicial exercise of discretion—Need to show that costs unnecessarily incurred—R.S.C., Ord. 65, r. 11.

A solicitor, instructed to act for a wife in relation to matrimonial differences and divorce on the ground of the husband's adultery, telephoned to the husband and obtained an oral admission of his adultery. Subsequently the solicitor interviewed the husband and, after the solicitor had warned him that anything which he said might be used in divorce proceedings and that he need not say anything, the husband made a written statement admitting adultery. The husband was anxious that a decree of dissolution of marriage should be made against him. The wife presented a petition for divorce, which the husband did not defend. The evidence of adultery tendered at the hearing was the written statement. The hearing was adjourned for the papers to be put before the Queen's Proctor. At the adjourned hearing counsel for the Queen's Proctor stated that inquiries had been made and that the Queen's Proctor proposed to take no further part in the case. The husband gave evidence on oath of his adultery and, the court being satisfied that there was no collusion, a decree nisi was granted. The wife was legally aided. On making the order for taxation of the petitioner's costs pursuant to Sch. 3 to the Legal Aid and Advice Act, 1949, the court excluded all solicitor's costs relating to the written statement made by the husband and attendances and telephone conversation in relation thereto, and similar costs were excluded from the order for party and party taxation, so that the costs should be borne by the solicitor personally. In excluding these costs the court was actuated by disapproval of what it considered to be a general practice followed by the petitioner's solicitor of approaching the respondent to matrimonial proceedings and obtaining such a statement as was obtained in the present case. On appeal,

Held: the disallowance of these costs was not a judicial exercise of discretion for the following reasons—

(i) (per HODSON, L.J., WILLMER, L.J., concurring) because it was not part of the court's function in this connexion to say whether the solicitor's conduct was professionally proper or improper (see p. 250, letter I, and p. 251, letter H, post),

(ii) (per WILLMER, L.J.) because every case must be judged on its own facts and there was no ground for complaint of what the solicitor had done in this case, but the court had dealt with this case on the basis that the practice was in all circumstances open to objection (see p. 251, letter H, to p. 252, letter B, post),

(iii) (per DEVLIN, L.J.) because, as the costs in question had not proved fruitless, the order excluding them was misconceived, there being no power to make it either under R.S.C., Ord. 65, r. 11, or the inherent jurisdiction of the court over solicitors; moreover, in the absence of a clearly established practice, the solicitor was entitled to use his own judgment and what he had done did not amount to misconduct (see p. 253, letter H, and p. 254, letter A, post).

Per CURIAM: a matter of professional ethics is a matter for the Law Society rather than for the trial judge (see p. 250, letter I, and p. 251, letter H, post).

Appeals allowed.

[**Editorial Note.** R.S.C., Ord. 65, r. 11, was revoked on Jan. 1, 1960, by R.S.C. (No. 3) 1959 (S.I. 1959 No. 1958), r. 1; see now r. 7 and r. 8 of the Supreme

Court Costs Rules, 1959, which are contained in the Second Schedule to S.I. 1959 No. 1958.

As to confessions of adultery in divorce cases, see 12 HALSBURY'S LAWS (3rd Edn.) 239, para. 448; as to the power of the court to disallow costs which have proved fruitless by reason of a solicitor's misconduct, see 30 ibid., 431, para. 809.]

Cases referred to:

Bayliss Baxter, Ltd. v. *Sabath*, [1958] 2 All E.R. 209; [1958] 1 W.L.R. 529; 3rd Digest Supp.

Campbell (Donald) & Co. v. *Pollak*, [1927] All E.R. Rep. 1; [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 788, *3503*.

Appeals.

On Oct. 26, 1959, His Honour JUDGE TEMPLE-MORRIS sitting as a commissioner at Cardiff, pronounced a decree nisi of divorce in favour of the wife petitioner in an undefended divorce suit on the ground of the respondent husband's adultery, but disallowed certain costs, relating to the petitioner's solicitor's obtaining information and evidence from the respondent, both as between party and party and (the wife being legally aided) as between solicitor and client. On Nov. 25, 1959, the commissioner refused the petitioner leave to appeal against that part of his order which disallowed these costs as between party and party. The petitioner now appealed against that part of the order, and her solicitor appealed against that part of the order which disallowed these costs which were to be taxed pursuant to Sch. 3 to the Legal Aid and Advice Act, 1949. The facts are stated in the judgment of HODSON, L.J.

C. T. Reeve for the appellants, the petitioner and her solicitor.

The respondent did not appear and was not represented.

HODSON, L.J.: This is an appeal on the part of a petitioning wife and her solicitor from an order of His Honour JUDGE TEMPLE-MORRIS made at Cardiff on Oct. 26, 1959. The appeal is only on a question of costs. So far as the party and party costs which are involved in this appeal are concerned, leave to appeal was refused, and this court can only entertain the appeal, at any rate on that part of the order, on the basis that the learned judge did not exercise any judicial discretion in dealing with the matter as he did.

The order was an order pronouncing a decree nisi of divorce in an undefended case, the ground of the divorce being the adultery of the husband, the respondent, with a woman service on whom had been dispensed with. That part of the order stands. It was made on Oct. 26, 1959, on which day the order as originally drawn

> "condemned the respondent in costs incurred and to be incurred on behalf of the petitioner up to June 23, 1959."

The situation was that on June 23, 1959, the learned commissioner, not being satisfied as to the absence of collusion, adjourned the matter for the assistance of the Queen's Proctor, who appeared by counsel on Oct. 26 and said that the Queen's Proctor had made inquiries and proposed to take no further part in the case. On that occasion the respondent husband gave evidence of his own adultery, and the decree was pronounced.

The part of the order appealed against, there being no complaint about any costs which arose by reason of the adjournment not being allowed, reads as follows:

> "... excluding all solicitor's costs relating to the statement made by the respondent on Sept. 11, 1958, his attendances [that is, the solicitor's attendances] upon the respondent, and the telephone conversations in relation thereto, and the preparation of the affidavit in support of the application

for leave to dispense with the service of the petition on the woman named therein such costs to be taxed as between party and party."

The order continues—and this also is appealed against (1)—

"And it is ordered that the costs of the petitioner excluding all solicitor's costs relating to the statement made by the respondent on Sept. 11, 1958, his attendances upon the respondent, and the telephone conversations in relation thereto [and so on, following the wording of the previous part of the order] be taxed as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949."

The learned judge was concerned in this case, and rightly concerned, to see that justice was done in accordance with the law, which requires him, in an undefended (as in a defended) case, to be satisfied as to the charges which are to be proved, and also to be satisfied as to the absence of collusion. What happened in this case was this. The wife consulted her solicitor and gave instructions. Inferentially it appears from the evidence that the instructions were based on the supposed fact that the husband had committed adultery. Following that, a telephone number, which the husband had given to the wife—they were living apart—was given to the solicitor and the solicitor telephoned to the husband, spoke to him on the telephone, and obtained an admission from him on the telephone to the effect that he had committed adultery. This was followed by an interview which the solicitor had with the husband in which, after being warned that anything he said might be used in divorce proceedings and that he need not say anything, the husband made a statement which was reduced into writing. On the first day of the trial the only evidence of adultery which was produced was this statement made by a man who clearly, on the face of it, was importuning his wife for a divorce and anxious that a divorce should be pronounced against him on the ground of adultery. In circumstances of that kind the court is naturally concerned as to the weight of the evidence, because a statement of that kind, unless strongly supported by surrounding circumstances, must necessarily be of little weight. So far as the weight of the evidence is concerned, nothing in the end turned on that aspect of the case, because the husband eventually swore on oath (the previous statement being unsworn) that he had committed adultery, and on that evidence being accepted the decree was pronounced.

However, the commissioner, in depriving the petitioner of part of the costs, was actuated by the disapproval of the way in which the evidence had been obtained in the first instance, in that the solicitor had communicated with the husband and obtained the statement in the way which I have described. The commissioner said in terms that he did not think that that was the right thing to do: he had passed it once but when it was repeated he thought it was time to show his disapproval in no uncertain way by disallowance of costs, so that the matter should never be conducted in that way before him in similar cases in the future. He pointed out that there were plenty of inquiry agents about, and that if that sort of work was to be done it should be done by the inquiry agents.

With all respect to the learned commissioner, I do not think that in exercise of his duty in trying a case depending on evidence it was any part of his function to say whether the solicitor as a professional man was acting properly or improperly in behaving as he did. So far as the evidence is concerned, the weight does not necessarily vary because the person who obtains a statement is a solicitor, not an inquiry agent; and any matter of professional ethics is surely a matter not for the learned judge but for the disciplinary body, namely, the Law Society, which has to do with the professional conduct of solicitors. I do not see that

(1) This part of the order was appealed against by the petitioner's solicitor.

A it is a judicial exercise of discretion to deprive the solicitor of any part of the costs because the evidence has been obtained in that particular way.

I will read what the learned commissioner said, in order to show the way in which he, with the best intentions in the world, appears to have approached this case. He said (2):

B "I have in the past, for this particular firm, seen [the solicitor involved] go into the witness-box and give evidence that he has interviewed the respondents at his office and I have not said one single word, and I have granted a decree, because I thought, when he did so, it was an isolated incident. I saw him repeat it, I have not said anything; but when I saw that this was looking as though it was going to be a practice—and as I again say, no other firm appearing before me has ever indulged in this practice— C then I thought it right, and I still think it right, to say that in my view it should not be indulged in as a practice, as in the main it is very highly undesirable."

Then at the end of his judgment he said:

"A judge has autonomy in his own court in matters of policy as to the D methods of proof; provided always he obeys the laws of the land and follows decisions of higher courts. I am within the law; I am not violating any superior decision in saying, in matters of general policy, what finds favour and disfavour with me; and consequently I said what I had to say and I disallowed those particular few items of costs. A judge is entitled to state his preference as to the best ways on matters of presentation of evidence E in the cases before him. He accepts and applies the standards of proof required by law; it is for him to state how those standards are to be reached in his court, each case being decided on its own facts, proved in evidence. It has been my experience in the past that members of the Bar, and solicitors, members of the Law Society have welcomed such assistance and expressed their appreciation therefor. In my view [the solicitor involved] is endeavour- F ing to exaggerate incidents into a crisis, and if he were more amenable to the court's wishes, it would certainly be more helpful to the administration of this court."

In my judgment the learned judge has there confused in his mind two matters, namely, on the one hand the question of admissibility of evidence and the weight to be attributed thereto, and on the other hand the method in which evidence G is laid before the court; and, in dealing with the matter in the way in which he has, I am bound to say that I think it is outside his function to disallow costs for the reasons which he there stated. Therefore I think that this appeal should be allowed.

WILLMER, L.J.: I agree with the judgment which my Lord has delivered, H both with regard to its conclusions and with regard to the reasons given. I desire to add but a few words of my own.

The learned commissioner, as I understand his decision, made his special order with regard to the costs of this case by way of marking his disapproval of what he thought was the regular practice followed by the petitioner's solicitor of approaching the respondent in matrimonial proceedings direct for the purpose I of obtaining a statement. We were informed by counsel, who argued this appeal, that that was a matter with which the Law Society were very much concerned, and he invited us to give a general ruling on the propriety or otherwise of the so-called practice. I fear that if the Law Society are hoping for a general ruling they will be disappointed; for I think that it is quite impossible to say that in all circumstances such a practice is either right or wrong. In my judgment, every case must be judged on its own particular facts; and it is precisely

(2) These passages are from the judgment given by the commissioner when refusing leave to appeal against his order for costs.

here that, as it seems to me, the learned commissioner fell into error. He dealt with this case on the basis that the practice followed by the solicitor was in all circumstances open to objection, and failed to apply his mind to the particular circumstances of this case or to exercise his discretion with regard thereto. In such circumstances, it seems to me to follow that there has in this case in fact been no judicial exercise of discretion with regard to the question of costs. It is therefore open for this court to interfere.

Having examined, so far as we have been able to do so, the particular circumstances of this case, it seems to me that there is no ground for complaining in this case of the way in which the solicitor behaved; and in such circumstances it could not be a proper exercise of discretion to make such an order as to costs as the learned commissioner made. I therefore agree that this appeal should be allowed.

DEVLIN, L.J.: We have here before us what are in reality two appeals, because there are two orders that have been appealed against by two different appellants. The main order is the one in which the learned judge ordered that the costs of the petitioner that were to be taxed as between solicitor and client should exclude all solicitor's costs relating to the statement made by the respondent on Sept. 11, 1958. That he has power to make an order of that sort, which in effect makes the solicitor personally liable for the costs incurred, is beyond doubt. He has power both under the rules (3) of court, R.S.C., Ord. 65, r. 11, and also under the inherent jurisdiction of the court. It is a separate proceeding quite independent of the divorce suit, and one in which the solicitor has been called on to show cause why he should not be treated in this way. He was not formally called on in this case to show cause, but no complaint can be made or has been made about that because there is no doubt that the learned commissioner gave him ample opportunity to put his point of view in the witness-box. However, it is, as I say, a separate proceeding; and he, also represented by counsel, has appealed against that order.

The other order, the order in the suit itself, is in my judgment merely supplementary. The object of what the learned commissioner was doing was to penalise the solicitor for having acted in a way which in his, the learned commissioner's, view was improper; and of course it follows incidentally from that that if he were going to make the solicitor pay the costs personally then they should not be included in the petitioner's bill against the respondent. That is the other subsidiary order that he has made.

I propose to deal with this matter in relation to the first order, the order against the solicitor. I do not want to discuss the principles that emerge from *Donald Campbell & Co.* v. *Pollak* (4) and *Baylis Baxter, Ltd.* v. *Sabath* (5), to which the learned commissioner referred in the course of his judgment. It is quite clear, and it has been so held, that from an order made against a solicitor personally an appeal lies to the court without leave. Therefore no special rules regarding interference with the learned judge's discretion have there to be considered.

---

(3) The present power is conferred by Supreme Court Costs Rules, 1959, r. 8, which applies where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default. No order is to be made against a solicitor unless he has been given a reasonable opportunity to appear before the court and show cause why the order should not be made (ibid., r. 8 (2)). By r. 7 the court may direct that any costs in respect of anything done on behalf of a party improperly or unnecessarily in a cause or matter shall not be allowed to the party. The former R.S.C., Ord. 65, r. 11, which was the relevant rule at the time of the order as to costs made in the present case, began: "If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay . . ." and continued in the terms set out at p. 253, letter B, post. Thus under the new costs rules, r. 8 is directed to personal liability of the solicitor and r. 7 to disallowance to the party, though both extend to things done improperly.

(4) [1927] All E.R. Rep. 1; [1927] A.C. 732. (5) [1958] 2 All E.R. 209.

If that order is, in the view of this court, wrong, then there is plainly no material at all to support the order in the taxation as between party and party, and its rescission necessarily follows.

Now, as I have said, an order against a solicitor personally can be made under the rules of court, R.S.C., Ord. 65, r. 11, which provides, so far as is material,

> " If in any case it shall appear to the court or a judge that . . . by reason of any . . . misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client . . ."

There can be no question in this case of these costs having proved fruitless. If the learned judge had refused to admit the evidence, then it might well have been said that the costs of taking the statement were fruitless. If he has said that, though admitting the evidence, he attached no weight at all to it, the same might conceivably have been said; but in the course which the learned judge took he accepted the evidence and acted on it. I think that that is a fair inference. It is true, as HODSON, L.J., has pointed out, that the evidence was supplemented by the admission of the husband himself; but there is nothing in either of the judgments that the learned commissioner gave on this point to suggest that he would have rejected the solicitor's evidence. In those circumstances, it is clear that, so far from the costs incurred in the taking of the statement proving fruitless, they have in fact enabled the same result to be reached more economically than it could by any other means.

It is plain, therefore, that there is no case here under the rules. As I have said, the rule leaves untouched the inherent jurisdiction of the court; but I apprehend that where costs are concerned the same principle must operate. If the solicitor is to be deprived of some of the costs which he has earned, it must be because his misconduct has caused costs to be incurred which would not otherwise have been incurred. A solicitor is sometimes deprived of costs, or a party is sometimes deprived of costs, as it is said, to mark the disapproval of the court; and I am not suggesting for a moment that some round sum may not be imposed in that way where costs which it may not be possible exactly to quantify have been thrown away. Where, however, there is no question of costs being thrown away, an order of the sort made by the learned commissioner cannot stand. We have not discussed whether the inherent jurisdiction of the court permits it to impose a penalty or a fine on a solicitor for his misconduct. As my Lord has said, the ordinary course is to report the matter to the Law Society so that his professional brethren may deal with it. I need say no more about that because it is clear that the learned commissioner here was not imposing a fine or a penalty in terms and was not directing his mind to that at all: the order relates to costs.

In my judgment, therefore, the order is misconceived, there being no power to make it either under R.S.C., Ord. 65, r. 11, or under the inherent jurisdiction of the court. I think that I ought to add the expression of my own view, since [the solicitor's] conduct has been called in question, that I can see nothing in what he did that amounts to misconduct at all.

In saying that, I am not seeking either to uphold or to condemn the practice which the learned commissioner said was improper, namely, the taking of a statement from a respondent by the solicitor to the petitioner and not by an inquiry agent. On that I have nothing at all to add to what has been said by my brethren, who are much more familiar with the right principles to be applied in cases of that sort than I am. However, taking it (as they have said) that there is no universal practice one way or the other, it seems to me that it is impossible to say that what the solicitor did amounted in any way to misconduct. Had there been a clear practice which he had infringed it might be different. Without

there being a clear practice it could not be said that what he did amounted to misconduct. In the absence of a clear practice, he was entitled to use his own judgment. The reasons which he gave for what he did appear to me to be sound and sensible ones (6); and indeed I should like to say that the impression which his evidence—given in answer to the questions from the learned commissioner, the solicitor being thus not in a very easy position—makes on my mind is altogether a good one.

I agree that the appeal should be allowed.

Appeals allowed.

Solicitors: *Theodore Goddard & Co.* (for the appellants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

BIRD AND OTHERS *v.* O'NEAL AND ANOTHER.

[PRIVY COUNCIL (Lord Radcliffe, Lord Tucker and Lord Cohen), June 20, 21, 22, July 26, 1960.]

Privy Council—West Indies—Windward Islands and Leeward Islands—Master and servant—"Trade dispute"—Lawful dismissal of shop employee—Whether shop employee a "workman"—Whether lawful dismissal of workman can be subject of trade dispute—Trade Unions Act, 1939 (*Leeward Islands No.* 16 *of* 1939), *s.* 2, *as amended—Trade Disputes* (*Arbitration and Inquiry*) *Act*, 1939 (*Leeward Islands No.* 17 *of* 1939), *s.* 2 (1).

Master and Servant—Trade dispute—Lawful dismissal of shop employee—Whether shop employee a "workman"—Whether lawful dismissal of workman can be subject of trade dispute—Picketing of employers' business premises—Nuisance—Trade Unions Act, 1939 (*Leeward Islands No.* 16 *of* 1939), *s.* 2, *as amended—Trade Disputes* (*Arbitration and Inquiry*) *Act*, 1939 (*Leeward Islands No.* 17 *of* 1939), *s.* 2 (1).

In June, 1955, Miss W., who was employed as a clerk in the respondents' drug store in St. John's, Antigua, on a weekly basis was summarily dismissed by the second respondent, no reason being given for the dismissal. The second respondent refused to give any reason for it to Miss W.'s trade union. Voluntary negotiations between the union and the respondents about her reinstatement having broken down, a board of inquiry was appointed under the Leeward Islands Trade Disputes (Arbitration and Inquiry) Act, 1939, s. 8 (1)* on the basis that a trade dispute existed between employers and workmen. The respondents' representative withdrew from the inquiry when the board ruled that there was a trade dispute, and the respondents ignored the report of the board, a copy of which was sent to them. The executive committee of the trade union having resolved in September, 1955, that H., the general secretary, should take steps to picket the respondents' business premises, six paid pickets were engaged by H. and by J., who was a member of the executive committee of the union, to picket the premises. Intimidation and threats of violence were used by the pickets over, in particular, a period between Sept. 17 and Sept. 26, 1955, to prevent customers entering the respondents' business premises and to an extent which amounted to an actionable nuisance. The picketing continued subsequently until trial. The respondents brought an action for damages and an injunction against the appellants, all of

(6) The solicitor said in his evidence that he saw potential respondents himself in the hope that he would be enabled to attempt to effect a reconciliation, and to save expense in getting statements.

* The relevant terms of s. 8 (1) are printed at p. 256, letter I, post.

whom, except the eighth appellant, S., were members of the executive committee of the union. The fourth and sixth appellants, however, were not present at the meeting when the resolution was passed. S. took part in the picketing and was described as the chief picket. None of the respondents' remaining employees were members of the union and there was no dispute between them and the respondents. The respondents contended (at first instance) that the lawful dismissal of a workman could not be the subject of a trade dispute, and contended (on appeal) that the term " workman " in the Trades Union Act, 1939 (s. 2 of which provided " ' workmen ' includes labourers ") did not include a clerk and that there was no trade dispute between the respondents and Miss W. Damages of £80 awarded for nuisance were increased on appeal to £100 on the ground that these contentions were correct and that there was no trade dispute.

Held: (i) the relationship of master and servant did not exist between the individual appellants and the pickets, and the appellants were not vicariously liable for the acts of the pickets on such a ground (see p. 260, letter A, post).

(ii) on the evidence the two appellants, J. and S., were present and assisting in the picketing which was being carried out with threats and intimidation from Sept. 17 to Sept. 26 so as to obstruct the approaches to the respondents' premises, thereby constituting a nuisance causing damage to the respondents' trade (see p. 260, letter H, post); an injunction to restrain the two appellants from continuing the nuisance and £80 damages against these two defendants would, accordingly, be granted.

Per CURIAM: (i) the lawful dismissal of an employee could be the subject of a trade dispute (see p. 263, letter D, post).

R. v. *National Arbitration Tribunal, Ex p. Bolton Corpn.* ([1941] 2 All E.R. 800; [1942] 2 All E.R. 425) considered.

(ii) in the absence of words of limitation the word " workman " called for a wide and liberal interpretation which should not exclude shop assistants (see p. 263, letter C, post).

Appeal allowed in part.

[Editorial Note. The Leeward Islands trade union legislation is closely parallel to the comparable English legislation. The definitions of " trade dispute " in s. 2 of the Trade Unions Act, 1939, and s. 2 (1) of the Trade Disputes (Arbitration and Inquiry) Act, 1939, are similar to the definition in the English Trade Disputes Act, 1906, s. 5 (3). Section 6 (A) (2) of the Trade Unions Act, 1939, is similar to a provision in the English Conspiracy, and Protection of Property Act, 1875, s. 3, as amended by s. 1 of the Act of 1906 and s. 7 of the Trade Unions Act, 1939, to the English Trade Disputes Act, 1906, s. 2 (1).

As to acts in furtherance of a trade dispute, see 32 HALSBURY'S LAWS (2nd Edn.) 521, para. 819, and Cumulative Supplement; and for cases on the subject, see 43 DIGEST 120-123, *1237-1256.*

For the Conspiracy, and Protection of Property Act, 1875, s. 3, see 5 HALSBURY'S STATUTES (2nd Edn.) 886, and for the Trade Disputes Act, 1906, s. 2 and s. 5, see 25 HALSBURY'S STATUTES (2nd Edn.) 1267, 1268.]

Case referred to:

R. v. *National Arbitration Tribunal, Ex p. Bolton Corpn.*, [1941] 2 All E.R. 800; [1941] 2 K.B. 405; *revsd.*, H.L. sub nom. *National Assocn. of Local Government Officers* v. *Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.

Appeals.

Appeals by special leave from a judgment of the West Indian Court of Appeal (MATHIEU-PERCY, JACKSON and HOLDER, C.JJ.), dated Apr. 25, 1957, dismissing an appeal by the appellants (Vere Cornwall Bird, Edmund Hawkins Lake,

Novelle Richards, Ernest Williams, Bradley Carrott, John Ireland, Levi Joseph, Joseph Samuel and Lionel Hurst) from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (DATE, J.), dated Jan. 3, 1956, awarding the respondents (Joseph Reynold O'Neal and Gertrude O'Neal) an injunction restraining the appellants, their servants and agents from watching and besetting certain business premises of the respondents in the city of St. John, and ordering the appellants to pay the respondents £80 as damages for conspiracy. On a cross-appeal by the respondents, the West Indian Court of Appeal increased the damages to £100. The facts are set out in the judgment of the Board.

J. F. F. Platts-Mills and *K. M. McHale* for the appellants.
J. G. Le Quesne for the respondents.

LORD TUCKER: This appeal by special leave from a judgment of the West Indian Court of Appeal arises out of an action claiming damages and an injunction brought by the respondents against the appellants as a result of events which followed a resolution of the executive committee of the Antigua Trades and Labour Union authorising the General Secretary to take the necessary steps to picket the business premises of the respondents. The circumstances leading up to the passing of this resolution are conveniently set out in the judgment of the trial judge, DATE, J., as follows:

" In May, 1949, one Averyl Winter was employed as a clerk at [O'Neal's drug store] on a weekly basis. She continued working there until Saturday, June 11, 1955, when she was summarily dismissed by the plaintiff, Gertrude O'Neal, and paid one week's wages in lieu of notice; no reason was given for the dismissal. Sunday, June 12, was, of course, a dies non. On Monday, June 13, the defendant, Ireland, a field officer of the Antigua Trades and Labour Union of which Miss Winter is a member, went to Miss O'Neal and asked for the reasons for Miss Winter's dismissal. Miss O'Neal refused to give any. Thereupon, according to Miss O'Neal, Mr. Ireland demanded one year's pay for Miss Winter, and this was also refused. Representations were then made by the union to the labour commissioner of Antigua about Miss Winter's dismissal, and conciliation meetings under his chairmanship were held at the Labour Department between representatives of the drug store and representatives of the union on June 23 and July 7. At both meetings the unions' representatives asked for the reinstatement of Miss Winter. The representatives of the drug store said that in dismissing Miss Winter without giving reasons and paying her a week's wages in lieu of notice they were acting within their legal rights, and that they were not prepared to consider the claim for reinstatement. At the second meeting a written undertaking was signed by Miss Winter to the effect that nothing said there would be used by her in any case of slander or libel; the representatives of the drug store then stated five reasons which they said were the only reasons for the dismissal. These were examined and severely criticised by the union's representatives, who expressed the view that they proved nothing against Miss Winter and did not justify her dismissal. As the representatives of the drug store persisted in their refusal to reinstate Miss Winter, the chairman inquired whether they would be prepared to consider settling the matter on a basis other than reinstatement, to which they replied in the negative. The voluntary negotiations having broken down, the union approached the government for the appointment of a board of inquiry under the Trade Disputes (Arbitration and Inquiry) Act, 1939, s. 8 (1) of which reads thus:

' Where any trade dispute exists or is apprehended the Governor may, whether or not the dispute is reported to him under this Act, inquire into the causes and circumstances of the dispute, and, if he thinks fit, refer any matter appearing to him to be connected with or relevant to

A the dispute to a board of inquiry (hereinafter referred to as the board) appointed by him for the purpose of such reference, and the board shall inquire into the matters referred to it and report thereon to the Governor.'

" By instrument dated Aug. 16, 1955, the then Acting Governor of the Leeward Islands appointed a board of inquiry ' to inquire into the causes B of the dispute that arose over the dismissal of Miss Averyl Winter by the proprietors of O'Neal's Drug Store, St. John's, and to report thereon to the Governor and to submit to him such conclusions, recommendations and observations as the board sees fit.' At the inquiry, which was held on Aug. 24, Mr. E. E. Harney, representing the plaintiffs, submitted in limine that there was no trade dispute between Miss Winter and the drug store C and that the appointment of the board was, consequently, invalid. The gist of his contention was that the relationship of employer and employee had been legally terminated by the giving of a week's wages to Miss Winter in lieu of notice, and that there could therefore be no trade dispute within the meaning of the Act under which the board was operating. The board ruled that ' the terms of reference contained in the instrument dated Aug. D 16, 1955, which gave the board its validity showed prima facie that there was a trade dispute existing between the proprietors of O'Neal's Drug Store and Miss Averyl Winter and therefore the board had full power and authority to inquire into the dispute.' At this stage Mr. Harney sought and was granted permission to withdraw from the inquiry, and the plaintiffs took no further part in the proceedings, but the minutes of meetings at E the Labour Department, which contained inter alia the reasons given by Miss O'Neal for the dismissal of Miss Winter, were produced in evidence and closely examined. In its report submitted to the Acting Governor on Aug. 31, 1955, the board, after setting out its findings, expressed the opinion that there was no moral justification for the dismissal of Miss Winter and, using as a norm one of the accepted principles of good indus- F trial relations, that is the principle of mutual respect and tolerance of human rights between employer and workman, recommended the proprietors of the drug store be asked to pay her a sum equivalent to thirteen weeks' wages ' as compensation for her dismissal '. Under cover of a letter from the Administrator of Antigua dated Sept. 6, 1956, a copy of the report was sent to Mr. Harney for the information of his clients and himself G ' and such action with the view to a settlement of the dispute as may be deemed advisable.' In a letter the administrator also informed Mr. Harney and his clients that the Acting Governor agreed generally with the recommendations of the board. The plaintiffs ignored this communication, and on Sept. 16 the administrator caused the report to be published in the local press. The following day the plaintiffs' business premises were picketed."

H The picketing took place pursuant to the resolution referred to above of the executive committee of the Trades and Labour Union of Sept. 9, 1955, which was as follows:

" Be it resolved that provided up to the time of the publication of the board's award the dispute between Miss O'Neal and the trade union is not I settled the general secretary (1) should take the necessary steps to picket the business premises."

After the meeting, the appellants Joseph (No. 7) and Hurst the general secretary (No. 9) engaged six paid pickets to picket the respondents' business premises. The appellants numbered 1 to 7 and No. 9 were all members of the executive committee of the union. Samuel (No. 8) was not a member but was described as the chief picket. Nos. 4 and 6 (Williams and Ireland) were not present at

(1) The appellant, Lionel Hurst.

the meeting of the executive committee when the resolution was passed. Hurst, in his evidence at the trial, stated that he gave the pickets instructions to conduct themselves in an orderly manner and told them that their duty was to pass on information to members of the public with regard to the dispute and not to molest anyone.

Paragraph 5 to para. 10 of the respondents' statement of claim are as follows:

" 5. The first seven named and the last named defendants and each of them wrongfully and maliciously conspired and combined amongst themselves (with intent to injure the plaintiffs and thereby compel them to submit to the demand of the Antigua Trades and Labour Union to pay compensation to one Averyl Winter a former clerk in O'Neal's Drug Store who had recently been lawfully dismissed from her employment by the plaintiffs) wrongfully and without legal authority to watch and beset or cause or procure to be watched and beset the said business places of the plaintiffs and the approaches and entrances thereto in such manner as was calculated to intimidate customers and prospective purchasers.

" 6. In furtherance and execution of their said conspiracy and combination the said first seven named and the last named defendants and each of them wrongfully and without legal authority caused or procured the defendant Joseph Samuel and other persons to the number of twelve or thereabouts (hereinafter referred to as the pickets) wrongfully and without legal authority to watch and beset the said business places of the plaintiffs daily from Sept. 17, 1955, in such a manner as is calculated to intimidate customers and prospective purchasers and to obstruct the approaches thereto. The first seven named and the last named defendants and each of them in acting as in this paragraph stated acted for the purpose of intimidating and preventing customers and prospective purchasers from entering the said business places and purchasing therein.

" 7. The first seven named and the last named defendants on several occasions on Sept. 17, 1955, and on divers other occasions thereafter attended outside the said business places of the plaintiffs or in the vicinity thereof and gave encouragement to the said pickets.

" 8. The defendant Levi Joseph and the pickets have by threats and acts of violence and intimidation and coercion prevented divers customers and prospective purchasers from entering the said business places and purchasing therein.

PARTICULARS.

" (i) On Sept. 17, 1955, the defendant Levi Joseph led a steel band and a number of pickets carrying placards to the said business places of the plaintiffs and surrounded same blocking the approaches and entrances thereto and shouting in a threatening manner to persons who attempted to enter the said business places ' Don't buy from O'Neal's Drug Store, a strike is on.'

" (ii) On the said Sept. 17, 1955, and on several days thereafter the defendant Joseph Samuel who is well known to the general public as a local constable paraded up and down outside the said business places ringing a bell and shouting ' Don't buy from O'Neal's Drug Store people. You no hear you no foo buy from this Drug Store.' And when people asked why not? Defendant Samuel told them that the police will lock them up.

" (iii) The said defendant Joseph Samuel on Sept. 19, 1955, assaulted a person whose name is unknown who was attempting to enter one of the business places for the purpose of purchasing therein.

" (iv) The said pickets carrying flags and placards with slogans such as ' Hold the line, the workers security is challenged ' written thereon attend daily around the said business places and in a menacing and threatening manner surround and obstruct persons especially old men and women and

children who attempt to enter the said business places shouting at them ' Hold the line '.

" (v) The defendant Levi Joseph on the morning of Sept. 24, 1955, and other pickets conducted themselves in a boisterous and disorderly manner marching up and down in front of the said business places shouting ' Hold the line '—' Don't buy from this Drug Store, workers must be respected.'

" 9. In the alternative the defendants and each of them wrongfully and maliciously conspired with intent to injure the plaintiffs to create a nuisance and did in pursuance of their conspiracy create a nuisance by the continuous shouts and other noises of the pickets and by obstructing the approaches to the said business places of the plaintiffs thereby seriously interfering with the comfort of the plaintiffs and the ordinary enjoyment of the said premises by them.

" 10. By reason of the premises the plaintiffs have suffered damage—Loss estimated at $500.00 up to this date has thereby been incurred.

The plaintiffs claim against the defendants and each of them:

(i) Damages.

(ii) An injunction restraining the defendants their servants and agents from unlawfully watching and besetting the business places of the plaintiffs . . ."

Evidence was given on both sides as to what took place during the picketing over the period from Sept. 17 to the date of the trial on Nov. 30, 1955, but neither Samuel nor any of the other pickets was called. After referring to the evidence and having remarked on the absence from the witness-box of all the pickets, the judge said:

" Having given careful attention to these and the other arguments advanced by learned counsel for the defence, I am, nevertheless after the fullest consideration of the evidence of all the witnesses I have had the opportunity of hearing and observing, of the opinion that the particular incidents mentioned by me as having been related by Gertrude O'Neal, Linda O'Neal, Victoria Frederick, Cardigan Stevens and Iris Barrow did take place, and that their accounts of them are substantially correct; these persons impressed me as being essentially truthful witnesses, whatever their feelings towards the union."

The Court of Appeal after referring to the passage cited above said:

" There is abundant material from which the learned judge could so find, and we indorse that finding."

There are, therefore, concurrent findings of fact on this part of the case which clearly establish, when the evidence which the judge accepted is looked at, that intimidation and threats of violence were used to prevent customers from entering the business premises of the respondents to an extent which amounted to an actionable nuisance. How far responsibility for these acts of the pickets can be established against all or some of the appellants will, however, require further consideration.

The trial judge approached this question as follows. He found that the appellants, other than Samuel, had, by the resolution of Sept. 9, 1955, agreed to the picketing of the respondents' premises, that the general secretary had appointed the pickets pursuant to the authority conferred on him by the resolution and that the pickets so appointed had used coercion, intimidation and threats of personal violence, and that the pickets so appointed were the servants of the appellants who were liable for the acts of their servants. He accordingly held that, although the predominant object of the picketing was the furthering by the appellants of their own interests, they had conspired to achieve their purpose by the use of unlawful means. Samuel, although he was not a member of the executive committee and had not attended any of its meetings was held

liable, as the judge said it was not disputed that he had combined with the other appellants for the purpose of picketing the respondents' premises. A

This reasoning cannot be supported. The pickets were not the servants of the individual appellants. They were appointed by the Antigua Trades and Labour Union which could, of course, only act by agents who were in this case the executive committee and the general secretary, but this does not create the relationship of master and servant between these persons and the pickets. B The general manager or works foreman of an industrial limited liability company may have authority to engage and dismiss workmen and direct their operations, but this does not make the workmen appointed by them their servants. The Court of Appeal, as previously stated, indorsed the trial judge's findings with regard to the means and methods adopted in the picketing, but were not satisfied that he had made a definite finding that the main purpose of the conspiracy C was to further the appellants' legitimate interests and said that they were still less convinced that there was sufficient and satisfactory evidence to support such a conclusion. Having examined the evidence, they said:

> "An examination of the evidence clearly reveals not only what was the real intention of the appellants but also the nature of their agreement at the material time, their external acts and their conduct show that by D mutual consent and acquiescence they had a common purpose, that is, to cause injury to the respondents and bring them into subjection by employing means which were manifestly unlawful."

They do not seem to have examined the position of each individual appellant in order to determine whether, and if so how, he had become a party to the E unlawful conspiracy. It would, therefore, appear that they must have approached the question in the same way as the trial judge, i.e., on the basis of the existence of the relationship of master and servant between the individual members of the executive committee and the pickets.

In rejecting any conclusion adverse to the appellants based on the master and servant theory, their Lordships must not, however, be understood as F saying that a finding of unlawful conspiracy might not have been established against some of the appellants if the courts below had approached the case from a different angle, i.e., by looking to see what part, if any, each appellant had played in connexion with each specific incident when threats or intimidation had been used and then considering whether such part necessarily compelled the inference that the particular respondent was party to a conspiracy to use G unlawful means to further the object of the picketing and thereby create a nuisance. Their Lordships do not consider it would be proper for them at this stage to undertake such an investigation in the absence of clear and convincing evidence implicating the persons concerned and pointing irresistibly to their participation in an unlawful conspiracy.

Examination of the evidence accepted by both courts below does, however, H reveal beyond doubt that the appellants Joseph (the organiser) and Samuel (the chief picket)—apart from any question of conspiracy—were present and actively assisting in the picketing which was being carried out with threats and intimidation so as to obstruct the approaches to the respondents' premises continuously from Sept. 17 to Nov. 26, 1955, thereby constituting a nuisance which has been found to have caused damage to the respondents' trade. Joseph I led the pickets on Sept. 17 when they were first posted and was frequently present thereafter during the period in question. Samuel was present throughout. On Sept. 17, when the pickets arrived, Joseph was at their head and taking a leading part. He was shouting "Don't buy from O'Neal's Drug Store" and told the pickets to shout behind the people going into the store. Samuel was present throughout and himself shouted "Don't buy from O'Neal's". One of the pickets (a Dominican named Tilton Theophile) threatened to knock down several persons attempting to enter the store. On Sept. 19 Samuel, who was a

special constable, told people they would get into trouble if they went in. September 24 was a particularly noisy day. Some pickets were heard to threaten to beat people if they went in. Joseph was present that day egging on the pickets to shout louder. The respondents telephoned the police to complain. Joseph said he was temporarily substituting for one of the pickets. After a visit from the police, Joseph was urging the pickets to shout louder. On Oct. 15 a young woman was surrounded by pickets and entered the store "almost in a state of collapse." On Nov. 11 Samuel said to a customer "Nelson, don't you hear you must not go in there to buy. You is a dog". On Nov. 26 a Mrs. Allen asked Samuel what was the meaning of the words "Hold the line" (which was a slogan freely used by the pickets throughout this period) and was told it meant that nobody should enter the drug store.

The Court of Appeal in referring to these matters said:

> "In reality the evidence discloses that on the morning of Sept. 17, 1955, the pickets carrying placards arrived accompanied by a steel band playing and a large crowd. The appellant Samuel was one of the pickets. They were installed around the premises by the appellant Levi Joseph with much flourish, fanfare and noise. Thereafter their behaviour was of such a nature as to intimidate and prevent people from going into the store and it is clear that as found by the trial judge, methods of obstruction, coercion, intimidation and threats of personal violence were used. On occasions the pickets kept up a continuous shouting for sustained periods to such an extent as to constitute a nuisance."

Their Lordships are satisfied that the concurrent findings of fact are sufficient to establish the existence of a nuisance which has caused damage to the respondents, and that the evidence accepted by the trial judge clearly shows that the appellants Joseph and Samuel are liable as participants with others in the creation and continuance of the nuisance. The statement of claim alleges in the alternative a conspiracy to create a nuisance and the creation thereof pursuant to such conspiracy. Their Lordships do not consider it necessary or desirable to investigate whether the participation of the appellants Joseph and Samuel in the creation of the nuisance was in pursuance of a previous conspiracy or not. It suffices that they are each responsible for the tort in the commission of which they have assisted. They are, accordingly, liable for the damage which the trial judge has assessed at the sum of £80, and as against them the respondents are entitled to an injunction the terms of which will be indicated later.

It will have been observed that, so far, no reference has been made to the legislation relating to trade disputes. As there is nothing in the relevant legislation to protect any individual from liability for torts committed by him whether in furtherance of a trade dispute or not, it is not strictly necessary to the decision of this appeal to determine certain questions which are of considerable importance to trade unions and employers and which figured prominently in the courts below. But their Lordships consider it is desirable to make some observations thereon. The relevant statutory provisions are as follows:

"*Trade Unions Act*, 1939.

> "2. In this Act— . . .
>
> 'Workmen' includes labourers.
>
> 'Trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen, connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person (2).

* * *

(2) As amended by the Trade Unions (Amendment) Act, 1949.

" 6 (A) (1) . . .

" (2) An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable (3).

* * *

" 7. It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working (4).

" *Trade Disputes (Arbitration and Inquiry) Act*, 1939.

" 2 (1). For the purposes of this Act ' trade dispute ' means any dispute or difference between employers and workmen, or between workmen and workmen, connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person.

" The expression ' workmen ' means any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

* * *

" 8 (1). Where any trade dispute exists or is apprehended the Governor may, whether or not the dispute is reported to him under this Act, inquire into the causes and circumstances of the dispute, and, if he thinks fit, refer any matter appearing to him to be connected with or relevant to the dispute to a Board of Inquiry (hereinafter referred to as ' the board ') appointed by him for the purpose of such reference, and the board shall inquire into the matters referred to it and report thereon to the Governor."

It was contended by counsel for the respondents at the trial that, in order to constitute a trade dispute over a dismissal, a dispute or difference must arise between the remaining employees and the employer. In the present case, there was no dispute or difference between the remaining employees (none of whom were members of the union) and the respondents. He also appears to have contended that, in any event, there can be no trade dispute between a dismissed employee and a dismissing employer if the dismissal was lawful (i.e., if the period of notice required by law is given or payment in lieu thereof made). The trial judge rejected these submissions. He held that a trade dispute existed and that the predominant object of the picketing was a furthering by the appellants of their own interests, although they had other objects in mind and unlawful means had been used. On appeal, the respondents by cross-appeal gave notice that they would contend (i) that the definition of workman in the Trade Unions Act, 1939, does not include clerk, and (ii) that the judge was wrong in holding that a trade dispute existed between the respondents and Averyl Winter represented by the Antigua Trades and Labour Union. The Court of Appeal accepted both these contentions and increased the damages from £80 to £100 by reason of the non-existence of a trade dispute. In arriving at these conclusions, they held that the only dispute was between the union and the respondents, basing themselves on certain observations of BENNETT, J., in the Court of Appeal in *R.* v. *National Arbitration Tribunal, Ex p. Bolton Corpn.* (5). These observations were, however, not relied on by the respondent

(3) As added by the Trade Unions (Amendment) Act, 1942.
(4) As substituted by the Trade Unions (Amendment) Act, 1947.
(5) [1941] 2 All E.R. 800; [1941] 2 K.B. 405.

corporation when that case reached the House of Lords (6), where the decision of the Court of Appeal was reversed, and VISCOUNT SIMON, L.C., in his speech stated (7) that they must be regarded as abandoned. LORD WRIGHT described (8) as " strangely out of date " the argument that a difference between a trade union acting for its members and their employer cannot be a trade dispute.

The Court of Appeal further held that Miss Winter was not a workman. They would appear to have construed the words " ' Workmen ' includes labourers " in s. 2 of the Trade Unions Act, 1939, as amended, as though it were a definition. Although it is true that the definition in the Trade Disputes (Arbitration and Inquiry) Act, 1939, cannot be imported as such into the Trade Unions Act, there is nothing to compel a limited and restricted meaning to the word " workman " in the latter Act. On the contrary, the subject-matter would seem to their Lordships, in the absence of words of limitation, to call for a wide and liberal interpretation which should not exclude shop assistants. With regard to the trial judge's finding that the predominant object of the picketing was the furtherance of the appellants' own interests, their Lordships are unable to agree with the Court of Appeal that this did not amount to a definite finding that the main purpose of the alleged conspiracy was to further the appellants' legitimate interests, nor can they accept the view that the finding was not justified by the evidence. Their Lordships also agree with the trial judge's rejection of the submission that the lawful dismissal of a workman cannot be the subject of a trade dispute.

For the reasons previously stated, however, their Lordships will humbly advise Her Majesty that the order of the Court of Appeal be discharged and that the judgment of the trial judge be varied by entering judgment for the respondents for the sum of £80 damages against the appellants Joseph and Samuel only and that an injunction against the appellants Joseph and Samuel restraining them from creating a nuisance to the respondents by using threats or intimidation or inciting other persons to use threats or intimidation to deter customers from entering the premises of the respondents or otherwise obstructing free access by the public thereto, be substituted for the injunction ordered by the trial judge. The appellants Joseph and Samuel must pay one-half of the costs in the courts below, excluding the costs of the cross-appeal which must be paid by the respondents and excluding the costs of joining the appellant Hurst and the costs of, and incidental to, the two applications for an interim injunction as to which the trial judge's order will stand. There will be no order as to costs of the present appeal.

Appeal allowed in part.

Solicitors: *Robert K. George* (for the appellants); *Zeffertt, Heard & Morley Lawson* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(6) [1942] 2 All E.R. 425; [1943] A.C. 166.
(7) [1942] 2 All E.R. at p. 428; [1943] A.C. at p. 176.
(8) [1942] 2 All E.R. at p. 435; [1943] A.C. at p. 189.

CHERRY *v.* INTERNATIONAL ALLOYS, LTD.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), July 14, 15, 25, 1960.]

Factory—Dangerous machinery—Truck for conveying factory product—Whether machinery requiring to be fenced—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

A factory producing alloy materials used petrol-driven Lister trucks with engines somewhat similar to that of a motor car for carrying and removing materials produced. An employee at the factory sustained an injury while making in the course of his employment an adjustment of the engine of one of the trucks, which had to be done with the engine running. He brought an action for damages against his employers, alleging breach of their statutory duty to fence dangerous machinery, i.e., the truck, under s. 14 of the Factories Act, 1937,

Held: the action failed, since the truck was not " machinery " to which, on a common-sense construction of s. 14 of the Factories Act, 1937, that section was intended to apply.

Dictum of LORD EVERSHED, M.R., in *Rogers* v. *News of the World*, cited by SELLERS, L.J., in *Kimpton* v. *Steel Co. of Wales, Ltd.* ([1960] 2 All E.R. at p. 277) and *Parvin* v. *Morton Machine Co., Ltd.* ([1952] 1 All E.R. 670) applied.

Appeal dismissed.

[As to dangerous machinery in a factory requiring to be fenced, see 17 HALSBURY'S LAWS (3rd Edn.) 70, para. 122; and for cases on the subject, see 24 DIGEST (Repl.) 1052, 1053, *202-205*.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Bath v. *British Transport Commission*, [1954] 2 All E.R. 542; [1954] 1 W.L.R. 1013; 24 Digest (Repl.) 1063, *257*.

Kimpton v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. 274; [1960] 1 W.L.R. 527.

Parvin v. *Morton Machine Co., Ltd.*, [1952] 1 All E.R. 670; [1952] A.C. 515; 116 J.P. 211; 24 Digest (Repl.) 1059, *239*.

Rogers v. *News of the World* (Nov. 19, 1958), unreported, cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.

Smith v. *Chesterfield & District Co-operative Society, Ltd.*, [1953] 1 All E. R. 447; [1953] 1 W.L.R. 370; 24 Digest (Repl.) 1051, *193*.

Stephens v. *Cuckfield R.D.C.*, [1960] 2 All E.R. 716; [1960] 3 W.L.R. 248.

Thomas (Richard) & Baldwins, Ltd. v. *Cummings*, [1955] 1 All E.R. 285; [1955] A.C. 321; [1955] 2 W.L.R. 293; 24 Digest (Repl.) 1056, *223*.

Thorogood v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 24 Digest (Repl.) 1023, *13*.

Appeal.

The plaintiff appealed against an order of GORMAN, J., made on July 28, 1959, dismissing an action for damages for personal injuries suffered as a result of an accident to the plaintiff in the course of his employment as a motor fitter by the defendants at their factory at Aylesbury on Oct. 10, 1956, which he alleged was due to the negligence and breach of statutory duty of the defendants. The grounds of appeal were that the judge was wrong in holding that the defendants were not in breach of their common law duty of care to the plaintiff, and in holding that s. 12 or s. 14 of the Factories Act, 1937, did not apply and that the defendants were not in breach thereof.

John Thompson, Q.C., and *B. W. Chedlow* for the plaintiff.

P. M. O'Connor, Q.C., and *Bernard Caulfield* for the defendants.

Cur. adv. vult.

July 25. The following judgments were read.

SELLERS, L.J.: On Oct. 10, 1956, the plaintiff was employed by the defendants as a motor mechanic in their factory at Aylesbury where they produce various kinds of alloy materials. In the factory a number of trucks were used for carrying and removing the materials produced there. Some were electrically driven, and there were nine Lister trucks which were petrol-driven with an engine somewhat similar to that of a motor car. The plaintiff was an experienced mechanic and his duties included the running maintenance of these various trucks and also major and minor repairs.

On the day in question the plaintiff was attending to one of the Lister trucks in part of the electricians' shop, and after replacing a broken fan belt he took the opportunity of adjusting the oil feed. This adjustment had to take place with the engine running, and the adjustment was made by turning a small wheel with his fingers and then tightening a nut with a spanner. As the plaintiff was tightening the nut by lifting the spanner upwards, the spanner slipped and his right hand was caught by the revolving fan and seriously damaged.

As with the ordinary motor car, the fan serves to cool the engine and is normally enclosed, in this case by a louvred plate or guard, but this had to be opened downwards to give access to the oil feed for adjustment and so left the fan during that operation unguarded. The adjustment had to be done with care but it was a simple operation and one frequently carried out. The Lister trucks had been in general and regular use in this factory for many years and there never had been any further or other guard or protection to the fan than the outside louvred plate. The truck was a three-wheeled vehicle of a standard type in common use throughout the country in the larger factories.

In this action, brought by the plaintiff to recover damages from his employers, it was alleged amongst other grounds that the accident was caused by the defendants' breach of the statutory duty to fence under s. 14 of the Factories Act, 1937, as the fan was a dangerous part of machinery and that it was unfenced and was not in such a position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced. That is the only breach of duty relied on in this appeal, the plaintiff not challenging in this court the other findings of the learned judge in favour of the defendants.

The defendants contended that the Lister truck was not machinery to which the Factories Act, 1937, and in particular s. 14, applied and therefore there was no duty to fence the fan in question. The learned judge upheld this submission and found that the truck as used for transport in these premises was not "machinery" within s. 14. The sole question is whether this Lister truck, which would normally be described as a vehicle, is machinery to which the Factories Act, 1937, applies. If it is such machinery, then it is conceded by the defendants that there was a breach of s. 14 and the plaintiff is entitled to recover.

The only definition of machinery in the Act is that machinery includes a driving belt. Otherwise it is left to the court to decide in any given case whether the article or plant complained of is machinery as contemplated and intended by the legislature. The learned judge, who has had long and very active experience of litigation under this much invoked statute, has found confidently that the Act does not apply. It is an opinion I would be reluctant to disturb. The difficulty in the case is to find the right approach to the problem. Where there is no definition, what are to be the guides? It is conceded in the arguments on each side that little, if any, guidance is available from other sections of the statute, except perhaps to reveal absurdities if the plaintiff's contention is correct.

The safety provisions of Part 2 of the Act, and in particular s. 12, s. 13 and s. 14, are appropriate to what might be called production machinery but give no

indication of their applicability to a motor car, truck or other vehicle where the obvious dangers as a self-contained unit moving about a factory are of a wholly different character to those to which s. 14 (1) refers. Under s. 22 hoists and lifts, under s. 23 chains, ropes and lifting tackle, and under s. 24 cranes and other lifting machines, are dealt with separately. By s. 24 (8) " lifting machine " means a crane, crab, winch, teagle, pulley block, gin wheel, transporter or runway, and these are dealt with. The plant included in these sections serves to remove goods in the course of the processes of production, but there is no reference, directly or by implication, to a vehicle such as a motor car or a truck. The express provisions of s. 24 prevent any analogy between cranes and other lifting machines and the mobile truck on the factory floor. The Lister truck under consideration had no lifting power but served only to carry goods.

Under s. 151, which deals with the expression " factory ", sub-s. (1) (vi) excludes any premises from being a factory if used as ancillary to an industrial undertaking for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out. This is a curious exception if a motor vehicle is to be regarded as dangerous machinery in whole or in part.

The plaintiff has relied on the truck being a necessary adjunct to the process of manufacture and containing within itself machinery, and has contended that s. 14 deals with " other machinery " than prime movers and transmission machinery, and that the truck falls within " other machinery ". That the word " machinery " need not be interpreted in its widest sense is clear from *Parvin* v. *Morton Machine Co., Ltd.* (1), where the House of Lords held that s. 14 (1) of the Factories Act, 1937, does not apply to machines and machinery manufactured in a factory. In that decision more assistance could be obtained from the construction of the Act than is available here. But if this truck is machinery to which the Act applies, so is an ordinary motor car whilst in the factory, at least if used for factory purposes, and that no one, I would have thought, could have described as factory machinery.

The intuitive or instructive decision, whilst appropriate to a jury within the ambit of the evidence, is not a satisfying judicial decision, but there are occasions when it may play its part. We were invited to take a common-sense view. I would approach the matter as this court did in *Rogers* v. *News of the World* (2), and in *Kimpton* v. *Steel Co. of Wales, Ltd.* (3), which relied on and quoted an extract from the judgment of the Master of the Rolls in the former case (4). I do not repeat the quotation. The question was whether three steps constituted a " staircase " within the meaning of s. 25 (2). The issue was the same in both *Rogers* (4) and *Kimpton* (3) and in each case, on slightly varying facts, this court said they were not a staircase. The Master of the Rolls agreed with the trial judge that the construction of the words, which are ordinary English words, must be determined by common sense, and that any attempt at definition or philosophical discussion should be avoided.

SOMERVELL, L.J., said in *Bath* v. *British Transport Commission* (5) that if words are perfectly familiar all one can do is to state whether or not one regards them as apt to cover or describe the circumstances in question in any particular case. Like the learned judge, I would hold that the truck is not machinery to which s. 14 was intended to apply. It is a vehicle. I would dismiss the appeal.

PEARCE, L.J.: The sole question in this appeal is whether the Lister truck was machinery within the meaning of s. 14 of the Factories Act, 1937. It was employed in the process of manufacture and spent its life in the factory.

---

(1) [1952] 1 All E.R. 670; [1952] A.C. 515.
(2) (Nov. 19, 1958) unreported. Cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.
(3) [1960] 2 All E.R. 274.
(4) *Rogers* v. *News of the World* (Nov. 19, 1958), unreported. Cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.
(5) [1954] 2 All E.R. at p. 543.

Section 12 deals with prime movers. Section 13 deals with transmission machinery. Section 14 (1) deals with other machinery, starting with the words:

> " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced . . ."

The Act deliberately refrains from defining machinery, and the interpretation section, s. 152 (1), merely says: " Machinery includes any driving-belt." One cannot gain help from paraphrases or further definition, since the word machinery is simple and well known. It therefore carries whatever meaning is given to it by the ordinary use of language.

In their widest sense the words " any machinery " would include machinery that has been manufactured in the factory. However in *Parvin* v. *Morton Machine Co., Ltd.* (6) they were given a more restricted meaning which included only such machinery as is employed " in the processes of manufacture or as ancillary to these processes ", and excluded machinery that had been manufactured in the factory. The House of Lords arrived at its conclusion by a consideration of the terms of the three sections, and what LORD ASQUITH OF BISHOPSTONE called their " architecture " and the implications of the Act itself.

Here we have little guidance from the Act itself. The association of s. 14 with s. 12 and s. 13 by position and wording tends towards the view that the section is primarily dealing with the machinery that is at the operative end of the prime movers and transmission, the effective machinery to which the power is directed. Counsel for the defendants points to various absurdities that would arise under the provisions of the Act if they are held to apply to Lister trucks. And lorries or motor cars that came to visit the factory would be caught by those provisions.

It is clear that the provisions of the Act and s. 14 itself are not apt for application to trucks and lead to some unreasonable results; and one may fairly assume that trucks were not in the mind of the draftsman. Trucks are self-contained units and the dangers that they create are different dangers from those caused by factory machinery with which the Act was primarily concerned. The danger of being run over or knocked down is wholly different from the dangers that arise in factories from catching, cutting, pinching and crushing. And any dangers that may arise from contact with the internal engines of the trucks are far more frequent in garages (to which the Act does not apply) than in factories.

Nevertheless, if the Act uses plain language that must embrace the Lister truck, the provisions apply to it when it is on factory premises. The question whether an article is machinery, like the question whether any part of the machinery is dangerous, is a question of fact for the court to determine in each case; but " the question must . . . be judged by reference to the right principle of law " (see JENKINS, L.J., in *Smith* v. *Chesterfield & District Co-operative Society, Ltd.* (7)). *Parvin's* case (6) shows that the words " any machinery " in this Act do not include all machinery of every kind, since they do not include machinery that is manufactured by the factory. One is thus entitled to apply these ordinary words in the context of the Act and in the context of a factory.

Although the Lister truck may be " machinery " in the widest sense of the word it would not normally be described as such. It is more normally classified as a vehicle or a motor vehicle or a mechanically propelled vehicle. Admittedly a ventilating fan also is more often described as such than as machinery, yet in *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* (8) (where this point was not taken) it was held to be within the Act. However, I doubt if that case is helpful, since a fan which is part of the ventilating system is nearer to machinery than is a vehicle. It does not have so self-contained an identity of its own. Moreover, in the context of a factory especially, this truck would not normally be classed as machinery. A person taking a layman's inventory of the contents of a factory

---

(6) [1952] 1 All E.R. 670; [1952] A.C. 515. (7) [1953] 1 All E.R. at p. 450.
(8) [1951] 1 All E.R. 682; [1951] 2 K.B. 537.

would refer to machinery and vehicles under separate headings and would, I think, put the fan in *Thorogood's* case (9) under the former heading and the Lister truck under the latter. But comparison with other border-line articles gives little guidance. In argument we have discussed such things as travelling cranes and mobile drills. But these things do not come within so well-known a class with such well-defined attributes as motor vehicles.

If, therefore, an ordinary man would not in the context of a factory consider this truck as coming within the classification of machinery, was the learned judge compelled to hold otherwise? In *Rogers* v. *News of the World* (10), LORD EVERSHED, M.R., said (11):

> " ' The first question . . . is this: do these three steps constitute a " staircase " within the meaning of s. 25 (2) of the Act? If you get into a debate on the meaning of the words " steps ", " stairs ", " stairway ", " staircase ", you find yourself, I think, in an atmosphere which might have been appropriate to the ancient sophists; but I agree with the learned judge that the construction of these words, which are ordinary English words, in this Act must be determined according to the ordinary standards of common sense; and if that is right, I would myself avoid any attempt at definition and philosophical discussion. I would confine myself to the question posed as I have earlier posed it—looking at these three steps as there illustrated in these photographs, do they constitute a " staircase " within the meaning of s. 25 (2) of the Act? With all respect to Mr. Thompson's argument—attractive as it always is—I must say that I would answer that question unhesitatingly in the negative ' ."

That passage was relied on by SELLERS, L.J., in *Kimpton* v. *Steel Co. of Wales, Ltd.* (11) as was a dictum of LORD REID in *Richard Thomas & Baldwins, Ltd.* v. *Cummings* (12). SOMERVELL, L.J., said in *Bath* v. *British Transport Commission* (13):

> " Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case."

In *Stephens* v. *Cuckfield R.D.C.* (14) UPJOHN, L.J., giving the judgment of the court, used a similar approach and said (15):

> " . . . whether a piece of land is properly described as a ' garden ' or ' vacant site ' or ' open land ' for the purposes of the section is a question to be determined in the circumstances of each case, and the court whose duty it is to decide it must exercise its common sense on the matter."

The learned judge, who has had considerable experience of cases under the factories legislation, decided that this Lister truck was not " machinery " and did not come within s. 14. If he was not compelled to find otherwise, that was a reasonable decision that conforms with common sense. In my view he was not precluded from such a decision and his judgment was right.

DEVLIN, L.J.: I have no doubt that a truck is a machine and its engine is machinery, but I think the full width of the words " any machinery " in s. 14 of the Factories Act, 1937, must be controlled by consideration of the scope and

---

(9) [1951] 1 All E.R. 682; [1951] 2 K.B. 537.

(10) (Nov. 19, 1958) unreported. Cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.

(11) Cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.

(12) [1955] 1 All E.R. at p. 290; [1955] A.C. at p. 334.

(13) [1954] 2 All E.R. at p. 543. (14) [1960] 2 All E.R. 716.

(15) [1960] 2 All E.R. at p. 720.

objects of the Act. The relevant principle of construction is, in my opinion, correctly and concisely set out in MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.), at p. 60. Dealing with the interpretation of general words and phrases, the author says:

> "While expressing truly enough all that the legislature intended, they frequently express more, in their literal meaning and natural force: and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter."

The learned author cites a number of authorities in support of his general proposition, and he deals in particular with the group of cases covering the construction of the word "inhabitant." He says (ibid., at p. 63):

> "The complex term 'inhabitant' may be cited as having frequently furnished illustration of this adaptation of the meaning to what appears to suit most exactly the object of the Act. In the abstract, the word would include every human being dwelling in the place spoken of."

And he follows that with a number of cases in which that general term has been restricted.

In my judgment the object of the Factories Act, 1937, is not to make safety provision for vehicles, being things which may travel inside or outside a factory, or plant and machinery inside them. I think, therefore, that, in accordance with the principle which I have stated, the wide meaning of the words should be cut down so as to exclude vehicles. On those grounds, in my judgment the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *W. H. Thompson* (for the plaintiff); *Hair & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re SUTHERLAND (*deceased*). WINTER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Willmer and Upjohn, L.JJ.), July 20, 21, 22, 1960.]

Estate Duty—Company—Shares—Valuation—Allowance for contingent liabilities—Balancing charge—Liability not existing at the date of the death—Finance Act, 1940 (3 & 4 *Geo.* 6 *c.* 29), *s.* 50, *s.* 55—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 7 (5)—*Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 292.

S., who died in March, 1953, owned shares which for the purposes of estate duty had to be valued in accordance with s. 55* and s. 50* of the Finance Act, 1940, that is to say, the net value of the assets of the company, not the value of the shares, had to be ascertained. The net value was by s. 55 (2) the principal value in accordance with s. 7 (5)* of the Finance Act, 1894 (viz., the estimated price that the assets would fetch if sold in the open market at S.'s death), less the value of liabilities, including contingent liabilities, estimated in accordance with s. 50 (1) of the Act of 1940. The assets of the company included five ships, the principal value of which for estate duty purposes was £1,150,000. That figure was considerably in excess of the value to which the ships had been written down by reason of depreciation allowances under Part 10 of the Income Tax Act, 1952. If the ships had been sold at the date of S.'s death a balancing charge under s. 292 of the Act of 1952, involving liability to income tax and profits tax, would have arisen. The ships were sold after S.'s death for a sum approximating to the principal value so estimated for estate duty purposes, and a balancing charge was assessed on the company. The question arose whether in determining the net value of S.'s shares for the purposes of s. 55 of the Finance Act, 1940, an allowance should be made against the principal value of the assets of the company for the additional tax which at the date of S.'s death would have been exigible if the ships had then been sold.

Held: the allowance should not be made for the following reasons—

(i) the principal value of the ships was, under s. 55 (1) of the Finance Act, 1940, to be estimated by reference to what the company's assets would fetch if sold in the open market at S.'s death and neither s. 55 nor s. 7 (5) of the Finance Act, 1894, required it to be assumed that a sale had in fact occurred (see p. 274, letter F, post).

(ii) the question what were the liabilities, within s. 50 (1) of the Finance Act, 1940, of the company in respect of which allowance had to be made from the principal value was a question that should be determined in the light of the facts as they were at the time of S.'s death, when the ships in fact had not been sold, and should not be determined on the assumption of there having been a sale at S.'s death, although valuation under s. 7 (5) of the Finance Act, 1894, proceeded on the hypothesis of a sale at S's death (see p. 274, letter G, p. 276, letter H, and p. 277, letter D, post).

(iii) moreover, any prospective liability to tax in respect of a balancing charge, if and when the ships were subsequently sold, was not a liability or contingent liability within s. 50 (1) of the Act of 1940, merely by reason of the fact that a prudent business man would have foreseen the probability of the assessment of a balancing charge and would have provided for it (see p. 276, letters E to G, p. 277, letter I, post).

Re Duffy ([1948] 2 All E.R. at p. 760) followed.

Decision of DANCKWERTS, J. ([1959] 2 All E.R. 682) affirmed.

* For the relevant terms of s. 55, s. 50, and s. 7 (5), see pp. 271, 272, post.

[As to balancing allowances and charges, see 20 HALSBURY'S LAWS (3rd Edn.) 501-504, paras. 964-969, and as to valuation of assets of companies deemed to pass on death, see 15 HALSBURY'S LAWS (3rd Edn.) 33-37, paras. 63-69.

For the Finance Act, 1940, s. 50, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 478, 483, and for the Income Tax Act, 1952, s. 292, see 31 HALSBURY'S STATUTES (2nd Edn.) 283.]

Cases referred to:

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Duffy, Re, Lakeman v. *A.-G.*, [1948] 2 All E.R. 756; [1949] Ch. 28; [1949] L.J.R. 133; 2nd Digest Supp.

Inland Revenue Comrs. v. *Wood Bros.* (*Birkenhead*), *Ltd.*, [1959] 1 All E.R. 53; [1959] A.C. 487; [1959] 2 W.L.R. 47; 3rd Digest Supp.

Whitney v. *Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; 28 Digest (Repl.) 357, *1578*.

Appeal.

This was an appeal by the executors of the will of Sir Arthur Munro Sutherland, Bart., deceased, from an order of DANCKWERTS, J., given on June 19, 1959, and reported [1959] 2 All E.R. 682, whereby it was declared that no allowance fell to be made in valuing for estate duty the shares of B. J. Sutherland & Co., Ltd., on the basis of the net value of the assets of the company by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of ships belonging to the company by reason of, and up to, the amount of capital allowances previously received in respect of the said ships.

Sir John Senter, Q.C., and *R. A. Watson* for the taxpayers.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

LORD EVERSHED, M.R.: In this case we have all reached a clear conclusion on what I will venture to call the premise to the argument presented by the taxpayers. We have, therefore, thought that there would be no advantage in reserving judgment, and that possibly, on the other hand, there would be an advantage in stating our view at once, in case the taxpayers should desire to consider taking the case further.

The facts are set out in the report of the case in the court below (1). The problem is one of the liability for estate duty of the estate of Sir Arthur Munro Sutherland. Sir Arthur, at the time of his death which occurred on Mar. 29, 1953, was the owner of 98,700 shares of £1 each in the capital of the ship-owning company B. J. Sutherland & Co., Ltd., and during the five years immediately preceding his death he had such control over that company that, for the purpose of estate duty, the shares in the company which were part of his estate had to be valued in accordance with the provisions of s. 50 and s. 55 of the Finance Act, 1940. The result, if the learned judge was (as I think he was) correct in his conclusion, may no doubt be said to work a little hardly on the estate. It is conceivable that in other cases the advantage of hardship might be the other way; but, acknowledging the hardship, it is nevertheless our duty to interpret, as best we can, the obligations imposed by the statute to which I have alluded.

I turn, therefore, at once to the relevant sections in the Act of 1940; it is convenient to read them in the reverse order as did the learned judge. Section 55, as amended, provides:

> " (1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in . . . a company to which this section applies, then if—(a) the deceased had the control of the company [at the period stated] . . . the principal value of the shares . . . in lieu of being estimated in accordance with the provisions of s. 7 (5) of the

(1) [1959] 2 All E.R. 682; [1960] Ch. 134.

Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection.

" (2) For the purposes of such ascertainment as aforesaid—(a) the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with [s. 7 (5) of the Finance Act, 1894] less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death . . ."

It is convenient to have in mind s. 7 (5) of the Finance Act, 1894. It provides:

" The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

So far, then, the matter stands thus, if I can correctly summarise it: Having regard to the nature of the deceased's shareholding in this company, for the purposes of estate duty one must value not the shares but the assets of the company—here, in particular five ships—and they are to be valued by estimating the price which those ships would fetch if sold in the open market on Mar. 29, 1953. Section 55 (2) of the Act of 1940 provides that the allowances intimated in s. 50 of the Act of 1940 shall be made and it is only necessary, I think, to read the latter part of sub-s. (1) of that section:

". . . the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) . . ."

It is not in dispute that the value of these ships, estimated according to the method prescribed by s. 7 (5) of the Finance Act, 1894, on Mar. 29, 1953, was £1,150,000. It is the fact that the ships were at a later date sold for approximately that figure; but counsel for the taxpayers in the course of his attractive argument (if he will allow me to say so), conceded that the fact of the sale was for present purposes irrelevant. His argument would be just as good if in truth the ships were still sailing the seas under the flag of the same company, and even if the ships were never sold at all.

The question raised is thus put in the originating summons in the case:

" Whether on the true construction of [the sections which I have already read] and in the events which have happened any, and, if so what allowance falls to be made in valuing for estate duty the shares of the company on the basis [therein stated] and in particular whether allowance falls to be made at such date [viz., Mar. 29, 1953] by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of the ships in question by reason of and up to the amount of capital allowances previously received by the company in respect of the said ships."

I shall not go into figures; it is again not in doubt that by reason of the depreciation allowances for tax purposes which had been made to the company in respect of these ships, they had at the relevant date a written-down value considerably less than the figure of £1,150,000 which I have mentioned. It, therefore, follows that, had the ships been sold on Mar. 29, 1953, for that price, there would have arisen (and I can now speak in terms of certainty because all relevant subsequent Finance Acts have, of course, been passed) liability for the company to be charged income tax in respect of a balancing charge, that charge arising from the fact that the sale price was considerably in excess of the written-down value; and, similarly, there would have arisen an obligation to pay profits tax arising from the same circumstances.

I shall come back presently to deal with an argument put by counsel for the taxpayers in the course of his reply which I will for present purposes summarise as follows: He said that if one looked as a business man at the affairs of the company as they stood on Mar. 29, 1953, and if one realised that the ships then were worth a sum considerably in excess of their written-down value, then one would have to acknowledge (and as a prudent man would have to make provision accordingly) that one had received remissions in respect of tax from the Revenue which were greater than should have been received, and that there was, therefore, an obligation to restore those excessive allowances to the Revenue which would arise if and when the ships were sold at or at anything like the price which I have mentioned. So, said counsel, looking broadly at it in that way, would it not be right to say that, as things then stood, there was a contingent liability on the company to restore those excessive allowances to the Revenue, the contingency being the event (likely enough it may well be) of a sale in due course? That argument is distinct from the argument which counsel for the taxpayers put in the forefront of his case. I cannot do better justice to the argument than by referring to the proposition as counsel was good enough to formulate it for us in writing:

> "The sole and express statutory hypothesis on which the valuation falls to be made under s. 55 and s. 50 of the Finance Act, 1940, is a notional sale of the assets at their open market price at the time of the death, making allowance for liabilities, including, it is submitted, those attaching, or crystallising, as a matter of law, on the sale."

If I do not, therefore, do the proposition an injustice, it is to this effect that since for the purpose of arriving at the value of the ships at the relevant date one must assume a sale, one must for all purposes of the application of the two sections proceed on the basis that this notional sale took place on Mar. 29, 1953. If that premise is right, then, as it seems to me, there is much to be said for the argument which proceeds from the premise. If one is, so to speak, to treat the ships as having in fact been sold, then can one avoid the inevitable consequence of the sale that one must also take account, as having then arisen, of liability in respect of the balancing charge for income tax and profits tax? Still accepting the premise, the argument further proceeds to point out that in a case of balancing charge one must look at the Income Tax Act, 1952, s. 292 (1) which provides:

> "Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant [belonging to a person carrying on a trade and provided or used for the purpose of the trade] that is to say [and then the events include the sale of the machinery or plant] an allowance or charge (in this Chapter referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs."

So it is said that the effect of s. 292 is definitely, on the happening of the relevant event, to create a liability. In that respect counsel for the taxpayers has argued that the case may be distinct from the ordinary case of income tax—say a charge for income tax under Sch. D. In the latter event one must regard the language of the Income Tax Act, 1952, s. 1, which provides:

> "Where any Act enacts that income tax shall be charged for any year at any rates, then, subject to the provisions of this Act, the tax at those rates shall be charged for that year."

So counsel for the taxpayers makes this point: if (as was the case in *Re Duffy, Lakeman* v. *A.-G.* (2), to which I shall make later an allusion) the apprehended liability is for income tax under Sch. D, then it may be that one cannot say that

(2) [1948] 2 All E.R. 756; [1949] Ch. 28.

the liability exists, that the charge has arisen, until the passing of the subsequent Finance Act which states for the year of assessment that there shall be income tax for that year at such and such a rate. Per contra, says counsel, with a balancing charge, the language of s. 292 which I have read shows that the charge definitely attaches on the happening of the event and the liability exists even though its final quantification may await the coming into operation of a subsequent Finance Act; and counsel reinforces that argument by reference to the well-known language used by LORD DUNEDIN in *Whitney* v. *Inland Revenue Comrs.* (3). In the same way counsel says, quoad the profits tax, that the Finance Act, 1937, s. 19, which introduced the tax under its then title of National Defence Contribution, definitely imposed the charge then and there on the happening of the event, the arising of the profits of the business, though, again, the quantification might have to await subsequent legislation. LORD DUNEDIN in the passage referred to said (4):

> ". . . there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment."

So it is the argument of counsel for the taxpayers that, given always the premise, one must treat the liability as having arisen by virtue of the sections mentioned on the happening of the event, the happening being by the premise necessarily supposed to have occurred.

If I may say so, I think there is great force in the argument, and I appreciate the distinction which counsel for the taxpayers finds in the particular language of the sections appropriate to the balancing charge and the profits tax. What may have to be considered in regard to it is the effect of *Re Duffy* (5); but I do not, on this aspect of the case, find it necessary to express any view on that matter, because to my mind the premise which the proposition assumes is not in truth well founded. The Finance Act, 1894, s. 7 (5), prescribes a method of valuing an asset. It does not require it to be assumed that the sale which in estimation must be taken into account has occurred, and nothing in that subsection or in s. 55 (as I think) has the effect that one must, for the purposes in question, deem the sale to have occurred with whatever the consequences are. The section merely directs that one should arrive at the value of the asset by answering the question: If it were sold today on the open market, what would this asset fetch? In this case the answer is £1,150,000. Having done that, one inquires of the company what were its liabilities of the nature indicated in s. 50 and s. 55. I have been unable to answer that second question otherwise than in the light of the facts as they were then affecting the company and I cannot see, on the language of the sections, that one is entitled, in considering what the contingent liabilities (for example) were, to proceed on the hypothesis that these ships had in truth been sold.

Junior counsel for the taxpayers raised the converse case where the asset, when valued in the method prescribed, turned out to be worth less than its written-down market value, so that the company would be able to say, in respect of that asset, that it had not been allowed enough and be able to claim, by virtue of s. 292, a balancing allowance. With all respect, it seems quite impossible, on the language of these sections, to say that for the purpose of valuing the assets of this testator one would be entitled in such a case to add to the supposed sale value at the relevant date something for the balancing allowance which, if there had been a sale, the shipowner would be entitled to recover. That consideration, I think, adds force to what I regard as the answer to this appeal, viz., that one is merely required by the section to value the ships, and one is not called on for all the purposes of both sections to assume that the sale in fact had taken place.

(3) [1926] A.C. 37 at p. 52. (4) [1926] A.C. at p. 52.
(5) [1948] 2 All E.R. 756; [1949] Ch. 28.

If that is right, it is the answer to the present appeal. But the question of *Re Duffy* (6) has been raised, and it will be convenient if I make a reference to that case, which came before this court in 1948. That was not a case of a balancing charge. It was a case in which the deceased owned shares in a company, just as Sir Arthur Sutherland owned shares in B. J. Sutherland & Co., Ltd., of a kind which brought into operation the Finance Act, 1940, s. 50 and s. 55; in other words, one was called on to look at the value of the assets of the company. Having done that, one was then by s. 50 required to consider what were the liabilities of the company. In that case, the company, at the death of the testator, had earned a substantial amount of trading profit. The deceased had died in June, 1942; and, according to the ordinary principles of income tax, the liability for such tax on the company in respect of that year would not arise until Apr. 5, 1943, and would then only arise if one assumed (as no doubt would be an obvious assumption) that there was passed by Parliament a Finance Act in 1943 imposing income tax at such and such a rate on trading profits calculated for the preceding trading year. So it was contended that one should, in applying s. 50 of the Act of 1940, regard as a contingent liability a company's liability to pay income tax in respect of the profits earned in the then current year, in particular in respect of the period of that year which ended with Mr. Duffy's death. That view was, however, rejected by this court. The learned judge, DANCKWERTS, J., made two citations from the judgment of LORD GREENE, M.R., and I follow him in referring to the same passages. LORD GREENE, M.R., said (7):

> "In the present case each of these companies made profits in the year in which the deceased died. According to the system that I have mentioned, a proportionate part of these profits would fall to be added to the value of the companies' assets as shown by the previous balance sheets. What is said is this. The profits earned in the year during which the deceased died will form the basis of the assessments for income tax in respect of the next year. Therefore, the profits which are earned during that year in which the deceased died carry, so to speak, in gremio, a liability for tax in respect of the financial year which will only begin after the death of the deceased. ROXBURGH, J., has held that that argument does not succeed."

The second passage relied on by the learned judge was at the end of LORD GREENE, M.R.'s judgment, when, after pointing out that no doubt as a matter of ordinary business sense it could be regarded as being as near certain as anything could be that there would be liability to pay income tax in respect of these profits, he said (8):

> ". . . but, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability—a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date."

It was said by counsel for the taxpayers that the validity of that decision has been (to say the least) seriously challenged as the result of a later case in the House of Lords, *Inland Revenue Comrs.* v. *Wood Bros.* (*Birkenhead*), *Ltd.* (9). That case related to balancing charge; but the point, as I apprehend the case, was the short one (or, at any rate, one that can be shortly stated), and I take my statement from the speech of LORD MORTON OF HENRYTON as follows (10):

> "The one question which remains for decision is whether the sum of

(6) [1948] 2 All E.R. 756; [1949] Ch. 28.
(7) [1948] 2 All E.R. at p. 758; [1949] Ch. at p. 33.
(8) [1948] 2 All E.R. at p. 760; [1949] Ch. at p. 35.
(9) [1959] 1 All E.R. 53; [1959] A.C. 487.
(10) [1959] 1 All E.R. at p. 55; [1959] A.C. at p. 503.

£18,675 already mentioned [the balancing charge figure] is, or is not, part of the 'actual income from all sources' of the respondent company for the relevant period . . ."

As appears from the preceding paragraph in the noble Lord's speech, it was agreed, first, that a balancing charge was properly made on the respondent company under the relevant sections of the Act of 1952; secondly, that the amount on which the balancing charge was made was correctly computed, under the same provisions of that Act, at £18,675; and, thirdly, that on the true construction of the Act, once the amount on which the balancing charge was made had been ascertained, the balancing charge was income tax on that amount at the appropriate rate. That being the nature of the case, the House by a majority came to the conclusion that the figure of £18,675 was not part of the actual income of the company from all sources. *Re Duffy* (11) does not appear to have been referred to; and, with all respect to counsel for the taxpayers, I am unable to conclude that anything in the decision in *Wood's* case (12) (and I include, as counsel did, the argument of Mr. Blanshard Stamp as reported in the Law Reports) ought to be taken by us as disabling the decision in *Re Duffy* (11) as an authority binding on us.

If I have rightly posed the problem which seems to me to confront in limine the argument of counsel for the taxpayers, the answer to this case does not seem to me to depend on *Re Duffy* (11) at all. This case is, in other words, a stronger case. In *Re Duffy* (11) the profits had in fact arisen. In this case no sale had in fact at the date of the death taken place on the happening of which event alone a balancing charge would arise. But *Re Duffy* (11) would, I think, if it stands (as I think that we in this court must treat it as standing), provide an answer to the alternative way in which counsel for the taxpayers put his case, the way I earlier intimated. In order to make the matter intelligible, I will repeat this alternative way of putting the case, i.e., that as a matter of business sense, on examining the affairs of this company, B. J. Sutherland & Co., Ltd., on Mar. 29, 1953, one would have to say: "It now appears quite clear that excessive allowances for wear and tear have been given, and therefore, if and when these ships are sold" and, in view of the testator's death, one might say that a sale sooner or later was at least very probable, "it is certain that a balancing charge will have to be met". That being so, can it not be said that on Mar. 29, 1953, there was a contingent liability to that extent? If that argument is put forward, then the passage which I have read at the end of the judgment of LORD GREENE, M.R., in *Re Duffy* (13) would provide the answer, if that decision is good law. I have said that, with all respect to counsel for the taxpayers, I am unable to treat *Wood's* case (12) as qualifying or disabling the decision in *Re Duffy* (11). Therefore, I think that on the alternative argument, *Re Duffy* (11) provides the answer. But on the main argument, as I have already indicated, the taxpayers' argument falls down, because the requirement of valuation does not seem to introduce a hypothesis which has to be assumed not only in arriving at the valuation but also in discovering what were the company's liabilities.

I said at the beginning of this judgment that it may seem—it may be the fact—that the result is rather hard on the estate here because, as I stated, the ships have since in fact been sold, a balancing charge has arisen, and, therefore, it might be said that the Crown in one capacity (viz., as collecting income tax) has recovered a sum in respect of that balancing charge and now comes in another capacity (in its Estate Duty Office capacity) and claims estate duty on a figure which includes the sum which is payable to the Crown for income tax and profits tax. As was pointed out, *Re Duffy* (11) itself worked hardly and that particular hardship, I understand, has been relieved by subsequent legislation,

(11) [1948] 2 All E.R. 756; [1949] Ch. 28.
(12) [1959] 1 All E.R. 53; [1959] A.C. 487.
(13) [1948] 2 All E.R. at p. 760; [1949] Ch. at p. 35.

A s. 30 of the Finance Act, 1954. Our duty is to construe these sections as best we can, and, so doing, I have come myself to the clear conclusion that these sections do not permit an allowance by way of contingent liability in respect of the balancing charge, either for income tax or profits tax. In those circumstances, agreeing with DANCKWERTS, J., I would dismiss the appeal.

B **WILLMER, L.J.:** I agree with the judgment which my Lord has delivered, and I do not find that I can usefully add anything to it.

UPJOHN, L.J.: I agree. The main part of the appellants' case is based on the view that under the Finance Act, 1894, s. 7 (5), there is to be a notional sale of the assets. I am quite unable to accept that view. I do not propose to read the section, for it has already been read. We are all familiar with the fact C that in fiscal legislation many artificial conceptions are introduced for the purpose of casting the net of the tax gatherer as wide as possible. This is particularly so in the case of estate duty legislation. Frequently we meet with what are usually referred to as " deeming sections ". For example, in some circumstances and for some fiscal purposes, a company may be deemed to be a trustee of its assets for its shareholders—a wholly artificial conception. I see nothing in s. 7 D which compels this court to introduce any artificial conception that the assets of the company, in this case certain ships, are to be deemed to be sold or treated as sold at the moment of death. All that that section directs is a valuation, and all that the commissioners have to do is to express an opinion as to what the assets would be likely to fetch if sold in the open market.

Accordingly, I agree with my Lord that the taxpayers' case fails in limine. E If, however, it be thought that that is too strict or narrow a view—I do not myself think that it is—I still remain of opinion that the taxpayers' claim must fail in this case. That is a matter which depends on the Finance Act, 1940, s. 50 and s. 55. Section 55 (1) provides that in certain circumstances the principal value of shares shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection, F which provides for valuation of the assets in accordance with s. 7 (5) of the Act of 1894 and for making an allowance for liabilities in accordance with s. 50. Section 55 (6) provides:

> " In this section references to the assets of a company shall be construed as references to the assets that it had at the death of the deceased."

G It is perfectly plain that the assets referred to are real assets; and it seems to me a necessary corollary that the liabilities that are referred to in the section must be real, and not notional liabilities. The whole object is to try to reach a true value of the shares by reference to the value of the assets after deducting liabilities. However contingent they may be, they must be real liabilities; but the whole basis of the taxpayers' case is that these liabilities are notional or fictional liabilities which arise on the notional or fictional sale at the moment of death. Accord- H ingly, for that reason too, it seems to me that the taxpayers' case fails.

So far, in my judgment, *Re Duffy* (14), which has been much debated, does not enter into the matter. It is when we come to the second branch of the argument of counsel for the taxpayers that that case becomes relevant. That branch is this, that the prudent man at the moment of death would make provision for the balancing charge and the tax charged thereon, for he could see that the ships if I sold would attract such a charge. It is said that *Re Duffy* (14) did not bind this court because a balancing charge has been held in *Inland Revenue Comrs.* v. *Wood* (15) not to be income. In my judgment, however, that case does bind us, for whatever be the nature of the balancing charge it cannot possibly be disputed that it is subject to income tax, and therefore it seems to me *Re Duffy* (14) covers this case.

---

(14) [1948] 2 All E.R. 756; [1949] Ch. 28.
(15) [1959] 1 All E.R. 53; [1959] A.C. 487.

It was said then that the authority of *Re Duffy* (16) has been impaired by certain recent cases. The first is *Inland Revenue Comrs.* v. *Wood* (17). I agree with my Lord that there is nothing in *Wood's* case (17) that affects in any way the decision in *Re Duffy* (16). The other case is the well-known case of *British Transport Commission* v. *Gourley* (18) where, after much conflict of judicial opinion, it was decided that when estimating a loss of earnings or prospective earnings in the future, some allowance must be made for income tax on those earnings. That is an entirely different subject-matter from the problem which arises in this case, where the duty of the commissioners and of the court is to come to a correct valuation of the assets of a company after allowing for its liabilities at a particular moment of time. Therefore, I see nothing in those cases which affects the authority of *Re Duffy* (16) in this court.

Having said that, I do not want it to be thought for one moment that I think that there is any doubt about the correctness of the decision, with which I at all events respectfully agree, although its harsh effect has to some extent and in some circumstances been modified by statute. However, the present case is indeed some way removed from *Re Duffy* (16). As was pointed out in that case, it was morally certain that income tax would be charged next year. The only doubt would be whether the chancellor would turn the screw one more twist or would think it proper in his mercy to relax it. The tax was morally certain. In this case, at the moment of death there does not seem to me any ground for saying that it would be morally certain or even likely that a balancing charge would become exigible. The directors of the company might decide to continue to run these ships for a long time. It might be that they would decide to sell the ships in a time of slump such as is happening at the moment. In that case, far from there being a balancing charge, there might be a balancing allowance. So it seems to me that when under s. 50 of the Act of 1940 the contingent liabilities are to be assessed to such estimation as appears to the commissioners to be reasonable, there are no grounds on which it could be said that it would be right to make some allowance for a balancing charge, possibly arising in future, if the company decided to sell its ships. Therefore, although I agree that *Re Duffy* (16) governs this case, it seems to me that this case equally is some way removed from it. For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Keenlyside & Forster*, Newcastle-upon-Tyne (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

---

(16) [1948] 2 All E.R. 756; [1949] Ch. 28.
(17) [1959] 1 All E.R. 53; [1959] A.C. 487.
(18) [1955] 3 All E.R. 796; [1956] A.C. 185.

STOREY *v.* STOREY.

[COURT OF APPEAL (Hodson, Ormerod and Harman, L.JJ.), June 28, July 28, 1960.]

Divorce—Appeal—No case to answer—Submission wrongly accepted by trial court—Two types of submission—Power of appellate court to order a re-hearing—Right of party who submitted no case to give evidence at re-hearing.
Negligence—No case to answer—Whether defendant submitting no case should be put to his election.

There are two sets of circumstances under which a defendant may submit that he has no case to answer; there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, or the submission may be that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. In the former type of submission a defendant who elects to call no evidence is bound by his election, and no new trial can be ordered by an appellate court, but this rule does not of necessity apply to the latter type of submission. If the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission. At such new trial the defendant is not bound by his election, and so may give evidence.

Per CURIAM: (i) in a divorce case the tribunal always has a discretion whether or not to put a respondent to his election, and in exercising this discretion the tribunal will have the question of status, and therefore of public interest, involved well in mind; subject to this qualification we see no reason why the practice in divorce cases should not be in line with that in other cases (see pp. 282, 283, post; *Wilson* v. *Wilson*, [1958] 3 All E.R. 195, considered).

(ii) it is better in matrimonial disputes for the justices to hear both sides before coming to a decision, particularly as a finding by them of desertion or persistent cruelty may form the basis for a subsequent petition for divorce (see p. 282, letter H, post; dictum of LORD MERRIMAN, P., in *Ramsden* v. *Ramsden*, [1954] 2 All E.R. 623, adopted).

(iii) in negligence cases the combined effect of *Alexander* v. *Rayson* ([1935] All E.R. Rep. 185), *Parry* v. *Aluminium Corpn., Ltd.* ((1940), 162 L.T. 236), and *Laurie* v. *Raglan Building Co., Ltd.* ([1941] 3 All E.R. 332) is that the proper procedure, if a submission of no case to answer is made by the defendant in a negligence case, is to require him to elect whether to stand on his submission, and if he does so there cannot thereafter be a new trial (see p. 281, letter F, post).

Appeal dismissed.

[As to submission of no case in divorce suits, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, text and note (e), and generally as to such a submission, see 3 ibid. 71, para. 106, text and notes (p)-(r); and for cases on the subject, see 27 DIGEST (Repl.) 544, *4921* and DIGEST (Practice) 564, *2228*.]

Cases referred to:

Alexander v. *Rayson*, [1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

Horton v. *Horton*, [1960] 1 All E.R. 503; 124 J.P. 206.

Laurie v. *Raglan Building Co., Ltd.*, [1941] 3 All E.R. 332; [1942] 1 K.B. 152; 111 L.J.K.B. 292; 166 L.T. 63; 2nd Digest Supp.

Parry v. *Aluminium Corpn., Ltd.*, (1940), 162 L.T. 236; Digest Supp.

Ramsden v. *Ramsden*, [1954] 2 All E.R. 623; 118 J.P. 430; [1954] 1 W.L.R. 1105; 3rd Digest Supp. A

Wilson v. *Wilson*, [1958] 3 All E.R. 195; [1958] 1 W.L.R. 1090; 3rd Digest Supp.

Yuill v. *Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 27 Digest (Repl.) 544, *4921*.

B

Appeal.

On Nov. 5, 1959, at the adjourned hearing by justices in and for the county of Southampton of a complaint by a wife that her husband had been guilty of persistent cruelty to her and had deserted her, the husband's solicitor submitted at the close of the wife's case that there was no case for the husband to answer and elected to stand or fall on his submission. The justices accepted this C submission and dismissed the complaints. The wife appealed to the Divisional Court. In the written reasons for their decision furnished to the Divisional Court the justices stated, inter alia, " had we accepted the wife's evidence in full we could have said there was objective cruelty here but this we were unable to do." On Jan. 20, 1960, the Divisional Court (LORD MERRIMAN, P., and COLLINGWOOD, J.), after analysing the justices' reasons, came to the conclusion D that the justices had misdirected themselves in law, but that the Divisional Court was " incompetent to express any view as to how much and in what particular detail the evidence should have been accepted or rejected as given by the wife and her witnesses " and therefore that the court had " no option but to set this dismissal aside and to order the complaints to be re-heard " by a fresh panel of justices. On Feb. 3, 1960, the Divisional Court gave the wife leave to E appeal against that part of its order which ordered a re-hearing. The wife now appealed, contending that the Divisional Court, having held that the justices were wrong to accept the submission of no case, should either have made an order for maintenance in her favour or have remitted the case to the justices for further findings of fact.

R. E. G. Howe for the wife. F

A. S. Trapnell for the husband.

Cur. adv. vult.

July 28. **ORMEROD, L.J.**, read the judgment of the court at the request of HODSON, L.J.: This is an appeal from an order of the Divisional Court directing that there should be a re-hearing of a summons for maintenance issued by the G appellant wife against her husband based on persistent cruelty and desertion. At the hearing before the justices the husband through his solicitor submitted that there was no case to answer and on being put to his election chose to stand on his submission and called no evidence. The Divisional Court having ordered a re-hearing has in effect released the husband from his election and the wife has appealed to this court, contending that the Divisional Court was wrong to H order a re-hearing having but two alternatives in allowing the appeal, that is to say to make an order on one or other of the grounds put forward by the wife or to remit the case to the justices for further findings of fact. To send a case of this character back for further findings in the light of the directions given by the Divisional Court would, we think, be likely to be a fruitless exercise since the justices could hardly be expected to have a sufficient recollection of the case to I be able to dissect the wife's evidence into parts which could be classified as credible and incredible. It would seem, therefore, that the only way in which justice can be done between the parties must be by re-trial, and, this being the situation, unless the court is compelled by law to allow the appeal it would seem that the course taken by the Divisional Court must necessarily be right.

The first submission made on behalf of the wife was that once the Divisional Court had decided that the justices were wrong in finding that there was no case to answer, an order should have been made in her favour on the ground of the

husband's persistent cruelty. The Divisional Court was of the opinion that the only satisfactory way of dealing with the case was to send it back for re-hearing by a fresh panel of magistrates. In his judgment, the learned President says:

> "I am quite satisfied, not having seen or heard the witnesses, that we are incompetent to express any view as to how much and in what particular detail the evidence should have been accepted or rejected as given by the wife or her witnesses."

A little later, after citing a passage in the justices' reasons, he said:

> "Taking that passage alone it leaves us in complete doubt as to what extent they did accept the wife's evidence if they did not accept it in full."

It is unnecessary to go further into the reasons given by the justices, or to cite further from the President's judgment on this part of the case. The justices having come wrongly to the conclusion that there was no case to answer, it seems clear, as we have said, that justice could not be done between the parties without a re-hearing, particularly as a finding that the charge of cruelty was plainly made out would be equal to saying to the wife that she could at once present a petition for divorce with the imprimatur of the Divisional Court.

The wife contends that there could be no re-hearing because the husband submitted to the magistrates that there was no case to answer and elected to stand on his submission. In *Alexander* v. *Rayson* (1) this court expressed the view that the judge should not be asked to express an opinion until the evidence is completed, and in *Parry* v. *Aluminium Corpn., Ltd.* (2), a case where there was a submission of no case to answer but the defendant was not put to his election, GODDARD, L.J., said (3):

> "... in all these cases of negligence ... the judge should say ... 'Do you elect to call no evidence?'"

In *Laurie* v. *Raglan Building Co., Ltd.* (4), LORD GREENE, M.R., after pointing out that the defendant in that case must be deemed to have elected, said:

> "That being so ... there can be no question of a new trial ... and the matter must be dealt with on the evidence as it stands."

The combined effect of these three cases appears to be that the proper procedure if a submission of no case is made by the defendant in a negligence case is to require him to elect whether to stand on his submission, and if he does so there cannot thereafter be a new trial. In *Yuill* v. *Yuill* (5) LORD GREENE, M.R., considered the practice and said (6):

> "... I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie* v. *Raglan Building Co., Ltd.* (7)) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission."

---

(1) [1935] All E.R. Rep. 185; [1936] 1 K.B. 169.
(2) (1940), 162 L.T. 236.
(3) (1940), 162 L.T. at p. 237.
(4) [1941] 3 All E.R. at p. 337; [1942] 1 K.B. at p. 156.
(5) [1945] 1 All E.R. 183; [1945] P. 15.
(6) [1945] 1 All E.R. at p. 185; [1945] P. at p. 18.
(7) [1941] 3 All E.R. 332; [1942] 1 K.B. 152.

In *Wilson* v. *Wilson* (8) KARMINSKI, J., held that it was the established practice of the Divorce Division, other than in exceptional circumstances, that a party making such a submission must be put to his election.

There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. *Laurie* v. *Raglan Building Co., Ltd.* (9) was a clear case of the former, *Yuill* v. *Yuill* (10) of the latter. In *Yuill* v. *Yuill* (11), LORD GREENE, M.R., said:

> " In the court below, when the case for the appellant was closed, counsel for the respondent made a submission. It was intended to be a submission of no case—not, as I understand, in the sense that the evidence led by the appellant was insufficient in law to support a decision in his favour—but by way of an invitation to the judge to dismiss the petition without calling on the respondent."

There can, we think, be no doubt that in the former type of submission a defendant is bound by his election, and there can be no new trial. This rule, in our opinion, however, does not of necessity apply to the second type of case where the judge is invited to dismiss the case because of the unsatisfactory or unreliable nature of the evidence. In some cases it may well be that the appellate court will be able to decide the case without sending it back, but in others, and this in our judgment is certainly one, justice could not be done without a re-hearing. There was no election in *Yuill* v. *Yuill* (10) and it was unnecessary in any event to consider the question of a new trial, and therefore the question of an election being binding did not arise. In our opinion, if the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission.

It was further submitted on behalf of the wife that even if there should be a new trial the husband should none the less be bound by his election and should not be allowed to give evidence. This proposition is quite untenable. If there is to be a re-hearing the wife may well put her case differently, or call further evidence, and the husband cannot be denied the opportunity of giving in evidence his version of the events in question.

It follows from the foregoing that we would dismiss the appeal. The President took the view, both in this case and in *Horton* v. *Horton* (12) that questions of this kind should be considered on a different basis from other cases as the question of status and therefore of public interest was involved. We agree with the view expressed by the President in *Ramsden* v. *Ramsden* (13) and in other cases that it is better in matrimonial disputes for the justices to hear both sides before coming to a decision, particularly as a finding by them of desertion or persistent cruelty may form the basis for a subsequent petition for divorce. On the other hand, the practice of putting a respondent to his election appears to have been adopted in the Divorce Court since *Alexander* v. *Rayson* (14) was decided. There is always a discretion remaining in the tribunal which would no doubt have the question of status well in mind in considering the exercise of that

---

(8) [1958] 3 All E.R. 195. (9) [1941] 3 All E.R. 332; [1942] 1 K.B. 152.
(10) [1945] 1 All E.R. 183; [1945] P. 15.
(11) [1945] 1 All E.R. at p. 184; [1945] P. at p. 17.
(12) [1960] 1 All E.R. 503. (13) [1954] 2 All E.R. 623.
(14) [1935] All E.R. Rep. 185; [1936] 1 K.B. 169.

A discretion. Subject to this qualification, we see no reason why the practice in divorce cases should not be in line with that in other cases.

Appeal dismissed.

Solicitors: *Carter & Barber*, agents for *Ewing, Hickman & Clark*, Southampton (for the wife); *Watkins, Pulleyn & Ellison*, agents for *Bernard Chill & Axtell*, Southampton (for the husband).

B

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C

WINE SHIPPERS (LONDON), LTD. *v.* BATH HOUSE SYNDICATE, LTD.

[COURT OF APPEAL (Hodson, Ormerod and Harman, L.JJ.), July 22, 25, 1960.]

Discovery—Originating summons—Landlord and tenant—New tenancy—Originating summons adjourned into court for trial with witnesses—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

D

Discovery will not be ordered in proceedings taken by originating summons in the Chancery Division except in very special cases where the facts are such as to justify such an order being made; the nature of the proceedings themselves cannot justify such an order; to do so there must be some

E

circumstances peculiar to the particular case (see p. 285, letter I, and p. 286, letter E, post).

Re Borthwick ([1948] 2 All E.R. 635) applied.

Re St. Martin's Theatre ([1959] 3 All E.R. 298) explained.

The landlords of business premises gave as their reason for opposing the grant of a new tenancy to their tenants that they intended to demolish

F

or reconstruct the premises on the termination of the tenancy, which was the ground of opposition provided by s. 30 (1) (f) of the Landlord and Tenant Act, 1954. The tenants applied by originating summons for the grant of a new tenancy. The landlords filed affidavit evidence stating their intention of redeveloping the premises with adjoining premises, and the tenants filed affidavit evidence not admitting that the landlords had the requisite

G

intention. The evidence so filed was not the whole evidence intended to be given, nor did the affidavits define the issues. The master directed that the summons be adjourned into court for trial with witnesses. On appeal by the landlords from an order for discovery by them,

Held: there was no material on which to find that this was a very special case where the facts were such as to justify an order for discovery being

H

made; and, therefore, discovery must be refused.

Decision of BUCKLEY, J. ([1960] 2 All E.R. 511) reversed.

[As to the discretion of the court in granting discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 5, para. 5, and as to discovery in actions commenced by originating summons, see ibid., p. 6, para. 5, text and note (p).

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES

I (2nd Edn.) 414.]

Cases referred to:

Borthwick, Re, Borthwick v. *Beauvais*, [1948] 2 All E.R. 635; [1948] Ch. 645; [1949] L.J.R. 50; 18 Digest (Repl.) 12, *70*.

St. Martin's Theatre, Re, Bright Enterprises, Ltd. v. *Willoughby de Broke (Lord)*, [1959] 3 All E.R. 298; [1959] 1 W.L.R. 872; 3rd Digest Supp.

Interlocutory appeal.

The landlords, Bath House Syndicate, Ltd., appealed against an order for

discovery made by BUCKLEY, J., on May 5, 1960 (reported [1960] 2 All E.R. 511). The applicants for discovery, Wine Shippers (London), Ltd., who were tenants of No. 83, Piccadilly, instituted proceedings by originating summons under Part 2 of the Landlord and Tenant Act, 1954, for the grant to them by their landlords, Bath House Syndicate, Ltd., of a new tenancy of the premises. The landlords had given notice dated Sept. 28, 1959, to the tenants, determining their tenancy on Mar. 31, 1960, and stating as the ground for opposing an application to the court for the grant of a new tenancy that provided by s. 30 (1) (f) of the Act of 1954, viz., that on the termination of the current tenancy the landlords intended to demolish or reconstruct the whole of the premises. The tenants gave a counter-notice that they were not willing to give up possession on Mar. 31, 1960. The landlords filed an affidavit deposing that they were entitled to the reversion expectant on the leases of the adjoining properties Nos. 82 and 84, Piccadilly, and that they had been given planning permission by the London County Council to erect buildings on the site provided that all three buildings were demolished. The tenants by affidavit deposed that they did not admit that the landlords had the intention required by s. 30 (1) (f). At the hearing before the master, the tenants asked for discovery. The master directed a pro forma summons to be taken out applying for discovery and adjourned this into court. He also adjourned the originating summons into court to be heard on oral evidence with witnesses. On the summons for discovery, BUCKLEY, J., ordered that the landlords:

> " by their proper officer do . . . make and file a full and sufficient affidavit stating whether they have or have had in their possession or power any and (if any) what documents relating to the following matters and accounting therefor that is to say (a) planning permissions building and bye-law consents for the proposed demolition of the properties known as numbers 82, 83 and 84, Piccadilly and/or the proposed reconstruction of the said three properties and each of them now in force or in respect of which application is being made or is required by the appropriate authority to be made together with all correspondence in connexion with any such application as aforesaid (b) agreements or contracts for the said proposed demolition and/or tenders agreements or contracts for the said proposed reconstruction of the said three properties and each of them together with all correspondence in connexion with any proposed agreement or contract for any such purposes as aforesaid (c) the financial position of the respondents to meet the expenditure involved in the said proposed demolition and the said proposed reconstruction being balance sheets and profit and loss accounts for the last two accounting years of the respondents for which accounts have been completed together with any agreements entered into between the respondents and any other party for the provision of finance in connexion with the said proposed demolition or reconstruction (d) (i) the respective interests of the various occupiers of 84, Piccadilly and (ii) the steps taken by the respondents to determine each such interest together with all correspondence in connexion therewith . . ."

R. E. Megarry, Q.C., and *J. L. Harman* for the landlords.
T. J. Sophian for the tenants.

HODSON, L.J.: The landlords, Bath House Syndicate, Ltd., served a notice under s. 30 of the Landlord and Tenant Act, 1954, determining a tenancy of business premises occupied by the applicants, who are Wine Shippers (London), Ltd. They stated in the notice that they would oppose any application for a new tenancy on the ground that they intended to demolish or reconstruct the whole of the premises and could not reasonably do so without obtaining possession. The tenants served a counter-notice under the Act stating that they were unwilling to give up possession, and applied to the court by originating summons for

A the grant of a new tenancy. The tenants filed an affidavit stating that they did not admit that the landlords had the requisite intention to demolish or reconstruct the premises on the termination of their tenancy, and the master adjourned the originating summons into court to be tried on cross-examination of the deponents on their affidavits and on oral evidence in chief subject to cross-examination. The tenants applied by summons for further directions asking for discovery of a B large number of documents. The learned judge made an order for discovery (1), and it is against that order that the landlords have appealed.

If the matter had been res integra, I for my part should have approached this case on the footing that it was obviously a matter in the discretion of the learned judge, with which this court could not be expected to interfere. There being a question between the parties, inter alia, as to the intention of the landlords and C whether theirs was a firm and settled intention to carry out their project, that was a matter for the landlords to establish and one which the tenants were anxious to dispute. The matter is not, however, res integra, but is (as the learned judge recognised) governed by authority.

This procedure by originating summons, unlike proceedings in an action, is designed to deal rapidly and simply with a number of matters—usually matters D which arise in the Chancery Division, in which Division this originating summons was issued. There are no rules dealing with discovery in matters raised by originating summons; and there is authority which is binding on this court to the effect that, although there is a discretion to make orders for discovery in these cases, that discretion will only be exercised in special circumstances. The authority, which is that of LORD GREENE, M.R., is taken from *Re Borthwick, Borthwick* v. E *Beauvais* (2). The words of the judgment which are relied on are these (3):

> " The view that ROXBURGH, J., took, and I think rightly took, was that the discovery in proceedings in the Chancery Division by originating summons ought only to be ordered in very special cases where the facts are such as to justify such an order being made."

F I should explain that *Re Borthwick* (2) was not a matter arising under the Landlord and Tenant Act, 1954, but was a matter which arose under an Act which had not very long been in operation—the Inheritance (Family Provision) Act, 1938. For applications under that Act there were special rules, one of which, R.S.C., Ord. 54F, r. 9, reads:

> " The court or a judge may require evidence in regard to any matter which G the court or a judge considers to be relevant to the application and may direct any party to the proceedings or any person on whom notice of the proceedings has been served to attend on the hearing of the application and give evidence orally or to be cross-examined on any affidavit made by him."

H The learned judge, ROXBURGH, J., who refused to make an order for discovery in that case, based himself not on the narrow ground that in proceedings under the Inheritance (Family Provision) Act, 1938, and the rules relating to applications made thereunder discovery could not ordinarily be ordered, but on the broad ground which was accepted by the Court of Appeal, as is shown by the judgment of LORD GREENE, M.R., with whom the other member of the court, ASQUITH, L.J., agreed.

I I think that it is to be taken to be the rule, at any rate in the Chancery Division, that, where proceedings are taken by originating summons, discovery will not be ordered except in what are described as " very special cases where the facts are such as to justify such an order being made ". It may be that matters have changed since the originating summons was first thought of and that in modern light and in the complexity of modern litigation it may well be desirable that

---

(1) [1960] 2 All E.R. 511. (2) [1948] 2 All E.R. 635; [1948] Ch. 645.
(3) [1948] 2 All E.R. at p. 636; [1948] Ch. at p. 649.

discovery should be ordered in all cases where the learned judge in his discretion thought fit. That is a matter for consideration by the Rule Committee; and we here are aware that there is in existence a Report (4), for which one member of this court is responsible, which indeed made recommendations on this particular subject, but those recommendations have not yet been adopted and we have to administer the law and practice as it is laid down by authority; otherwise indeed —apart from the fact that it is our duty to do so—we should create great confusion.

The learned judge did not purport to do other than to follow the decision of the Court of Appeal in *Re Borthwick* (5), but he felt able to make the order for discovery in this case on considering what had taken place before the master when the matter came before him because the master thought it would be a convenient course to adjourn the originating summons into court to be tried on oral evidence, not merely on cross-examination of deponents on their affidavits but on evidence to be given orally in chief and cross-examined to in the ordinary way. The learned judge felt himself able to say that that was a peculiar position and came within the heading of a " very special case where the facts are such as to justify such an order being made ". He said in part of his judgment (6):

> " The issues have not been defined in pleadings, and although they may be capable of being inferred from the affidavits which have been filed, I do not think that it would be right to say that they have been defined by those affidavits. On the other hand, the evidence so far filed is not anything like the whole evidence which it will be necessary for the parties to adduce at the trial."

I may say that he accepted, as I understand it—at any rate I accept—the submission made by counsel on behalf of the landlords that the nature of the proceedings themselves cannot be special circumstances but there must be some circumstances peculiar to the particular case. So far as I can see, there were no special circumstances in this case which in themselves differ from those in other cases; and the mere fact that the evidence before the master was incomplete and that the matter was directed to be tried by oral evidence does not make it in any sense a special case of very special facts. But counsel for the tenants does not only depend on that. He says that this is one of those cases where, within the *Re Borthwick* (5) principle (as he described it), discovery ought to be ordered because there is real doubt as to the landlords' case. That submission cannot be accepted as a ground in this case for making an order for discovery. The position which the tenants have taken up is that they do not know anything about the landlords' financial position, anything about the arrangements which have been made with regard to disposal of the tenants in other buildings in the same block, and although they have seen the planning permission they say that that is conditional and unsatisfactory and so forth. The learned judge took the view that the evidence before the court when it is given orally ought to be properly tested and that in order to enable it to be properly tested he thought it right that the applicants should have an opportunity of subjecting the deponents to cross-examination.

Lord Greene, M.R., said in *Re Borthwick* (7) that the plaintiffs had

> ". . . not put forward a single shred of fact or suggestion casting doubt on the fairness or accuracy of the executors' evidence on the subject of value. Indeed, their complaint is this: ' We cannot do that without some materials, and the reason why we want discovery is to enable us to test what the executors have said and to see whether or not we can find something on which to attack their estimate '. In ordinary litigation the ordinary rules

(4) Report of the Committee on Chancery Chambers and the Chancery Registrars' Office, 1960, Cmnd. 967, para. 73.
(5) [1948] 2 All E.R. 635; [1948] Ch. 645.
(6) [1960] 2 All E.R. at p. 516.
(7) [1948] 2 All E.R. at p. 637; [1948] Ch. at p. 650.

A of discovery enable litigants to conduct such an examination, but this is a very special jurisdiction under a very special Act . . . The judge has ample power, if he is not satisfied or if he thinks there is a reasonable ground for doubting the accuracy of such an estimate as this, to require further evidence on the point, to summon the executors before him, to put questions to them and to subject them to cross-examination."

B LORD GREENE, M.R., is dealing there with the language of r. 9 of R.S.C., Ord. 54F, which I have read. He continued:

> " If [the judge] thought that was the proper course, or if the matter was a matter of doubt or if suspicion was aroused, that, no doubt, would be the course that he would take . . ."

C Then LORD GREENE, M.R., went on to deal with the facts of the particular case; but in his judgment he lends no support to the view that an application for discovery ought to be acceded to merely in order to arm the applicants with material for cross-examination.

In this case there was no material put before the court to form the foundation D for any doubts as to any of the matters referred to. All that the applicants were able to do was to express ignorance. I mention that because reference has been made to a decision of DANCKWERTS, J., in *Re St. Martin's Theatre, Bright Enterprises, Ltd.* v. *Lord Willoughby de Broke* (8), where there were special circumstances. DANCKWERTS, J., does not in terms refer to *Re Borthwick* (9) in his judgment, although it was cited to him, however, in argument as justifying an E order for discovery being made against the tenants. In that case it was shown, on a report by the official referee, that dilapidations for which the tenants were liable amounted to some £16,000, and in those circumstances DANCKWERTS, J., felt justified in making an order (which, in view of the facts of that case, I regard as an order made in very special circumstances) for discovery against the tenants.

F However, the rule itself must, I think, necessarily apply just as much in proceedings instituted under the Landlord and Tenant Act, 1954, as in any other proceedings commenced by originating summons; and, as the learned judge did, I also reject the argument that *Re Borthwick* (9) has no application to any other subject-matter than an originating summons issued under the Inheritance (Family Provision) Act, 1938. The ground which the court stood on was a wider G ground than that: it was expressed quite clearly to be a ground applicable to an originating summons. In those circumstances I think that this court has no alternative but to allow this appeal.

The evidence before the learned judge has been supplemented, by leave today without opposition on the part of the landlords, by an affidavit by a clerk in the employment of the solicitors for the tenants, which has shown that they have H inspected at Bush House the file of the landlord company; some information is given as to the capital of the company and so forth such as would be expected to appear on the register; and there is a description of the mortgages and charges. That information, of course, could have been obtained by the tenants at any time. It has provoked in answer a letter (which is later in date than the judgment of the learned judge) written to the representative of the landlords from an insurance I company showing the arrangement which has been tentatively reached between the insurance company and the landlords for providing building finance. That is the only additional evidence which has been put before us.

I do not think that it is necessary for me to go through the order which the learned judge has made. He recognised that a summons for discovery could not be at large, as in cases where issues have been defined by pleadings and discovery has to be given touching all the matters in issue between the parties; and with the

(8) [1959] 3 All E.R. 298. (9) [1948] 2 All E.R. 635; [1948] Ch. 645.

assistance of counsel an order for limited discovery was made. It is quite clear that, the proceedings being by originating summons, where issues are not clearly defined by pleadings, unless points of claim and of defence are ordered, it must necessarily be that a special order for discovery is made and not one in the widest form. Since, however, the parties have not had any difficulty in agreeing the form of discovery order which would be appropriate in such a case as this, there seems to be no point in my going through the details of it. A B

The tenants, in support of their argument, have in addition referred to the practice in the county court as it was under the old Landlord and Tenant Act, 1927, and have pointed out that in the county court where the premises were within the county court jurisdiction proceedings were by originating application and that an answer to that application opened the way to an application for discovery as a matter of common form. That may be a recommendation in support of the argument that the position should be the same in the High Court, but proceedings in the High Court are not always regulated in the same way as proceedings in the county court, and we have to take proceedings in the High Court as we find them. Even if other counsels may prevail in future, it seems to me that at present this court is bound, following *Re Borthwick* (10), to come to the conclusion that here there was really no material on which to find that the exception—that is, the " very special case where the facts are such as to justify an order being made "—has been established. C D

For those reasons I would allow the appeal.

ORMEROD, L.J.: I agree; and although we are differing from the learned judge there is nothing that I wish to add. E

HARMAN, L.J.: I agree, but with reluctance. It seems to me that in cases involving questions of fact of this sort discovery should go as a matter of ordinary discretion. It further seems to me that this case and the last one that we heard in this court, both under the Landlord and Tenant Act, 1954, do show that the order regulating procedure under that Act is in need of attention; but as matters stand I do not feel that we are at liberty to do anything but allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Samuel Sebba* (for the landlords); *Evans, Baker & Co.* (for the tenants.)

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

(10) [1948] 2 All E.R. 635; [1948] Ch. 645.

CARL-ZEISS-STIFTUNG *v.* RAYNER & KEELER, LTD. AND OTHERS.

Re TRADE MARK No. 249457 AND OTHERS.

[CHANCERY DIVISION (Russell, J.), July 22, 26, 29, 1960.]

Contempt of Court—Publications concerning legal proceedings—Pending proceedings—Dispute concerning trade mark and passing off—Letters to editor of trade journal and retailer with regard to publication of advertisements and to sale of articles bearing trade mark—Test of what constitutes contempt of court in such circumstances.

In 1955 C.-Z.-S. (which claimed to be a legal entity in East Germany) started an action for passing-off against a firm of the same name (said to be a legal entity in West Germany). In 1959 C. Z. Scientific Instruments, Ltd. (an agent in England marketing products of East German firms) issued an originating notice of motion to have registered trade marks expunged from the register. In 1960 the solicitors to the West German C.-Z.-S. wrote to the editor of a trade publication as follows: "It has been brought to our notice that you have published in your issue of the 10th instant an advertisement for Zeiss Binoculars on behalf of C. Z. Scientific Instruments, Ltd. . . . We must inform you that our clients [the West German C.-Z.-S.] are the registered proprietors of the trade mark No. 335738 being the words 'Carl Zeiss Jena' as depicted in the lenticular device shown in that advertisement, while C. Z. Scientific Instruments are the agents of an East German nationalised concern . . . which has no right to use the trade marks of which our clients are the proprietors. We think it right to warn you that our clients will take all legal steps available to them to protect their rights in their registered trade marks". The trade mark there referred to was in issue in both the action and the originating motion. The letter was not written for publication. The solicitors also wrote to a retail company selling cameras and optical instruments: "... you are advertising for sale cameras with what are stated to have 'Tessar' lenses but which are manufactured by an East German nationalised concern . . . We must inform you that our clients [C.-Z.-S. in West Germany] are the registered proprietors of trade mark No. 249457, being the word 'Tessar'. The East German nationalised concern has no right to use any trade mark registered in the name of our clients, and we think it right to warn you that our clients will take all legal steps available to them to protect their rights in their marks . . ." The plaintiff in the action and the applicant in the originating motion moved for injunctions against the West German C.-Z.-S. and the solicitors and alternatively an order for sequestration of the property of the West German C.-Z.-S. and an order committing the solicitors to prison. The ground for the application was that the letters constituted contempt of court, particularly as they contained no reference to the pending proceedings in which the title of the West German C.-Z.-S. to the trade marks was challenged.

Held: the letters did not constitute contempt of court because they were not likely to harm the plaintiff (in the action) and the applicant (in the originating motion) in the preparation or presentation of their cases by tending to discourage people from giving evidence on their behalf (see p. 293, letters D and E, post).

Dictum of KAY, J., in *Goulard & Gibbs* v. *Sir Coutts Lindsay & Co., Ltd. & Ferranti* ((1887), 4 R.P.C. at p. 190) considered.

Daw v. *Eley* ((1868), L.R. 7 Eq. 49) and *J. & P. Coats* v. *Chadwick* ([1894] 1 Ch. 347) distinguished.

Mullard Radio Valve Co., Ltd. v. *Rothermel Corpn., Ltd.* ((1933), 51 R.P.C. 1) and *Fenner* v. *Wilson & Co. (Barnsley), Ltd.* ((1893), 10 R.P.C. 283) applied.

M

[As to contempt of court by writing tending to defeat the ends of justice, see 8 HALSBURY'S LAWS (3rd Edn.) 6-12, paras. 8-15; and for cases on the subject, see 16 DIGEST 28, 29, *258-268*.]

Cases referred to:

Coats (J. & P.) v. *Chadwick*, [1894] 1 Ch. 347; 63 L.J.Ch. 328; 70 L.T. 228; 16 Digest 26, *236*.

Daw v. *Eley*, (1868), L.R. 7 Eq. 49; 38 L.J.Ch. 113; 33 J.P. 179; 16 Digest 27, *249*.

Dunlop Pneumatic Tyre Co., Ltd. v. *Clifton Rubber Co., Ltd.*, (1902), 19 R.P.C. 527.

Fenner v. *Wilson & Co. (Barnsley), Ltd.*, (1893), 10 R.P.C. 283; 16 Digest 28, *266*.

Gaskell & Chambers, Ltd. v. *Hudson*, [1936] 2 K.B. 595; 105 L.J.K.B. 734; 155 L.T. 507; Digest Supp.

Goulard & Gibbs v. *Sir Coutts Lindsay & Co., Ltd. & Ferranti*, (1887), 4 R.P.C. 189.

Haskell Golf Ball Co. v. *Hutchison & Main*, (1904), 21 R.P.C. 497; 16 Digest 28, *267*.

Henderson v. *Laing*, (1824), 3 Sh. (Ct. of Sess.) 384.

M'Lauchlan v. *Carson*, (1826), 5 Sh. (Ct. of Sess.) 147.

Mullard Radio Valve Co., Ltd. v. *Rothermel Corpn., Ltd.*, (1933), 51 R.P.C. 1; Digest Supp.

R. v. *Payne*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 16 Digest 23, *190*.

St. Mungo Manufacturing Co. v. *Hutchison, Main & Co., Ltd.*, (1908), 25 R.P.C. 356; 16 Digest 27, *247i*.

Smith v. *Mitchell*, (1835), 14 Sh. (Ct. of Sess.) 172.

Motions.

These were two motions, one by Carl-Zeiss-Stiftung, a firm in the eastern zone of Germany, which was the plaintiff in a passing-off action and the other by Carl-Zeiss Scientific Instruments, Ltd., which was the applicant in an originating motion (the purpose of which was to have trade marks expunged from the register). The motions brought in the action and in the proceedings by originating motion were each based on the same facts and the notice in each case claimed the same relief, viz., that Carl-Zeiss-Stiftung (a firm of the same name as the plaintiff in the passing-off action, but located in the western zone of Germany) and its solicitors be restrained until judgment in the relevant proceedings or further order from representing either (a) that the East German nationalised concern V. E. B. Carl Zeiss Jena had no right to use trade marks containing the words "Carl Zeiss Jena" or (b) that the said respondents were the registered proprietors of the trade mark No. 335778 or any other trade marks sought to be taken off the register in the said proceedings by originating motion without indicating that the said respondents' rights to be so registered were being challenged, and generally from making any representation calculated to prejudice or impede the fair trial of the relevant proceedings. Alternatively the applicants claimed an order that a writ of sequestration against the property of the said respondents might be issued and an order that the said solicitors be committed to prison for contempt of court in writing and sending a letter dated June 15, 1960, to the editor of a journal called "The Optician".

The facts appear in the judgment.

G. T. Aldous, Q.C., and *D. W. Falconer* for the applicant in each motion.

T. M. Shelford for the respondent Carl-Zeiss-Stiftung, Western Germany, a defendant in the passing-off action.

J. W. Mills for the respondent solicitors.

R. G. Lloyd for the respondent Carl-Zeiss-Stiftung, Western Germany, a respondent to the originating motion for rectification of trade marks.

RUSSELL, J.: These are two motions alleging contempt of court in two different proceedings. One of them is a passing-off action and the other is an originating motion for expunging certain trade marks. The action started in 1955. The plaintiff in the action is called Carl-Zeiss-Stiftung, which asserts itself to be a legal entity in the east zone of Germany, and the main defendant in the action bears exactly the same name, Carl-Zeiss-Stiftung, asserting itself to be a legal entity in West Germany. I will refer to them for convenience as respectively East Stiftung and West Stiftung. The originating motion, which was launched in 1959, is a motion to expunge registered trade marks, including a mark " C Z Jena " and another mark " Tessar ". All those marks are at present registered in the name of the West Stiftung.

Very briefly, the background facts are that in Germany at Jena, which is in what is now East Germany, before the war there was an entity, or an organisation, called the Carl-Zeiss-Stiftung which owned and operated two factories, one of which made optical instruments and the other of which made glass, and one may fairly say that in this country the name " Zeiss " has for a long time at least been a known name in connexion, in particular, with binoculars. The original Carl-Zeiss-Stiftung was the registered proprietor of the trade marks in question in the originating motion. During the war those marks became vested in the Custodian of Enemy Property. At the end of the war the two factories to which I have referred in East Germany were, under Russian military government, sequestrated, and are now operated as separate and independent entities and, as I understand it, legal persons. It is claimed that those separate bodies hold licences from the East Stiftung in respect of the trade marks in question. The products of these factories, which are now independent corporations, are marketed in this country by an agent, an English company, called Carl Zeiss Scientific Instruments, Ltd. The West Stiftung claims to be " the Stiftung ", if I may use that phrase, and a summons is pending in the action to stay all proceedings by the plaintiff in the action on the ground that those persons, the individuals who instructed solicitors for the plaintiff, had no authority to do so, not being what I have referred to as " the Stiftung ". The custodian in 1959 transferred the relevant trade marks to the West Stiftung.

The motion by Carl Zeiss Scientific Instruments, Ltd., alleging contempt and the motion by the East Stiftung alleging the same contempt were argued together, and in each reliance is placed on the same conduct and in each the same relief is asked for.

The subject of the complaint is to be found in two letters, though the notice of motion actually refers to one letter only. The other letter is in evidence as indicative of what the respondents to the motion will continue to do unless they are restrained. The first letter is dated June 15, 1960, and is written by the solicitors to the West Stiftung, Messrs. Dehn & Lauderdale. It is addressed to The Editor, " The Optician ", Columbia House, Aldwych, W.C.2., and it says:

> " Dear Sirs, It has been brought to our notice that you have published in your issue of the 10th instant an advertisement for Zeiss Binoculars on behalf of C. Z. Scientific Instruments, Ltd., of 12A Golden Square, W.1. We must inform you that our clients Carl-Zeiss-Stiftung, a body corporate having its principal place of business at Heidenheim a.d. Brenz Wurtenberg in the Federal Republic of Germany, are the registered proprietors of the trade mark No. 335738 being the words ' Carl Zeiss Jena ' as depicted in the lenticular device shown in that advertisement, while C. Z. Scientific Instruments are the agents of an East German nationalised concern which calls itself VEB Carl Zeiss Jena, but which has no right to use the trade marks of which our clients are the proprietors. We think it right to warn you that our clients will take all legal steps available to them to protect their rights in their registered trade marks."

VEB C. Z. Jena is the corporate entity to which I have previously referred which

operates the optical glass factory which was sequestered from the Carl-Zeiss-Stiftung. The trade mark referred to in that letter is one of the trade marks in issue in the proceedings. It was at one time suggested that that was a letter which was written to the editor, " The Optician ", for publication, but, in my judgment, it is plain that it was not written for publication but was intended as a warning to the editor that proceedings might be taken against him or against his paper should they continue to insert the East Stiftung's advertisements under these trade marks in their publication. Whether or not such an action could lie against the proprietors of a trade publication of this kind it is quite unnecessary for me to determine; but it is clear that it was not really written for publication but as a warning letter to the proprietors of " The Optician ".

The other letter is dated June 29, 1960, and is addressed to Dixons Camera Centre, Park Street, Bristol. It is also written by Messrs. Dehn & Lauderdale on behalf of the West German Stiftung. Dixons Camera Centre is a company or firm which has a number of branches at which it sells by retail, cameras, optical instruments, and so forth. That letter says:

> " It has been brought to our notice that you are advertising for sale cameras with what are stated to have ' Tessar ' lenses but which are manufactured by an East German nationalised concern calling itself ' VEB Carl Zeiss Jena '. We must inform you that our clients, Carl Zeiss Stiftung, a body corporate having its principal place of business at Heidenheim a.d. Brenz Wurtenberg in the Federal Republic of Germany are the registered proprietors of trade mark No. 249457, being the word ' Tessar '. The East German nationalised concern has no right to use any trade mark registered in the name of our clients, and we think it right to warn you that our clients will take all legal steps available to them to protect their rights in their marks. No doubt you will inform your other offices of the contents of this letter."

It is quite plain that the West Stiftung proposes, providing it is permissible, in appropriate cases where retailers are selling the products of the East Stiftung under any of these trade marks, to write such a warning letter to retailers, though there is no suggestion of any general campaign or circularisation of all retailers or of publicity in the press. It is said on behalf of the East Stiftung that letters such as these constitute contempt of court, and, on the basis of that, in each of the two proceedings the motion was launched asking for this relief, for an order that the West Stiftung and their solicitors, Mr. Steiner and Mr. Dehn, who are the two partners in Dehn & Lauderdale,

> " be restrained until judgment in these proceedings or further order from representing either (a) that the East German nationalised concern VEB Carl Zeiss Jena have no right to use trade marks containing the words ' Carl Zeiss Jena ' or (b) that the said respondents are the registered proprietors of the trade mark 335738 or any of the other trade marks sought to be taken off the register in the above-named proceedings without indicating that the said respondents' rights to be so registered are being challenged, and generally from making any representation calculated to prejudice or impede the fair trial "

of this action. Then it proceeds alternatively, to ask for a writ of sequestration against the property of the defendants, that is the West Stiftung, and for an order committing the two partners in the firm of solicitors to Brixton Prison for contempt. So far as actual relief is concerned, the battle has been confined to the question whether or not these letters and others which may be written similar to them constitute contempt of court. If so, it is said that there should be an injunction and no order was actually sought either to sequestrate or to commit.

It is to be observed that such letters contain two dogmatic statements (i) that the East German concern has no right to use the relevant trade mark and (ii) that the West Stiftung has the right, being the registered proprietor of the trade

mark; and there is no mention of any proceeding and no suggestion that there is any challenge in proceedings to the dogmatic statements made in the letters. The respondents to the motion submit that those letters and others like them are not a contempt of court and that any further letters which they write like those will not be contempt of court. There is no evidence, as I have indicated, that there is ever any intention behind the respondents to the motion or their solicitors to do more than write such letters in particular cases. The letters were written by the solicitors pursuant to general instructions by the West Stiftung to take all such steps as they considered desirable to protect the trade marks of their clients, short of actually initiating proceedings without further reference to their clients.

It seems to me clear that these letters and other letters like these letters can only be contempt of court if they are prejudicial to the current proceedings as being intended or likely to deter or discourage witnesses from giving evidence in favour of the plaintiff in the one proceedings or the applicant in the other proceedings. There are, of course, other general aspects of contempt by interference with legal proceedings, for example attempting to influence a judge or jury or the case where there is a campaign calculated to discourage litigation by intimidation or ridicule of a party and so forth; but none of these other aspects of contempt are, in my judgment, relevant to the present case. There are no general rules by which any particular case may be judged as constituting contempt; each must plainly be considered separately and on its own facts. In this case I ask myself the question (and I ask it at the moment apart from authority) whether the letters complained of and similar letters hereafter to be written are likely to harm the plaintiff and the applicant respectively in the preparation and presentation of their cases by tending to discourage people from giving evidence on their behalf. I will accept for the purposes of my judgment that there are, or may be, issues in the proceedings on which evidence of persons in the trade, such as the recipients of these letters, may be relevant.

I myself think that the answer to the question which I have posed to myself must, as a matter of common sense, be "No". It is, of course, of the first importance in the administration of justice that parties to litigation should not be in any way hampered in the prosecution of their claims or the putting forward of their contentions; but I think that a finding of contempt of court must be based on a solid view of the likelihood of such interference and not on fanciful notions of the susceptibility of the recipients of letters such as those. Incidentally, I observe that in fact the recipients of these two letters did nothing except refer the question immediately to the East Stiftung, or, rather, I think, to C. Z. Scientific Instruments, Ltd.

Counsel for the applicants submitted that it must be a contempt pending proceedings to assert dogmatically in letters to people who might be potential witnesses that one side was entitled to trade marks and the other side were infringers and without rights, particularly without any reference at all to the fact that there were pending proceedings in which those dogmatic statements were being challenged. To pursue such a course of conduct, he argued, would tend to crystallise in the minds of the recipients a wrong and fanciful notion of what the position actually was, and thus would be inclined to assist the opposing side in putting forward the contrary view in proceedings.

For the respondents to the motions it was said that these letters were no more than warning letters addressed to alleged infringers which might or might not be followed by proceedings. It was said (and correctly) that they were not a broadcast circular, they contained no abuse of the other side, they were mere warning letters and as such are not a contempt of court. It is pointed out that it is impossible to write a warning letter in a case such as this without asserting on the one hand that one side is entitled and on the other hand that the other side has no right. It is also argued for the respondents that the addition to such a letter of some reference to pending proceedings cannot be required in order to save

the letter from being contemptuous as being likely to discourage the recipient from giving evidence in those proceedings which are not mentioned at all. I must say that I for my part assent to those arguments.

My attention was drawn to a great many cases, to some of which I must refer, although I must bear in mind that, as has been said in some of them, each case must depend on its particular facts. I will refer first to those on which particular reliance was placed by the applicant in the motion.

Goulard & Gibbs v. *Sir Coutts Lindsay & Co., Ltd. & Ferranti* (1) is very shortly reported. In an action for infringement of certain patents, a motion was brought to restrain the plaintiffs from continuing to publish an advertisement which had appeared already in " The Times " and other newspapers signed by the plaintiffs' solicitors having reference to proceedings in the action, and their publishing or permitting to be published any advertisement alleging that the plaintiffs' patents had been or were being infringed by the defendants or either of them. This was the form of the advertisement signed by the plaintiffs' solicitors:

> " We are instructed by the directors of the National Company to warn the public that in consequence of the continued infringement of their patents by the defendant company, and by Mr. Ferranti, an action has been commenced in the High Court of Justice, Chancery Division, against Sir C. Lindsay and Co., Ltd., and Mr. Ferranti to restrain them from further infringing the said patents, and that actions will be commenced against all persons employing or using apparatus which is not according to the letters patent without leave of the patentees."

On reading that, it looks as if a " not " has crept in, and that it should be " to restrain them . . . from using apparatus which is according to the letters patent without leave of the patentees ". Counsel for the defendants in that action contended that the advertisement was calculated to prejudice the public mind and to prevent a fair trial of the action. On the other hand reliance was apparently only placed on the terms, which are not relevant to the present matter, of s. 32 of the Patents, Designs, and Trade Marks Act, 1883. There were some interlocutory observations from KAY, J., who did not deliver any judgment. One was (2):

> " You can warn as much as you like, but can you advertise I have brought an action against A B which is certain to succeed? "

At a later stage he said (2) that:

> ". . . to advertise a positive statement that the defendants had infringed was wrong, and [he] asked if the plaintiffs would undertake not to go on advertising to that effect. He further stated that he should not grant an injunction except to restrain this."

Ultimately the undertaking was given; and, as I said, there was no formal judgment at all. My only comment on that case is to state that it differs from the present case in that it involved an advertisement in all the leading newspapers as distinguished from individual letters written warning individual people. Secondly, I observe that in that case KAY, J., said (2):

> " You can warn as much as you like, but can you advertise I have brought an action against A B which is certain to succeed? "

I am bound to say that, if the learned judge meant to answer his own question in the affirmative, as I think that he did, because he said that to advertise a positive statement that the defendants had infringed was wrong, it seems to me that the learned judge in this very short case, which did not take the ordinary course, was making a mistake, and I find it very difficult to reconcile that case with the other decision.

---

(1) (1887), 4 R.P.C. 189. (2) (1887), 4 R.P.C. at p. 190.

A The next case referred to by counsel for the applicants was *Daw* v. *Eley* (3). I need not go much into the details of the facts except to state that, broadly speaking, there were patent proceedings pending, and the solicitor for one side, under a pseudonym, participated very actively in correspondence in the public press discussing and arguing fully the pros and cons of the infringement of a particular patent which was in issue in the proceedings, and, if I may borrow a B phrase which we shall find in subsequent cases about this sort of contempt, in every sense of the word discussing the merits in public. LORD ROMILLY, M.R., in that case, having said that he thought that the conduct of Mr. Collette (who was the solicitor) could not be defended, went on to say (4):

> " The principle is quite established in all these cases, that no person must do anything with a view to pervert the sources of justice or the proper flow C of justice; in fact they ought not to make any publications, or to write anything, which would induce the court, or which might possibly induce the court, or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the cause between the parties; and certainly they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating D to the case. Now, if that is done with the intention of perverting the ends of justice there is no question that the court would stop it, and very often the court will judge for itself what are the fair inferences to be derived from the publications which appear; but it must also go beyond this; it must stop the publication where the evident result would be to affect the administration of justice, though that might not have been the intention of the person E who did it."

He goes on to deal with the facts of the case and to deal with matters that Mr. Collette had written in his letters and published in the papers. The learned Master of the Rolls then went on (5):

> " Can anybody doubt that if I were persuaded that the whole of the statements in that letter were true, it would very seriously affect my opinion as F to the validity and the originality of Mr. Daw's patent? Then it is to be observed that this is written, not by a mere stranger, who might say that he really knew nothing at all about the cause, but it is written by the solicitor of the gentleman who is opposed to Mr. Daw in this suit. Surely that is a very strong feature in the case; he must wish that his client should succeed; and I venture to say that there is no solicitor who would not in the same G position feel the same thing; and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which, if believed, must have a beneficial effect upon his client, and afterwards say ' I had no intention of that sort at all, however much I may wish for it ' . . . There is one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, H should abstain entirely from discussing the merits of those questions in public print; if they do it at all, they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant, and has the strongest possible interest in his success, is, I in my opinion, highly reprehensible."

There is no suggestion whatsoever in the present case that it was intended or indeed thought likely by Messrs. Dehn & Lauderdale in any way to prejudice the minds of the recipients with a view to making it the more difficult for the East Stiftung to prepare and conduct their case. It is perfectly correct, however, to say that in *Daw* v. *Eley* (3) in the fullest sense there was a discussion of the

(3) (1868), L.R. 7 Eq. 49. (4) (1868), L.R. 7 Eq. at p. 59.
(5) (1868), L.R. 7 Eq. at p. 60.

merits of the case in public print, and is a very different situation from that which obtains in the present case, where there are what I regard as mere warning letters not involving any discussion of facts as such addressed in the form of individual letters to individual members of the retail trade.

The next case referred to was *J. & P. Coats* v. *Chadwick* (6), the decision in which, as it seems to me, did not find favour in the eyes of the Divisional Court in the later case of *R.* v. *Payne* (7). In *Coats* v. *Chadwick* (6) the headnote reads:

> "Pending an action for infringing a trade mark the plaintiffs are at liberty to warn the trade by circular; but to introduce discussion of the merits of the action is a contempt."

The circular in that particular case was in this form, being a circular sent out to the retail dealers in the same cotton trade as Messrs. Coats:

> "We regret to have to draw your attention to the fact that Messrs. James Chadwick & Brother, Ltd., have recently attempted to injure our trade by adopting a blue label for 400 yards six cord which so closely resembles ours as to produce the result of their goods being passed off as ours, nor can there be any doubt that this is intended . . . they have now adopted the device of imitating ours in order more readily to find purchasers for their thread. We are determined to use every means in our power to put a stop to unfair competition of this sort, and have therefore commenced proceedings against Messrs. Chadwick. We have also been compelled to take proceedings against retail dealers selling goods manufactured by Messrs. Chadwick and bearing the blue label which is an imitation of ours. We think it right to warn the trade in general of the course we are pursuing, and, for your information, we beg to give you at foot an extract from a recent judgment given in the Chancery Division of the High Court of Justice."

Then that extract from the judgment is added. CHITTY, J., said (8):

> "This circular has been widely distributed by the plaintiffs among retail dealers in the sewing-cotton trade and others. The special ground of complaint is that the class of persons to whom the circular is addressed is the very class to whom the defendants will have to look for evidence in support of their defence, and that it is calculated to create a bias against the defendants in the minds of those who receive it, and to deter them from coming forward as witnesses for the defendants. It appears to me that it is calculated to prejudice the defendants in their defence, and that it thus falls under the well-established head of contempt, by interfering with the course of justice. It is a strong, one-sided statement by one of the parties to the action on the merits of the case which is pending before the court. It unhesitatingly imputes fraud and dishonesty to the defendants. It charges them, not merely with imitating the plaintiffs' goods, but with the deliberate intention of imitating. The fact that Messrs. Coats hold a high position in the trade, being, as their counsel stated, at the very head of the trade, gives additional force to these statements, and renders it the more probable that the traders, and particularly the smaller retail traders, will be thereby affected adversely to the defendants . . . I grant the injunction as asked, with costs, adding that I should not have intervened if the circular had amounted to a mere warning to the trade against infringement or imitation. The plaintiffs are at liberty to warn the trade as much as they like, notwithstanding the pendency of this action; but they are bound to refrain during its pendency from public discussion on the merits or demerits of the case."

It is to be observed that CHITTY, J., came to the conclusion that it was a contempt on the basis of all the facts that he mentioned in the passage which I have just read, including, in effect, accusations of deliberate and fraudulent attempts to

(6) [1894] 1 Ch. 347. (7) [1896] 1 Q.B. 577. (8) [1894] 1 Ch. at p. 349.

steal the goodwill of Messrs. Coats. But, in addition to that, it certainly wholly distinguishes the case from the one I am now dealing with. I bear in mind very much the language of the learned judge in the last passage of his judgment, in which he recognised—as indeed did KAY, J., in *Goulard* v. *Lindsay & Co., Ltd.* (9)—that you are at liberty to warn the trade. If one considers the circulars in this case, I ask myself the question: How can you warn the trade, the retailers, not to sell the products of the Eastern Stiftung under these trade marks except in the course of a letter saying " We are entitled to the trade marks " mentioning also expressly that the other side are not entitled to the trade marks? To go beyond that might come into the field of discussion of the merits of the case; but I cannot bring myself to think that it is discussion of the merits of the case to assert that which one is bound to assert in the course of a warning letter, viz., that the writer is entitled to the trade marks and that the other people concerned are not.

The next case referred to was the Scottish case of *St. Mungo Manufacturing Co.* v. *Hutchison, Main & Co., Ltd.* (10) in which the defendants were the owners of a registered design for a golf ball, and they brought an action to restrain the St. Mungo Manufacturing Company from infringing it. I think that I had better name the parties, because they take up different positions according to their position in the action. During that litigation Hutchison distributed a circular to retailers, and that circular said that the St. Mungo Company had applied a fraudulent or obvious imitation of their design to golf balls and that proceedings had been commenced against the St. Mungo Manufacturing Company, and warning retail dealers against selling such golf balls. The St. Mungo Manufacturing Company applied for an injunction to restrain Hutchison from distributing those circulars, on the first ground that they constituted contempt of court, and on the second and alternative ground (which is not in point in these present proceedings) that the circular was unfair and misleading. It is to be observed that the circular there contained the phrase " a fraudulent or obvious imitation ", and that phrase is a phrase taken from s. 58 (b) of the Patents, Designs, and Trade Marks Act, 1883; but it is the fact that, although " fraudulent " in that section does not mean fraudulent in the fullest sense but in the sense of being a fraudulent copying, as suggested in the course of the hearing it is unlikely that such nicenesses were normally present to the mind of golf retailers in Scotland, and to them I should have thought that the word " fraudulent " would have meant that somebody was accusing the St. Mungo Manufacturing Company of being a fraudulent concern; to that extent the circular was evasive in its nature and calculated to bring discredit on the St. Mungo Manufacturing Company in relation to the pending proceedings. LORD SALVESEN was the judge who tried the case, and he said (11):

" The decisions relied on by the complainers, that the issue of the circular in question constituted a contempt of court, seem to support their proposition. In the earliest case on the subject (*Henderson* v. *Laing* (12)), a person who published and circulated a statement tending to create an impression as to the merits of the question which formed the subject of pending actions unfavourable to his opponent, was found to have committed an improper and unwarrantable interference with the proceedings of the court and was subjected in payment of the expenses of a petition and complaint. In *M'Lauchlan* v. *Carson* (13) it was held to be an interference with the administration of justice to publish a report of a statement, made at a public meeting of road trustees by their agent, relative to a case depending in court against them. The Lord President (HOPE), in sustaining the petition and complaint and finding the respondents liable in expenses, said (14)—' Reports of

(9) (1887), 4 R.P.C. at p. 190.
(10) (1908), 25 R.P.C. 356.
(11) (1908), 25 R.P.C. at p. 359.
(12) (1824), 3 Sh. (Ct. of Sess.) 384.
(13) (1826), 5 Sh. (Ct. of Sess.) 147.
(14) (1826), 5 Sh. (Ct. of Sess.) at p. 149.

depending cases are at all times very dangerous and tend to interfere with the administration of justice. It may be perfectly lawful to report that an interesting point of law has arisen and is depending in court but it is extremely improper to enter upon all the facts of the case '. No doubt there was a specialty in that case that the newspaper, in which the report appeared, was likely to be read by persons who might be jurors or witnesses at the approaching trial, but the observations made were perfectly general. In the subsequent case of *Smith* v. *Mitchell* (15), although nothing had been done by the respondent except to print in the form of a pamphlet a memorial and queries previously submitted by him to counsel, and calculated to produce an impression prejudicial to his opponents, he was found liable in the expenses of a petition and complaint to have the circulation interdicted although the copies complained of had not been circulated by his direction or authority. It thus appears that according to our law any publication bearing upon the merits of a dispute sub judice which prejudges the case or discounts the judgment before it is issued is liable to be restrained. I think the circular complained of is of this nature. It states as a fact that the complainers had applied a fraudulent or obvious imitation of a registered design belonging to the respondents to their golf ball called the ' Colonel ', and it warned retail dealers that if they sold ' Colonel ' golf balls with this design they would expose themselves to certain statutory penalties. The respondents were practically therefore by means of this circular endeavouring to obtain the same advantages as they would have got if an interim interdict had been granted, and, if their argument is sound, without exposing themselves to any liability for damages."

In my view, having regard to the very general statement which I have read, the statement (16) that:

> " It thus appears that according to our law any publication bearing upon the merits of a dispute sub judice which prejudges the case or discounts the judgment before it is issued is liable to be restrained ",

if the words " according to our law " are meant to include the law of this country, is far too wide. It seems to me, having regard to the later cases, quite plain at least that these letters could have been written in the form in which they are written with a reference to the fact that there were proceedings pending, and the phrase of LORD SALVESEN would, I think, suggest quite clearly that, in his view, a letter with such an addition would, nevertheless, since it suggests dogmatically that there is infringement and so forth, be restrained as contempt of court. I observe also that he goes on to say that, if not restrained, the respondents in that case would have been getting for themselves the advantage of an interlocutory injunction without any cross-undertaking as to damages. With great respect, that appears to me not to be relevant on the question whether there was contempt. LORD SALVESEN goes on (17) to another general observation:

> ". . . I think it is a wholesome rule that in all cases, that have been submitted to a legal tribunal for decision, the merits of the case should not be tried or discussed in publications by interested parties or by the newspapers; and that any breach of this rule should be visited by the penalty that the court may deem appropriate."

Again, with respect, if the learned judge there was intending to include in that a letter of the character which we have in the present case and to say that such a letter would constitute contempt I would respectfully disagree with him; but, as has been pointed out, every case must be dealt with on its own facts, and there is always a danger, in my view, of taking from cases such as this general statements made in the course of a judgment by judges which are made really

(15) (1835), 14 Sh. (Ct. of Sess.) 172. (16) (1908), 25 R.P.C. at p. 359.
(17) (1908), 25 R.P.C. at p. 360.

with the judicial eye, if I may put it in this way, only on the particular facts of the particular case.

The next case to which I propose to refer is *Gaskell & Chambers, Ltd.* v. *Hudson* (18). In that case both sides were manufacturers of beer pumps and both sides had sent circulars out to brewers. The defendants' circulars, according to the report, allegedly criticised the plaintiffs' beer pumps, and the action was brought in respect of statements in those circulars. After the statement of claim had been delivered the defendants sent round to the brewers a circular letter in these terms:

> " Since the commencement of this business our sales have shown considerable increases week by week, and this unbounded success seems to have aroused the rabid jealousy of [the plaintiffs] as shown by the enclosed ' statement of claim ' which we have received from them. Please keep the enclosed copy for reference. Our reason for bringing this to your notice is because [the plaintiffs] commenced a similar action against us on July 18 last, which they wholly discontinued on Nov. 30, and we refuse to be intimidated by these actions, and we intend to contest this ' cock and bull ' claim to the uttermost degree."

A copy of the statement of claim was enclosed. It was held that that did not constitute contempt. Counsel for the applicants in the present case pointed out that there had been in that case a previous circular by the other side to which, in a sense, this was a counterblast, and he also pointed out that it did, of course, include the statement of claim of the other side; but I think there is considerable force in the submission on behalf of the respondents to this motion that that decision, a decision of the Divisional Court in 1936, reveals a more robust approach to the question of contempt than is perhaps disclosed in earlier decisions, and to my mind suggests that the letters complained of in the present proceedings should not be treated as a contempt of court.

The next decision to which my attention was drawn is *Haskell Golf Ball Co.* v. *Hutchison & Main* (19), in which the Haskell Golf Ball Company started an action against Robert Hutchison and John Main for infringement of letters patent relating to golf balls. After the action had been commenced an advertisement was inserted by the plaintiffs in a paper known as the " Irish Golfer " with a large circulation saying:

> " Important Notice. It has come to the notice of the Haskell Golf Ball Company that golf balls known as the ' Springvale Eagle ', the ' Springvale Hawk '. . . are being offered for sale in the United Kingdom in infringement of letters patent belonging to the Haskell Company. This is to give notice that actions have been commenced against the manufacturers of or dealers in such balls claiming injunctions to restrain such infringements and damages. And further notice is given, that the Haskell Company will enforce its rights against all persons buying or selling or otherwise dealing in or using such infringing golf balls."

That was signed by the solicitors to the Haskell Golf Ball Company. BUCKLEY, J., in the course of his judgment, says (20):

> " Then it is said the advertisement ought to be stopped because it is an interference with the course of justice, and in that sense a contempt of court; that it is a proceeding that will embarrass the court in coming to a fair decision in the action when it comes on for trial. I confess that I have great difficulty in understanding how that contention can be put forward seriously. The contention as I understand it is this: that by this notice the patentee says, ' You are infringing my patent; you are selling an infringement of my patent; I have commenced an action to restrain the infringement of

(18) [1936] 2 K.B. 595.
(19) (1904), 21 R.P.C. 497.
(20) (1904), 21 R.P.C. at p. 500.

my patent ', and he is thereby affirming that the decision in the action will be in his favour. Would it have made any difference had he said 'offering for sale that which I allege to be an infringement of my patent '? I think certainly not. The circular simply means this: ' I say my patent is good, and I say you are infringing it; I have commenced an action in which I am going to maintain the affirmative of that, in which of course I may be defeated, and I may be wrong '. In *Fenner* v. *Wilson & Co., Ltd.* (21) the language of the threat was this: ' The public are especially warned that users of ' certain things ' are liable to damages and injunction in respect of such user '—which is stronger language than this. That was a direct affirmation that they were liable and that the decision would be in the patentee's favour. Upon that LINDLEY, L.J., said (22): ' We think we ought to say that we could not possibly treat these advertisements as a contempt of court; it would be extravagant to treat them as anything of the sort '. That language is stronger than this. The circular in this case, in my opinion, amounts to nothing more than this; the patentee says, 'The patent is a good one, I am going to maintain that it is a good patent, and you are infringing it '. Of course it would be competent for the patentee to commence actions against all the persons dealing in these alleged infringing articles. What he has done is something less than that. Instead of suing them all, he gives them notice that they are doing that which, as he claims, is a wrongful act. To use the language of LINDLEY, L.J., it seems to me that it is extravagant to treat anything of that kind as a matter which calls for the interference of the court or one which will interfere in any way with the course of justice."

That case differs from the present case in two respects, one, that this was actually published in a newspaper (and, of course, the publications, if I may use the expression, in this case are on a far more restricted basis) and, secondly, that the notice in this case mentioned that actions had been commenced against the manufacturers: and counsel for the applicants, I think, distinguishes that case in particular by saying that it would have been different if the letters in the present case had drawn to the attention of the recipients the fact that there were proceedings pending and therefore that some people were presumably challenging the validity of the statement already made.

I observe in passing that that case, *Haskell Golf Ball Co.* v. *Hutchison & Main* (23), was one which seems to have dealt not with the same subject-matter but with the same parties, or at any rate one of the same parties, as LORD SALVESEN'S case, *St. Mungo Manufacturing Co.* v. *Hutchison, Main & Co., Ltd.* (24).

The next case to which I will refer is *Mullard Radio Valve Co., Ltd.* v. *Rothermel Corpn., Ltd.* (25), which is a decision of FARWELL, J. That was a case in which Mullard Radio Valve Co., Ltd., was suing Rothermel Corpn., Ltd., claiming an injunction to restrain the infringement of certain letters patent. After the writ had been issued the plaintiffs inserted in a trade paper an advertisement in the following terms:

" Warning. Our attention has been called to the fact that radio valves are being imported into and sold in Great Britain constituting an infringement of letters patent No. 287958. We have accordingly found it necessary for the protection of our rights and of the radio industry in general, to issue writs against: [and then four names and addresses, including those of the defendants, were given], all of whom have been importing and selling infringing valves. We feel it our duty to warn both suppliers and users of infringing valves that they are rendering themselves liable to legal proceedings, and our reason for issuing this notice is to avoid, if possible, causing unnecessary annoyance and expense to any such suppliers or users who have purchased valves, without knowledge of the existence of the above patent."

(21) (1893), 10 R.P.C. 283. (22) (1893), 10 R.P.C. at p. 288.
(23) (1904), 21 R.P.C. 497. (24) (1908), 25 R.P.C. 356.
(25) (1933), 51 R.P.C. 1.

cannot think that any of the language of the learned judge in that case can be relied on in support of the submission that a letter such as the one now before me must be contempt unless there is a reference to the existence of proceedings, and I am bound to say that, for my part, the general impression I get from that case is that the learned judge would have found little difficulty in deciding that the letters in the present case were not to be treated as contempt.

The final case to which I was referred is *Dunlop Pneumatic Tyre Co., Ltd.* v. *Clifton Rubber Co., Ltd.* (27). In that case Dunlop Pneumatic Tyre Co., Ltd., had begun an action against Clifton Rubber Co., Ltd., to restrain infringement of patent. The plaintiffs in the action issued a circular in these terms:

> "Notice.—The Dunlop Pneumatic Tyre Co., Ltd., are advised that the tyre now being sold under the name of the Wapshare tyre is an infringement of the letters patent held by them. An action has already been brought against the Clifton Rubber Co., Ltd., in respect of their sale of such tyres, and the public are warned that similar actions will be brought against any person found manufacturing, selling, or using such tyres. Since the above notice first appeared certain cycle dealers have been discovered selling the said tyres and actions have accordingly been brought against them."

On the basis of that, proceedings were launched based on contempt to restrain the sending out of such circulars. There is no considered judgment of JOYCE, J., but he finally said (28):

> "I do not see why the plaintiffs were not entitled to say this. I think it has been well considered and well settled by counsel, and I do not see why they should not say it."

I have listened, I hope, with the closest attention to the arguments which have been developed before me with the authorities in mind, and it is with those authorities in mind that I have come to the conclusion which I have already expressed, that these and similar letters are not to be regarded as contempt of court in relation to the proceedings now pending. I was exhorted, very properly, by counsel for the applicants, that I must be astute to keep the stream of justice clear and pure; but for my part I cannot see in any such letter any likelihood of pollution.

It is at all times extremely dangerous to refer in any judgment to a case which has not been referred to by counsel; but I am going to refer to one such case which I looked at during the adjournment and after I had announced my decision. I refer to it because I think it right that I should do so, particularly having regard to the argument that counsel for the applicants presented to me about the absence of any mention in the letters of the existence of proceedings. It is *Fenner* v. *Wilson & Co.* (*Barnsley*), *Ltd.* (29). In that case the plaintiff began an action for infringement of patent, and, pending proceedings, inserted the following circular in the "Manchester Courier" and "Manchester Guardian":

> "Lake's Patent, No. 9855, A.D. 1886. Japanned shuttles, bobbins, and spools. Notice is hereby given that proceedings in Chancery will be commenced against all parties manufacturing, selling, or using japanned shuttles, bobbins, or spools not manufactured by the owner of the said letters patent or his licensees. The public are especially warned that users of japanned shuttles, bobbins, and spools are liable to damages and injunction in respect of such user. Sole licensees in England:—Wilson Bros., Limited, bobbin manufacturers, Cornholme, near Todmorden. A. Macdonald Blair, 5, St. James' Square, Manchester. Solicitor for H. N. Fenner—New England Butt Company, Providence, Rhode Island, U.S.A."

On the basis of that, proceedings for an injunction to restrain continuance of such publications were launched. KEKEWICH, J., came to the conclusion that

(27) (1902), 19 R.P.C. 527. (28) (1902), 19 R.P.C. at p. 528.
(29) (1893), 10 R.P.C. 283.

A these matters did constitute contempt of court. I observe that in the course of his judgment he says (30):

> " He [the plaintiff] states in plain terms that he, and those claiming through him, are the only persons entitled to use this invention, and that strangers who use it are liable to damages; and he also states that proceedings will be commenced against those who infringe those rights, ignoring
> B altogether the fact that there is the action pending. These advertisements, issued after the action commenced, do amount to a statement by the plaintiff that the action must succeed; that the action is a mere establishing of a title which really is beyond dispute. That is really precisely what KAY, J., puts in the case of *Goulard & Gibbs* v. *Lindsay & Co.* (31). ' You can warn as much as you like ', he says, ' but can you advertise, " I have brought an
> C action against A.B. which is certain to succeed?" ' ".

But the matter went to the Court of Appeal. The only relevant passage is one which has already been referred to in the passage which I cited from the judgment of BUCKLEY, J., in *Haskell Golf Ball Co.* v. *Hutchison & Main* (32) where LINDLEY, L.J., said (33):

D

> " I shall say very little about it. I am not going through the law of the case, which is in some respects difficult. I shall content myself with saying that having considered the case we think we ought to say that we could not possibly treat these advertisements as a contempt of court. It would be extravagant to treat them as anything of the sort."

I mention that case because, having observed it and looked at it, I thought it
E would be convenient to add it to those to which I had already referred. It occurs to me that the view expressed by the Court of Appeal is contrary to the submissions of counsel for the applicants that these matters are contemptuous in that they lack a reference to the existence of the present current proceedings.

In the result the motions in both cases will be refused.

Motions dismissed.

Solicitors: *Courts & Co.* (for the applicants in both motions); *Dehn & Lauderdale* (for the respondents in both motions).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(30) (1893), 10 R.P.C. at p. 285.
(31) (1887), 4 R.P.C. at p. 190.
(32) (1904), 21 R.P.C. at p. 500.
(33) (1893), 10 R.P.C. at p. 288.

NOTE.

Re TREPCA MINES, LTD.

[COURT OF APPEAL (Hodson, Ormerod and Harman, L.JJ.), July 8, 11, 12, 13, 1960.]

Company—Winding-up—Proof—Rejection—Appeal—Function of court—Claim contingent on the prospects of success in foreign proceedings.

[As to appeal from the decision of a liquidator in respect of proof of debts in a company's winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 671, para. 1330; and for cases on the subject, see 10 DIGEST (Repl.) 1038, 1039, *7178-7180.*

As to the general principles concerning jurisdiction in relation to foreign immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 30, para. 60; and for cases on the subject, see 11 DIGEST (Repl.) 369-371, *353-375.*]

Cases referred to:

British South Africa Co. v. *Companhia de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 11 Digest (Repl.) 371, *374.*

Emanuel v. *Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 11 Digest (Repl.) 503, *1211.*

Kentwood Constructions, Ltd., Re, [1960] 2 All E.R. 655; [1960] 3 W.L.R. 646.

Interlocutory Appeal.

This was an appeal from an interlocutory judgment of ROXBURGH, J., given on Oct. 20, 1959, (1) on a summons, taken out by a solicitor acting for the applicant, Radomir N. Pachitch (Pasic) of 2, Place-de-Four, Geneva, Switzerland, a creditor of Trepca Mines, Ltd., a company incorporated under the Companies Act, 1948, then in voluntary liquidation, to which summons the liquidator of the company was respondent, for an order that the respondent's decision rejecting the proof of the applicant in certain matters in the sum of £2,616,486, might be reversed and that the said proof might be ordered to be admitted in full. Security for costs in the sum of £650 had been ordered and evidence had been filed in the normal course. Both parties had given notice of their intention to cross-examine witnesses. Until the day of the hearing of the summons the applicant had been professionally represented. At the hearing the applicant appeared in person. He did not understand questions in English and soon after the hearing had begun he asked to be heard through an interpreter. He was unable to conduct his case unless he was allowed to conduct it through an interpreter. ROXBURGH, J., ruled that the proceedings before the court must be conducted in English and, with the consent of the liquidator, himself read the summons and the evidence filed on behalf of the applicant. On Feb. 10, 1954, the applicant had obtained judgment in a Yugoslav court against the company for £2,500,000, but by a judgment of the Yugoslav Court of Appeal, dated Sept. 5, 1955, this judgment was reversed. On June 3, 1957, the date the winding-up commenced, the applicant took Yugoslav proceedings, which failed later the same year, to set aside the judgment of Sept. 5, 1955, of the Yugoslav appellate court. He now produced a document dated Oct. 15, 1959, which showed, he said, that he put in train further Yugoslav proceedings for the purpose of upsetting the judgment of Sept. 5, 1955, on the ground that he had found fresh evidence, and asked for the English proceedings to be adjourned pending the re-hearing in Yugoslavia. ROXBURGH, J., rejected this application for an adjournment. The applicant claimed to prove for the sum of £2,500,000 plus interest at four per cent. under the following five alternative heads: (i) under the judgment of Feb. 10, 1954, (ii) as the value of the contingency that the judgment of Sept. 5, 1955, might be reversed, (iii) as the value of his ownership of the mining rights vested in his father on his father's death in December, 1926, and thereafter exploited by the company, (iv) as

(1) Reported [1959] 3 All E.R. 798.

the value of his claim to be indemnified for his loss as a result of this exploitation, which he claimed was wrongful, and (v) as the value of his claim for an account of the profits made by the company by this exploitation. ROXBURGH, J., rejected the applicant's application, being satisfied on the authority of *Emanuel* v. *Symon* (2) and another decision (3) that the English court would not enforce the judgment of the Yugoslav court as it would be given in the absence of the company. The applicant now appealed. The appeal is reported for the Court of Appeal's comments on *Re Kentwood Constructions, Ltd.* (4); the Court of Appeal did not comment on the observations of ROXBURGH, J., on the conduct of proceedings through an interpreter, for which the case was reported when it was before him; but see p. 306, letter C, post. The ground of the Court of Appeal's distinction of *Emanuel* v. *Symon* (2) is shown at p. 306, letter D, post.

J. G. Foster, Q.C., C. A. Settle, Q.C., and *Miss Valerie A. Pearlman* for the applicant.

L. G. Scarman, Q.C., P. J. Sykes and *R. O. C. Stable* for the liquidator.

HODSON, L.J.: This is an appeal from an interlocutory judgment of ROXBURGH, J., given on Oct. 20, 1959, whereby he rejected an application by the applicant to reverse the decision of the liquidator of Trepca Mines, Ltd., rejecting the proof of debt of the applicant for the sum of approximately £2,500,000. This court is asked to set aside the learned judge's order and to admit the proof either in whole or in part, or to remit the case to a learned judge of the Companies Court in order that the question at issue between the parties may be decided, it being contended in this court that the learned judge in two respects made an error in law in rejecting the applicant's proof so that he was deflected from the task which was before him of himself assessing the claim.

It is convenient in this connexion to refer to a recent decision of BUCKLEY, J., in the Companies Court, *Re Kentwood Constructions, Ltd.* (4) where, there having been a petition to wind-up the company and the claimants, a firm of chartered accountants, having been employed to investigate the company's affairs, the claimants lodged a proof of debt in the winding-up for £525 for professional services: the liquidator rejected the proof, and the claimants issued a summons asking that the decision of the liquidator might be reversed and that the proof be ordered to be admitted in full. BUCKLEY, J., in considering the matter before him, had to consider whether it was open to him to receive evidence as to the amount of the claim and whether he could (as the rules (5) provide) accept the claim not wholly but in part. He said (6) that:

> ". . . it was argued, on behalf of the liquidator, that the question before the registrar was simply whether the liquidator was right or wrong, on the evidence available to him, in rejecting the proof. HIS LORDSHIP did not think that that was the function of the court on an appeal from a rejection of a proof. When an application was made to the court to reverse such a decision of a liquidator, evidence was filed which was commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof, and the court was bound to decide the rights of the claimant in the light of the evidence which was before the court and not merely to express a view on whether the liquidator was right or wrong in rejecting the proof when he rejected it."

BUCKLEY, J., concluded (6) by saying:

> " It was not merely the function of the court to say that a decision was right or wrong; it might vary the decision in any way that it thought

(2) [1908] 1 K.B. 302.
(3) *Sirdah Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670.
(4) [1960] 2 All E.R. 655.
(5) Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 108 (cf., r. 107).
(6) [1960] 2 All E.R. at p. 656.

necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor."

I refer to that case as showing that the position, as I see it, is this: if (as the applicant contends) the learned judge was wrong in law on the two points which he took, which excluded the applicant's proof, the matter still must be determined by the court, that is to say by the learned judge of the Companies Court, and it is not possible to dispose of the matter finally on this appeal. The only other matter to which I need refer by way of preface is this. The applicant himself, although he had been represented by counsel before the registrar, appeared before the learned judge in person. He did not speak English: he conducted the proceedings through an interpreter. The proceedings were conducted in English so far as the court was concerned, as the court was listening to the English language through the mouth of the interpreter. But the difficulties of the learned judge were no doubt enhanced by the fact that, in a difficult matter, questions of law were left to be decided by him without any assistance from trained lawyers acting on behalf of a man who had not command of the English language.

[His Lordship then turned to the proof of debt which was rejected. After citing *Emanuel* v. *Symon* (7), the principle in which, he said, was best enunciated by Buckley, L.J. (8), His Lordship intimated that the difficulty in applying that decision was that the foreign judgment in the present case was not simply a judgment in personam but was a judgment in a mixed action which involved mining rights. The claim corresponded to a claim in this country for conversion of concentrates extracted from land in pursuance of a claim made by the applicant to the mining rights, which were immovables; the English court would not entertain actions in respect of immovables in a foreign country (*British South Africa Co.* v. *Companhia de Moçambique* (9)), and so the only competent court was the court of Yugoslavia. Roxburgh, J.'s reason for disposing of the claim was not, therefore, a proper answer to the applicant's claim; and, though the basis for valuing the applicant's claim might be very slender, as his claim was purely a contingent one depending on prospects of success in a foreign court, yet its value had never been assessed. It had been said that the judgment of the Yugoslav Court of Appeal in 1955, was not a judgment really on an appeal but was a judgment obtained by a party, a representative of the state, whose title corresponded roughly to that of the prosecutor or procurator-general in this country, who had intervened and, after argument as a third party, had obtained reversal of the decision. The mere fact that the system of law of another country allowed a judgment to be overturned by the intervention of a legal official, by whatever name called, did not, in His Lordship's opinion, disentitle the judgment to respect as a judgment. His Lordship (Hodson, L.J.) concluded that, for the reason stated at letter E above, the appeal should be allowed for the applicant's claims had not been assessed. Ormerod and Harman, L.JJ., concurred, the latter intimating that heads (iv) and (v) of the applicant's claim (see p. 305, letter A, ante), which were equivalents, might in certain circumstances have some value, which was a question that the court below had not considered.]

Appeal allowed: case remitted to the Companies Court for the value of the applicant's claims to be ascertained.

Solicitors: *Sidney Pearlman* (for the applicant); *Freshfields* (for the liquidator).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

---

(7) [1908] 1 K.B. 302. (8) [1908] 1 K.B. at p. 309. (9) [1893] A.C. 602.

THE LIVERPOOL (No. 2).

Steamship Enterprises of Panama, Inc., Owners of S.S. Liverpool *v.* Owners of S.S. Ousel, and Others.

[Court of Appeal (Hodson, Ormerod and Harman, L.JJ.), July 4, 5, 6, 7, 28, 1960.]

Shipping—Limitation of liability—Fund paid into court—Claims—Claim by harbour board for expenses of raising wreck, etc.—Claim by owners of wreck for liability to harbour board for excess of expenses over proceeds of sale of wreck, etc.—Double proof—Duty of harbour board to mitigate loss—Whether owners could claim against fund—Whether harbour board should give credit for amount of owners' claim—Mersey Docks and Harbour Board Act, 1954 (2 & 3 *Eliz.* 2 *c.* xlv), *s.* 3 (3).

On Jan. 8, 1957, the Ousel and the Liverpool were in collision in the River Mersey, for which collision the owners of the Liverpool admitted liability in negligence and as a result of which the Ousel sank. On the same day the Mersey Docks and Harbour Board gave notice under a private Act, the Mersey Docks and Harbour Board Act, 1954, that, pursuant to s. 3, the board had taken possession of the Ousel, would raise her, would sell any property recovered and would apply the proceeds in payment of the expenses. Any deficiency, viz., amount remaining after deducting the proceeds of sale from the aggregate expenses, was recoverable under s. 3 (3)* from the owners of the Ousel, but so that the amount recoverable by the board from the owners did not exceed the amount of the prescribed limit of liability under the Merchant Shipping Act, 1894, as amended. In an action by the owners of the Liverpool claiming limitation of liability a sum of some £106,226 together with interest thereon had been brought into court. Claims against this fund included claims by owners of cargo in the Ousel (amounting to some £170,507), and by the board (amounting to some £128,382) for damages and expenses incurred in connexion with the wreck of the Ousel, in which claim the board gave credit for some £60,359 proceeds of sale of cargo in and equipment of the Ousel. Claims were made also by the owners of the Ousel for the loss of the vessel and other damage (amounting to some £70,765) including a claim (item 22) for liability for wreck-raising expenses, namely, the excess of the board's expenses over the proceeds of sale reduced to the statutory limit of the Ousel under the Merchant Shipping Acts, for which amount (some £10,835), the owners of the Ousel were liable to the board under s. 3 (3). The amount of item 22 had not in fact been paid to the board; the owners of the Ousel had been ready and willing to pay it, but the board had not been willing to receive it. It was contended on behalf of cargo owners that item 22 was the same as part of the board's claim and that either item 22 should be disallowed or, if it were allowed, the board should give credit for its amount.

* Section 3 (3) of the Private Act reads as follows: "If the proceeds of sale of the vessel or of the wreck of the vessel and the cargo furniture tackle and apparel thereof so raised removed blown up or destroyed are insufficient after paying the said duties and purchase tax to reimburse the board for the said expenses the board may recover the deficiency from the person who was the owner of the vessel at the time of the sinking stranding or abandonment thereof . . . as a debt in any court of competent jurisdiction.

"Provided that if the owner of the vessel so raised removed blown up or destroyed is not under the provisions of the Merchant Shipping Acts, 1894 to 1952 as amended by any enactment for the time being in force, entitled to limit his liability in respect of the said deficiency that owner shall not be liable to pay the board in respect thereof a sum exceeding the amount prescribed in . . . the Merchant Shipping Act, 1894, as amended by any enactment for the time being in force, as the limit of liability to damages of the owner of the ship in respect of loss or damage to vessels goods merchandise or other things." The statutory limits of the Ousel and of the Liverpool are stated at p. 310, letter B, and p. 309, letter I, post. Item 22 was the amount of the statutory limit of the Ousel.

Held: the board's proof should be allowed at its full amount and that of the owners of the Ousel for item 22 should be disallowed for the following reasons—

(i) the board had a statutory right under s. 3 (3) of the Mersey Docks and Harbour Board Act, 1954, to recoup its expenses from the owners of the Ousel, apart from its common law rights in tort against the owners of the Liverpool (which had given rise to the fund in court) and there was no reason why the board should give credit for the value of that statutory right (viz., in effect give credit for a security against a third party) when proving against the fund in court, nor was the board under any obligation first to enforce its rights against the owners of the Ousel (see p. 313, letter B, post).

(ii) the principle that double proof would not be allowed in respect of what was in substance the same debt applied wherever there were rival claimants against an insufficient fund (see p. 313, letter E, post), and to admit both the claim of the board in full and the claim of the owners of the Ousel in respect of item 22 would be to admit double proof, since item 22 was in substance a claim in respect of the same debt (viz., the liability of the owners of the Liverpool for negligence) as that of the board; accordingly only one of the two claims should stand (see p. 314, letter F, post).

Dicta of SCRUTTON, L.J., in *Re Melton* ([1918] 1 Ch. at p. 60) and of MELLISH, L.J., in *Re Oriental Commercial Bank* ((1871), 7 Ch. App. at p. 103) applied.

(iii) the claim of the board had priority to the claim of the owners of the Ousel since the board were out of pocket in respect of the amount of item 22, and the owners of the Ousel, not having been called on to pay the amount, were not out of pocket (see p. 314, letter F, post).

Re Fenton ([1930] All E.R. Rep. 15) applied.

QUAERE whether the owners of the Ousel could resist a claim by the board under s. 3 (3) of the Act of 1954 to the extent of the dividend recovered by the board against the fund in respect of the amount (about £10,835) of item 22 (see p. 314, letter I, to p. 315, letter A, post).

Decision of LORD MERRIMAN, P. ([1960] 1 All E.R. 465) reversed.

[As to limitation of liability in shipping cases, see 1 HALSBURY'S LAWS (3rd Edn.) 63-65, para. 126; and 104, para. 236; see also for limitation of liability generally, 30 HALSBURY'S LAWS (2nd Edn.) 940, para. 1303; and 943, para. 1305; and for cases on the subject, see 41 DIGEST 914-926, *8058-8149* and SUPPLEMENTS.

For the rule against double proof, see 2 HALSBURY'S LAWS (3rd Edn.) 464, para. 914; and for cases on the subject, see 10 DIGEST (Repl.) 982, *6764*.]

Cases referred to:

Blackburne, Re, Ex p. Strouts, (1892), 9 Morr. 249; 4 Digest (Repl.) 287, *2632*.

British Westinghouse Electric & Manufacturing Co., Ltd. v. *Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 39 Digest 480, *1025*.

Burrell v. *Simpson & Co.*, (1877), 4 R. (Ct. of Sess.) 177; 39 Digest 921, *8113i*.

Dee Conservancy Board v. *McConnell*, [1928] All E.R. Rep. 554; [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656; 92 J.P. 54; 17 Asp. M.L.C. 433; Digest Supp.

Fenton, Re, Ex p. Fenton Textile Assocn., Ltd., [1930] All E.R. Rep. 15; [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273; 4 Digest (Repl.) 434, *3849*.

Hoey, Re, Ex p. Hoey, (1918), 88 L.J.K.B. 273; 4 Digest (Repl.) 364, *3316*.

Houlder, Re, [1928] All E.R. Rep. 366; [1929] 1 Ch. 205; sub nom. *Houlder, Re, Ex p. Rabbidge* v. *Eagle Star Dominions Insurance Co.*, 98 L.J.Ch. 12; 140 L.T. 325; 4 Digest (Repl.) 295, *2689*.

Melton, Re, Milk v. *Towers*, [1918] 1 Ch. 37; 87 L.J.Ch. 18; 117 L.T. 679; 4 Digest (Repl.) 453, *3974*.

Mersey Docks & Harbour Board v. *Hay, The Countess*, [1923] A.C. 345, 490; 92 L.J.P. 65; 129 L.T. 325; 16 Asp. M.L.C. 161; 41 Digest 943, *8351.*

Morris (B. O.), Ltd. v. *Perrott & Bolton*, [1945] 1 All E.R. 567; 172 L.T. 234; 2nd Digest Supp.

Morrison S.S. Co., Ltd. v. *Greystoke Castle (Cargo Owners)*, [1946] 2 All E.R. 696; [1947] A.C. 265; [1947] L.J.R. 297; 176 L.T. 66; 2nd Digest Supp.

Oriental Commercial Bank, Re, Ex p. European Bank, (1871), 7 Ch. App. 99; 41 L.J.Ch. 217; 25 L.T. 648; 10 Digest (Repl.) 982, *6764.*

Plummer & Wilson, Re, Ex p. Shepherd, (1841), 2 Mont. D. & De G. 204; 1 Ph. 56; 11 L.J.Ch. 25; 41 E.R. 552; 4 Digest (Repl.) 415, *3696.*

Prehn v. *Bailey, The Ettrick*, (1881), 6 P.D. 127; 45 L.T. 399; 4 Asp. M.L.C. 465; 41 Digest 601, *4280.*

Sass, Re, Ex p. National Provincial Bank of England, Ltd., [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 4 Digest (Repl.) 418, *3722.*

Appeal and cross-appeal.

The Mersey Docks and Harbour Board appealed and the owners of part of the cargo of the s.s. Ousel cross-appealed, against the decision of Lord Merriman, P. (reported [1960] 1 All E.R. 465), on preliminary points of law in a limitation of liability action brought by the owners of the s.s. Liverpool, which had negligently collided with and sunk the Ousel in the River Mersey. The facts were agreed between the parties, and were as follows.

On Jan. 8, 1957, the Panamanian tanker Liverpool and the British coaster Ousel were in collision in the port of Liverpool. As a result of the collision the Ousel was beached, and on the same day the Mersey Docks and Harbour Board (hereinafter referred to as " the board ") gave notice to the owners of the Ousel that the Ousel, her cargo, furniture, tackle or apparel were, or were likely to become, an obstruction or impediment or danger to the safe and convenient navigation or use of the port of Liverpool or the sea channels leading thereto, and that pursuant to s. 3 of the Mersey Docks and Harbour Board Act, 1954, and all other powers in that behalf, the board had taken possession thereof and would proceed to raise, remove, blow up or destroy the same as they deemed necessary. The notice also contained the statement that any property recovered would be sold by the board and the proceeds applied as a common fund for the payment of the expenses incurred in connexion with the raising, etc., of the obstruction, and with the detainer and sale of the property, the surplus (if any) being returned to the persons entitled thereto. It added that if the expenses so incurred exceeded the proceeds of sale or other sum payable to the board the difference up to, but not exceeding the amount prescribed by the Merchant Shipping Acts as the limit of the liability to damages of an owner of a ship in respect of loss or damage to vessels, goods, merchandise or other things, was recoverable by the board from the owner.

As between herself and the Ousel, the Liverpool was wholly to blame for the collision; and by an action proceeding in the Liverpool district registry, the owners of the Liverpool claimed to limit their liability in accordance with s. 503 and s. 504 of the Merchant Shipping Act, 1894, admitting that the collision and the damages resulting therefrom were caused by the improper navigation of the Liverpool. The plaintiffs paid into court about £112,000, consisting of an undisputed sum of £106,226 12s. 10d., being the aggregate amount of £8 per ton on the registered tonnage of the Liverpool, together with interest thereon at four per cent. The usual decree in a limitation action was made by the district registrar*. The relevant claims against the fund were as follows. There was a claim by the owners of certain cargo in the Ousel for £142,903 11s. 3d. There was a further claim for £27,603 18s. 11d. by other cargo owners. Also there was the

* By order dated May 28, 1958, as amended by an order dated Jan. 20, 1959, pursuant to the order of Karminski, J. (see [1959] 1 All E.R. 492).

claim of the board for £128,382 11s. 7d. for expenses incurred and damage sustained in connexion with clearing the Mersey of the wreck of the Ousel. In this claim the board gave credit for £60,359 14s. 3d. in respect of the sale of cargo formerly laden in the Ousel and certain of her equipment. There was also a claim on behalf of the owners of the Ousel for £70,765 5s. 1d. Of this sum £59,929 13s. 1d., including £58,000 for the estimated value of the Ousel herself, was the total of loss and damage of which particulars were given originally under twenty-one heads. Finally, the owners of the Ousel claimed £10,835 12s. under the heading "Mersey Docks and Harbour Board Contingent Claim of Board in respect of wreck-raising expenses; namely, Statutory Limit of Ousel". It was this claim (hereinafter called "item 22") which was the subject of the present appeal.

On behalf of the owners of the Ousel it was contended that though the money had not actually been paid, they had no escape from their liability to pay this sum to the board as being the deficiency referred to in s. 3 (3) of the Act of 1954, reduced to the amount of the limitation under the Merchant Shipping Acts. The board, on the other hand, claimed that it was entitled to recover in full the amount due under the Act of 1954, if and when it suited it to do so, and also to claim a dividend from the fund on the full amount of its claim, with the proviso that the sum recovered from these two sources should not exceed the total amount of the board's claim against the Liverpool.

It was ordered that this dispute should be tried as an issue in the reference, and two questions were agreed before KARMINSKI, J., in chambers for submission to the court, as follows*:

"It is ordered that the following two agreed questions be tried as separate issues by a judge alone:

"1. Whether item 22 of the claim of the owners of the Ousel should be allowed notwithstanding that the liability to the Mersey Docks and Harbour Board to which such item relates is contingent only.

"2. Whether, if the said item 22 of the claim of the owners of the Ousel is allowed the Mersey Docks and Harbour Board must give credit in its claim for an amount equivalent to the amount of the said item on the ground that otherwise there will not be a rateable distribution of the Limitation Fund among the several claimants."

During the hearing before LORD MERRIMAN, P., there appeared to be doubt whether the first question was wide enough to ensure that the question of double proof was raised, and that question was allowed to be amended in the following terms:

"(1) Whether item 22 of the claim of the claimants the owners of the Ousel should be disallowed on the grounds:—(a) that in substance it forms part of or is the same as part of the claim of the Mersey Docks and Harbour Board; (b) that the sum to which the said item relates has not yet been paid to the board by the claimants the owners of the Ousel; and (c) that accordingly unless such item is disallowed there will not be a rateable distribution of the limitation fund among the several claimants."

LORD MERRIMAN answered question 1 "No" and allowed item 22 of the claim of the Ousel against the fund. He answered question 2 "Yes" and ordered that the board should give credit in its claim against the fund for an amount equivalent to item 22. The board now appealed, and the Ousel cross-appealed, against LORD MERRIMAN'S order.

J. V. Naisby, Q.C., G. H. Newsom, Q.C., and *G. N. W. Boyes* for the Mersey Docks and Harbour Board.

Eustace Roskill, Q.C., and *H. V. Brandon* for the owners of part of the cargo on board the Ousel.

J. R. Adams, Q.C., and *R. F. Stone* for the owners of the Ousel.

Cur. adv. vult.

* The order was dated June 22, 1959.

July 28. **HARMAN, L.J.**, read the judgment of the court: This is an appeal from a decision (1) of LORD MERRIMAN, P., delivered on Dec. 21 last on two issues raised in an action in the Admiralty Court under which the plaintiffs, the owners of the steamship Liverpool (which was wholly responsible for a collision within the area of that port) have been allowed to limit their liability under s. 503 and s. 504 of the Merchant Shipping Act, 1894. The sum paid into court under this order amounts to some £112,000. The aggregate of the claims against the fund greatly exceed this sum and the dividend payable is likely to be in the region of 6s. in the £. All the facts are agreed and are sufficiently stated in the President's judgment and we need not repeat them beyond saying that the issue here is a tripartite one between three of the claimants. First of these is the Mersey Docks and Harbour Board, in which the area of the port is vested under their Act of 1857 and which under its latest Act, the Mersey Docks and Harbour Board Act, 1954, is empowered by s. 3 to take possession of any vessel sunk, stranded or abandoned within the limits of the port and to dispose of it as it thinks fit (2). The board is also empowered by the same section to sell any chattel salved from the vessel and to set the proceeds against the expenses incurred in its operations. This it has done and has thus reduced its gross expense to a sum just under £130,000, which is the amount claimed. The next claimants are the owners of the sunken vessel, the Ousel, whose claim amounts to just over £70,000, of which about £60,000 is agreed, and the last £10,000 is the subject-matter of the present dispute. This last sum represents a claim to be indemnified against the sum payable by the owners of the Ousel to the board as hereafter explained. Thirdly there are claimants to cargo and so on, whose claims amount to £170,000.

Certain of the cargo claimants have raised the instant question which arises out of the right, conferred on the board by the Act of 1954, apart from its common law claim for damages in tort against the Liverpool, now represented by the fund in court, to claim over against the owners of the Ousel any deficiency in the amount recovered after giving such credits as the Act enjoins. This deficiency, having regard to the proviso (2) to s. 3 (3), which entitles the Ousel to limit its liability, amounts to the £10,000 already mentioned. The cargo owners allege that this sum is being in effect claimed twice against the fund, first by the board and second by the Ousel. The President's decision was that the claim by the owners of the Ousel for the £10,000 should be allowed, but that the board must reduce its claim against the fund by a like amount. There thus arise, as we apprehend, the following questions: can both the board and the Ousel prove for the £10,000 against the fund, and if not which of them is to give way? The President decided that only one proof should be admitted to rank and that the Ousel's. The board appeals.

It seems to us that logically the first question to decide is whether the board should reduce its claim. The President's answer in the affirmative rested on two considerations, first that the board by letter dated Jan. 8, 1957, gave notice to the owners of the Ousel that any deficiency was recoverable by them from the owners, and secondly that by letter dated Jan. 26, 1959, the board gave further notice to the owners of the Ousel in these terms:

> "So far as concerns the main question contained in your letter, it is clear that whether the board makes a claim upon your clients, and if so for what sum, must depend upon the amount of the share that they may receive of the limitation fund. As matters stand at present it appears that the board's prospective share will still leave them with a deficiency on their wreck expenses greatly exceeding the amount of your clients' statutory liability under s. 3 of the board's Act (2) of 1954, and in such case the board

(1) Reported [1960] 1 All E.R. 465.
(2) The relevant part of s. 3 is set out in footnote* on p. 307, ante.

will of course look to your clients for payment of the sum for which they are liable under the statute."

The President held that by taking these steps the board had in effect mitigated its damages in tort against the Liverpool by the amount it was in a position to recover from the Ousel under its statutory power. He further held that the board ought in reason to mitigate its loss by enforcing this claim and that not to do so is unreasonable and therefore to the extent of the £10,000 the damages do not flow from the wrongdoing. In so deciding the President followed the principles as to mitigation of damages laid down in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* (3).

In our judgment the first part of the President's decision does not fit the facts. Let it be conceded that if the board had recovered the £10,000 from the Ousel under its statutory power that would have been satisfaction pro tanto of the damages, still the fact is that the board has not recovered this sum, and in our judgment there is no duty on it to do so. It is true that at the trial of the issue the Ousel owners declared themselves ready to pay and in fact tendered the money, which is now on deposit with stakeholders, but we cannot see that this makes any difference, for the tender has never been accepted. The passage from the judgment of LORD GODDARD in *B. O. Morris, Ltd.* v. *Perrott & Bolton* (4) cited by the President (5) shows quite clearly that even if the board had obtained judgment against the Ousel there would have been no duty on it to proceed to execution in alleviation of the Liverpool, which is a tortfeasor. Here in fact no claim for payment has ever been made. The letter of Jan. 26, 1959 (from which I have read), is merely an intimation that a claim may be made hereafter.

As to the second part of the President's decision, this case, in our judgment, has nothing to do with the duty to mitigate damages. It concerns the board's legal rights, and no duty rests on it at the demand of a tortfeasor to satisfy part of the damages by resorting to another tortfeasor; still less by resorting to an innocent party made liable merely by statute. If it were otherwise there would be no necessity for the Law Reform (Married Women and Tortfeasors) Act, 1935, and the law about contributions between tortfeasors, for any tortfeasor could oblige the creditor to sue the other debtors in order to alleviate his burden. The learned President in fact recognises this in his judgment in these words (6):

> " Let me say at once that this is not a question of one tortfeasor making the hopeless attempt to insist that another tortfeasor shall be sued first, or at all, as a condition of determining his own liability; or, indeed, of the tortfeasor dictating to the board whom else they shall sue, or in what order."

If there be no duty on the board to enforce its rights against the Ousel it can prove for its whole debt against the Liverpool without taking those rights into account. It is true that the claim is not being made against the Liverpool herself because she has taken advantage of the right to limit her liability, but she remains nevertheless the tortfeasor and the principle applies in our opinion to a claim arising out of the tortfeasor's wrongdoing. See in this connexion the observations of JESSEL, M.R., in *Prehn* v. *Bailey, The Ettrick* (7), where he was construing s. 54 of the Merchant Shipping Act, Amendment Act, 1862, which gave a right to a shipowner in default to limit his liability. It had been argued that, having paid the money into court, the owner was no longer a wrongdoer, but this the Master of the Rolls denied, saying " It does not make his acts right if they were previously wrongful ". Limitation in its Admiralty significance results in a position not unlike that in bankruptcy, and has indeed been said by LORD INGLIS, in *Burrell* v. *Simpson & Co.* (8), to be analogous to a statutory insolvency. See also *Mersey Docks & Harbour Board* v. *Hay, The Countess* (9), where all the

(3) [1912] A.C. 673.
(4) [1945] 1 All E.R. at p. 569.
(5) [1960] 1 All E.R. at p. 472.
(6) [1960] 1 All E.R. at p. 473.
(7) (1881), 6 P.D. at p. 132; 4 Asp. M.L.C. at p. 467.
(8) (1877), 4 R. (Ct. of Sess.) at p. 182.
(9) [1923] A.C. 345.

A Law Lords insisted that distribution of the fund is to be made rateably, and LORD SUMNER approved LORD INGLIS' observations (10). This is the position in bankruptcy (see the Bankruptcy Act, 1914, s. 33 (2) and s. 7) and in liquidation of an insolvent limited company (see the Companies Act, 1948, s. 302 and s. 317). It is a well-known rule in bankruptcy that a creditor having a security against the estate of the debtor must either surrender his security and prove for the whole B debt or value his security and prove for the balance, but it has never been the law that a creditor having a security against a third party for his debt must give credit for that when proving in the bankruptcy: see for instance *Re Plummer & Wilson, Ex p. Shepherd* (11). So here the board has a statutory right to recoup its expenses quite apart from the Liverpool's wrongdoing, but we see no reason why it should give credit for the value of that right when proving against the C fund. The first question should therefore be answered by saying the board need not reduce its claim by giving credit for the £10,000.

The second question is whether the Ousel can enforce its claim to the £10,000 which is the agreed amount of its liability to the board under the Act of 1954. This is a contingent claim, for the Ousel is not yet out of pocket by that or any other sum under this head. There is no reason, however, why a contingent D claim should not rank just as it does in any other case where there are rival claimants against an insufficient fund. Such a claim must be valued. The objection of the other claimants is that to allow the claim to rank would be to allow two claims in respect of the same debt: this raises the question of double proof. The principle is best explained in the judgment of MELLISH, L.J., in *Re Oriental Commercial Bank, Ex p. European Bank* (12). The relevant passage (13) E has already been cited in the President's judgment (14) and we do not repeat it here. A further good illustration is provided by *Re Hoey, Ex p. Hoey* (15), also alluded to by the President (14). Does this principle apply in a limitation action in Admiralty? There seems to us no reason why not. The principle must, as it seems to us, as a matter of justice, apply wherever there are rival claimants against an insufficient fund, as it does in bankruptcy, winding-up, and creditors' F administration actions.

A good deal of time was spent in the court below in the search for analogies. First was that of principle and surety, where different rules prevail according to whether the guarantee is of the whole debt subject to a limit or is of a part of the debt (see for instance *Re Sass, Ex p. National Provincial Bank of England, Ltd.* (16)). We do not pretend to follow the reasons for this distinction and are of opinion G that the analogy is of no help here where there is no principal debtor and no surety. Similarly we forbear to discuss cases on negotiable instruments (such as *Re Blackburne, Ex p. Strouts* (17)), where equally abstruse reasoning has been applied and fine distinctions have been taken. It is true that the reported cases appear to arise out of contract, and indeed it is difficult to think of a case other than one like the present to which the rule might apply in cases of tort, though perhaps H *Morrison S.S. Co., Ltd.* v. *Greystoke Castle* (*Cargo Owners*) (*The Cheldale*) (18) supplies a parallel. The principle is that the fund must not be saddled with two proofs where the two creditors are both seeking to enforce the same debt.

Are the two debts the same? This seems to us to be the difficult part of the case. The board's right against the Liverpool is the cost to which the board as owner of the port has been put as a result of the collision. Particulars are shown in I the record (19). The damage that flows from the Liverpool's wrongdoing is the reasonable cost of removing the obstruction: see *Dee Conservancy Board* v.

---

(10) [1923] A.C. at p. 382.
(11) (1841), 1 Ph. 56 at p. 59.
(12) (1871), 7 Ch. App. 99.
(13) (1871), 7 Ch. App. at p. 103.
(14) [1960] 1 All E.R. at p. 470.
(15) (1918), 88 L.J.K.B. 273.
(16) [1896] 2 Q.B. 12.
(17) (1892), 9 Morr. 249.
(18) [1946] 2 All E.R. 696; [1947] A.C. 265.
(19) I.e., the expenses incurred and damage sustained by the board in clearing the Mersey of the wreck of the Ousel. See p. 310, letter A, ante.

McConnell (20). Now this cost was some £60,000 more (21) than the amount claimed, and in our judgment the board might have claimed for the full amount and was not bound to exercise its statutory right to sell the salvaged chattels. It might have returned them to their owners, who then would have been obliged to give credit for their value when quantifying their claims against the fund. The board, however, did exercise its right of sale and has, in our judgment, rightly given credit for the sums realised. This is an instance of mitigating damages.

The £10,000 for which the Ousel seeks to prove is agreed as to quantity and has been called " the statutory limit of the Ousel ". It arises out of the proviso to s. 3 (3) of the Act of 1954 (22), and is the " deficiency " in the amount recovered by the board from sales of salved material against " expenses " incurred by it in exercise of its statutory powers under the section. These are the very same expenses as are claimed as damages in tort against the Liverpool: the two claims would be of the same amount but for the proviso to s. 3 (3), which enables the owners of the wrecked vessel to limit their liability by reference to her tonnage (22). This has been done here so that only £10,000 of the £130,000 expenses can be claimed against the Ousel and by her by way of indemnity against the Liverpool. That is in fact a part of the same debt, and in our judgment if both sums can be proved for, the same debt will have been proved for twice to the extent of £10,000. It was pointed out by SCRUTTON, L.J., in *Re Melton, Milk* v. *Towers* (23) that in considering the rule against double proof technicalities are not to be regarded. These are his words:

> " To these two sets of legal principles I have mentioned it remains to add the fact of the debtor's bankruptcy, and in particular the rule in bankruptcy that there must not be a double proof for the same debt, with the further explanation that, in determining whether the two proofs are in respect of the same debt, regard must be had, not to technicalities, but to the substance, as was pointed out in *Re Oriental Commercial Bank* (24)."

In our judgment, therefore, the fund is not to be subjected to both liabilities.

If we are right so far, the further question arises which of the competing, claimants may prove? In our judgment the answer is that the board has priority because it is actually out of pocket by the whole of its claim, whilst the Ousel is not because she has not yet been obliged to pay. Authority for this is to be found in *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.* (25). That was a very different case from the present, but is of assistance. Fenton was guarantor of certain debts to banks of an association in which he was interested. Both he and the association were insolvent. He had paid nothing under his guarantee, but claimed to prove in the liquidation of the association in respect of his liability, which was a contingent debt and, as ROMER, L.J., pointed out (26), would have been provable as such but for the rule against double proof, for the banks as principal creditors had already proved for the same debt, and had priority because they were out of pocket while Fenton was not.

The result may appear harsh to the Ousel, which was after all an innocent victim of the Liverpool's wrongdoing, but it flows from the wrongdoer's statutory right to limit her liability which results in loss to all the claimants. If, having received its dividend, the board, being, as it will be, still out of pocket, seeks to enforce its statutory right against the Ousel, the interesting question will arise whether the latter will be able to resist this claim to the extent of the dividend recovered by the board in respect of the £10,000 on some such principle as is

(20) [1928] All E.R. Rep. 554; 17 Asp. M.L.C. 433.
(21) The board gave credit for £60,359 14s. 3d. in respect of sale of cargo and equipment of the Ousel (see p. 310, letter A, ante).
(22) See footnote (*), p. 307, ante.
(23) [1918] 1 Ch. at p. 60.
(24) (1871), 7 Ch. App. at p. 103.
(25) [1930] All E.R. Rep. 15; [1931] 1 Ch. 85.
(26) [1930] All E.R. Rep. at p. 25; [1931] 1 Ch. at p. 120.

illustrated in *Re Sass* (27) and *Re Houlder* (28). This is not a question which is raised here. It has not been argued and we do not propose to attempt to answer it. It is, however, to be observed that if the Ousel can maintain a defence on these lines exactly the same result will have been achieved as that which flows from the President's decision: a result, it may well be thought, consonant with justice and good sense.

For the reasons we have indicated, while agreeing with the President on the question of double proof and that of whether the two debts are the same, we have arrived at a different conclusion and this appeal must be allowed and declarations substituted to the following effect: (a) that the claim of the board against the fund ought to be allowed at its full amount and (b) that the claim of the owners of the Ousel ought to be disallowed.

Appeal allowed: order below discharged. Declarations as above. Leave to appeal to the House of Lords granted to owners of the Ousel and to the board.

Solicitors: *R. H. Bransbury*, Liverpool (for the Mersey Docks and Harbour Board); *Waltons & Co.* (for the owners of part of the cargo on board the Ousel); *Weightman, Pedder & Co.*, Liverpool (for the owners of the Ousel).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

COTTERELL *v.* PRICE AND OTHERS.

[CHANCERY DIVISION (Buckley, J.), July 14, 15, 1960.]

Bankruptcy—Limitation of action—Time ceasing to run when receiving order made—Scope of doctrine—Remedies of secured creditor unaffected by receiving order—Remedies barred by subsequent expiry of period of limitation—Creditor ceasing to be "secured creditor"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5 *c.* 59), *Sch.* 2, *r.* 13 (*c*).

Mortgage—Equity of redemption—Limitation of action—Second mortgagee's estate and right to recover possession statute-barred—Equity of redemption incapable of surviving in gross.

On Mar. 13, 1930, the third defendant created a first mortgage on certain property, and on May 13, 1930, he created a second mortgage on the same property. The first mortgage became vested in the first and second defendants, and the second mortgage in the plaintiff. The legal date for redemption under the second mortgage was on or about Aug. 13, 1930. No interest was ever paid thereunder. On Nov. 15, 1938, a receiving order was made against the third defendant and he remained thereafter an undischarged bankrupt. In January, 1958, the plaintiff lodged a proof in the third defendant's bankruptcy in which he valued his security as second mortgagee and proved for a balance. On May 13, 1958, the plaintiff served on the trustee in bankruptcy a notice under r. 13 (c) of the rules in Sch. 2 to the Bankruptcy Act, 1914, requiring the trustee to elect whether he would or would not exercise the option of redeeming the security. The trustee did not exercise that option. The plaintiff, while conceding that as against the third defendant his remedies by action under the second mortgage were statute-barred, claimed (i) that as against the first and second defendants his right to redeem the first mortgage remained unaffected, and (ii) that as a result of the notice served under r. 13 (c) he had a statutory title under the Bankruptcy Act, 1914, enabling him as against the first and second defendants to assert his right to redeem the first mortgage.

Held: (i) on the second mortgagee's rights of action against the mortgagor becoming statute-barred in 1942, the second mortgagee lost all estate and interest in the mortgaged property and with it his status as mortgagee, and the equity of redemption, being incidental to that status, could not survive

(27) [1896] 2 Q.B. 12. (28) [1928] All E.R. Rep. 366; [1929] 1 Ch. 205.

in gross the demise of the second mortgage; accordingly the plaintiff had no right to redeem the first mortgage.

(ii) the doctrine that time ceased to run under the Limitation Act, 1939, when a receiving order was made in bankruptcy, operated only in the bankruptcy, and, since rights and remedies of secured creditors to realise their securities were, by s. 7 (2) of the Bankruptcy Act, 1914, unaffected by the making of a receiving order, the operation of the Limitation Act, 1939, in relation to these rights and remedies was not affected by the Bankruptcy Act, 1914; accordingly, by 1958 the plaintiff had ceased to be a secured creditor for the purposes of the rules in Sch. 2 to the Bankruptcy Act, 1914, and the notice served under r. 13 (c) was ineffective.

[As to the persons entitled to redeem a mortgage, see 27 HALSBURY'S LAWS (3rd Edn.) 232, 234, paras. 413 and 420; and for cases on the subject, see 35 DIGEST 344, 345, *867-871.*

As to time ceasing to run in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 469, para. 924.

For the Bankruptcy Act, 1914, Sch. 2, r. 13, see 2 HALSBURY'S STATUTES (2nd Edn.) 446.

For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.]

Cases referred to:

Benzon, Re, Bower v. *Chetwynd*, [1914] 2 Ch. 68; 83 L.J.Ch. 658; 110 L.T. 926; 5 Digest (Repl.) 798, *6753.*

Coles, Re, Ex p. Ross, (1827), 2 Gl. & J. 330; 4 Digest (Repl.) 351, *3191.*

Westby, Re, Ex p. Lancaster Banking Corpn., (1879), 10 Ch.D. 776; 48 L.J. Bcy. 89; 39 L.T. 673; 4 Digest (Repl.) 350, *3185.*

Adjourned Summons.

This was an application by originating summons, dated June 16, 1959, under R.S.C., Ord. 55, r. 5A, by Frederic Wynn Cotterell, in whom was vested a second mortgage (dated May 13, 1930) on property known as Malvern Cottage, Malvern Road, Shirley, in the county of Southampton, for a declaration that his right to redeem and require a transfer to himself of a prior mortgage (dated Mar. 13, 1930) on the same property was still subsisting and that he might be at liberty to redeem the mortgage and for consequential relief. The first and second defendants, Thomas Ralph Plumer Price and Robert William Lewington, were the first mortgagees. The third defendant, Lisle John Forman Mantle, was the mortgagor. The facts appear in the judgment.

J. Bradburn for the plaintiff.

P. R. de L. Giffard for the first and second defendants.

Muir Hunter for the third defendant.

BUCKLEY, J.: On Mar. 13, 1930, the third defendant mortgaged some property called Malvern Cottage to secure a sum of £900 and interest thereon, and that mortgage was effected by grant of a term of one thousand years with the usual proviso for cesser on redemption. On May 13, 1930, the third defendant created a second mortgage on that property (with other property which had already been made the subject of another first mortgage) in favour of a number of persons who lent money on a contributory basis; and that mortgage was effected by the grant of a term of three thousand years with a proviso for cesser on redemption. I need not go in any detail into the events which occurred, but the first mortgage is now vested in the first and second defendants, and the second mortgage became vested in the plaintiff. On Nov. 15, 1938, a receiving order was made against the third defendant, the mortgagor, and he remains, at the present time, an undischarged bankrupt. No interest was ever paid under the second mortgage of May 13, 1930. The legal date for redemption under that

A mortgage was Aug. 13, 1930, and accordingly, from that date, time began to run under the Statutes of Limitations for barring the second mortgagee's rights to foreclose that mortgage or to enforce other remedies under it. Initially, the plaintiff, or his predecessors in title as persons entitled to the benefit of the second mortgage, submitted no proof in the bankruptcy and in fact did nothing at all with regard to their security. However, in January, 1958 (the plaintiff having B got in all the other interests in the second mortgage and being then solely entitled to that mortgage) lodged a proof in the bankruptcy, in which he valued his security as second mortgagee as £2,250, and proved for a balance. The form of that proof has been the subject of some criticism by counsel who appears for the third defendant, and I think that it is open to some criticism. Nevertheless it is a proof; nobody can say properly that it is a complete nullity.

C Following on the lodging of that proof, the plaintiff, on May 13, 1958, served on the trustee in bankruptcy a notice under r. 13 (c) of the rules set out in Sch. 2 to the Bankruptcy Act, 1914, requiring the trustee to elect whether he would or would not exercise the power of redeeming the security valued at £2,250. Six months elapsed without the trustee exercising his option under that notice (if it were a good notice) to redeem the security. Counsel who appears for the D plaintiff concedes that as against the third defendant, the plaintiff's remedies by action under the second mortgage are statute-barred; but notwithstanding that fact, he says that the plaintiff's right as against the first mortgagees (that is to say, the first and second defendants), to redeem the first mortgage remains unaffected.

The sections of the Limitation Act, 1939, to which it is relevant to refer, are E first s. 18 (1), which provides:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued."

F The legal date for redemption was Aug. 13, 1930; I am not sure whether that was the date for payment under the covenant, but it must have been sometime in 1930. Time would then have begun to run in respect of the obligation to pay under the covenant, and would have expired in the year 1942. As regards foreclosure, s. 18 (4) provides:

> "Nothing in this section shall apply to a foreclosure action in respect of G mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action."

This refers back to s. 4 (3), which provides:

> "No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he H claims . . ."

So that the right to foreclose or the right to sue for possession would also have become barred in the year 1942. Section 16 provides:

> "Subject to the provisions of s. 7 of this Act and of s. 75 of the Land Registration Act, 1925, at the expiration of the period prescribed by this I Act for any person to bring an action to recover land (including a redemption action) or an action to enforce an advowson, the title of that person to the land or advowson shall be extinguished."

Counsel for the plaintiff says that although as against the third defendant, the plaintiff's rights to foreclose and sue for possession, or to sue on the covenant, are barred his right against the first mortgagees to redeem the first mortgage remains wholly unaffected. The only provision of the Limitation Act, 1939, dealing with redemption actions is s. 12, which provides that:

A

> " When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him."

Counsel's argument is that, this being the only provision in the Act for barring a redemption action, it is the only way in which his client could be deprived of his right to redeem the first mortgage, and that, the first mortgagees never having been in possession, the section cannot operate in the present case. In those circumstances he says that he is entitled, under s. 95 of the Law of Property Act, 1925, to give directions to the first mortgagee with regard to redemption of the first mortgage which would override any direction that the mortgagor, the third defendant, might give. Subsection (2) of s. 95 provides that:

B

C

> " The rights conferred by this section belong to and are capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer prevails over a requisition of the mortgagor."

Counsel for the plaintiff says that his client is an encumbrancer whose requisition is entitled to take precedence over any requisition of the third defendant relating to the redemption of the first mortgage. To bring himself within the provisions of that section, it is necessary for him to show that he is an encumbrancer within the meaning of the Law of Property Act, 1925. That term is defined in s. 205 (1) (vii) of the Act to mean a person entitled to the benefit of a legal or equitable mortgage, or a trust for securing money, or a lien or a charge of a portion, annuity or other capital sum or annual sum; so that in the circumstances of the present case the plaintiff's right to be regarded as an encumbrancer within the meaning of the Law of Property Act, 1925, depends on the answer to the question whether he is entitled to a legal mortgage of the property.

D

E

In my judgment, on the second mortgagee's rights against the mortgagor becoming statute-barred, the second mortgagee lost all estate and interest in the mortgaged property. He could no longer foreclose as against the third defendant; he could no longer sue for possession, and as a result of the provisions of s. 16 (to which I have referred) his estate in the land came to an end. It seems to me that the result was that he lost his status as a mortgagee. An equity of redemption is an incident of the status of mortgagor or puisne encumbrancer having the right to redeem the higher mortgage. It is part of the machinery provided by equity to enable anyone who is mortgagor of land, or who stands to any extent in the shoes of the mortgagor of land, to redeem the pledge of the land. The very term " equity of redemption " suggests that that is the character of the right. The equity of redemption exists for the purpose of assisting him who has a right to redeem the land, to get the land back. In my judgment, no one who has no estate or interest recognised by the law in the land can have an equity of redemption of that land, and when the second mortgagee loses his position as being, vis-à-vis the mortgagor, a mortgagee of the land—when he loses, by operation of s. 16 of the Limitation Act, 1939, his estate in the land—he ceases to be entitled to an equity of redemption. What the plaintiff is really attempting to assert here is not a right to redeem the land but a right to insist on a transfer of the first mortgage to him. He wants to get in the first mortgage in order that he may be in a position to exercise certain rights under the first mortgage, and thereby to put himself in a position to retain moneys in satisfaction of the debt due under the second mortgage without having to have recourse to remedies in the courts which, as against the third defendant, he is debarred from having by reason of the statute. Therefore it seems to me that counsel's submissions on this part of the case are fallacious because they assume (wrongly as I see it) that the equity of redemption can survive in gross the demise of the second mortgage as an enforceable mortgage against the mortgagor.

F

G

H

I

Further, counsel for the plaintiff says that as a result of the notice which was served under r. 13 (c) of Sch. 2 to the Bankruptcy Act, 1914, he has a statutory title (under the Bankruptcy Act, 1914) which enables him to assert against the first and second defendants that he is in a position to redeem their first mortgage. The plaintiff's right as second mortgagee to redeem the first mortgage was not barred by statute at the commencement of the bankruptcy. The time began to run in 1930, and the receiving order was made in November, 1938, so only a little over eight years had run at the time when the receiving order was made. Counsel says the effect of the receiving order was to put an end to the operation of the Statutes of Limitations so far as any remedies within the bankruptcy are concerned so that, vis-à-vis the trustee in bankruptcy, he says that the plaintiff remained a secured creditor entitled to adopt any of the courses open to him under rr. 10, 11, 12 and 13 of the rules contained in Sch. 2 to the Bankruptcy Act, 1914. Those are the rules which deal with proofs by secured creditors. Rule 10 provides what shall happen if the secured creditor realises his security, r. 11 provides what shall happen if he surrenders his security, and r. 12 requires that:

> "If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Rule 13 applies where a security is so valued and provides that (a) "the trustee may at any time redeem it on payment to the creditor of the assessed value" or (b) that he may require the property to be sold. Paragraph (c) of r. 13 provides:

> "Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued."

Counsel's contention is that as a result of the notice served under r. 13 by the plaintiff, and of the trustee's failure to elect within the six months, the equity of redemption of the second mortgage has become barred and the estate of the mortgagor, including his equity to redeem the first mortgage, has vested in the plaintiff.

The doctrine that time ceases to run under the Statutes of Limitations, where a party becomes bankrupt, has been dealt with in certain cases to which I have been referred. The first that I should mention is *Re Westby, Ex p. Lancaster Banking Corpn.* (1) which was a decision of BACON, C.J., who was then Chief Judge in Bankruptcy. In the course of his judgment, he says this (2):

> "The Statute of Limitations has nothing to do with the bankruptcy laws. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the Statute of Limitations has no application at all to such a case, or to the principles by which it is governed."

What the learned judge says there is that the operation of the statute is at an end with reference to debtor and creditor. He is not asserting that the bankruptcy puts an end altogether to the operation of the statute in relation to all matters

(1) (1879), 10 Ch.D. 776. (2) (1879), 10 Ch.D. at p. 784.

affecting the debtor's property, but in regard to the relation between the debtor and his creditor.

The other case to which I wish to refer is *Re Benzon, Bower* v. *Chetwynd* (3). This was a decision of the Court of Appeal, and the court had to consider whether, in a case where a creditor, who had been adjudicated bankrupt in 1892 and remained bankrupt until his death in July, 1911 (nineteen years later), the fact that he had by his will exercised a general testamentary power and thereby had made the subject-matter of that power assets for payment on his own death, enabled his creditors (time having started to run before bankruptcy) to say that they were entitled to come in and participate in the distribution of that asset and were not statute-barred. CHANNELL, J., who delivered the judgment of the court, said this (4):

> " On the point of the Statute of Limitations, inasmuch as the debts were incurred by the bankrupt before 1890 and 1892 respectively, they would prima facie have been barred long before his death in 1911. The contentions [of counsel for the appellants] on this point on behalf of the appellants were, first, that the exercise of the power of appointment which made the fund available as assets gave them a new right of action or proceeding which was not barred, and, secondly, that, even if that was not so, the effect of the bankruptcy was to prevent the statute running."

I need not deal with the first point, which the court did not think a good one. Then he goes on:

> " As to the second point, cases were quoted beginning with *Ex p. Ross* (5), which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy*."

The words " in the bankruptcy " are italicised. The court accordingly held that, although the appointment at death gave creditors a new fund out of which they could get payment and a new mode of proceeding in order to get it, this was merely a new remedy and not a new cause of action—the cause really being the old debt—and that the statute, having begun to run against the creditors before the commencement of the bankruptcy, continued to run notwithstanding the bankruptcy, and that the claims of the creditors, not being claims in the bankruptcy, were statute-barred. The importance of that case and of the way in which the doctrine is stated in the judgment of the court is that it is only " in the bankruptcy " that the statute ceases to operate. It does not have any effect on any rights or remedies which are unaffected by the bankruptcy. In my judgment a mortgagee who relies on his security retains and stands on rights which he had before the bankruptcy and which remain unaffected by the bankruptcy. Rules 10, 11, 12 and 13 set out in Sch. 2 to the Bankruptcy Act, 1914, do not in any way regulate what a mortgagee is to do qua mortgagee; they only limit the extent to which he is to be entitled to prove in competition with unsecured creditors, notwithstanding that he is a mortgagee and has rights and remedies which are peculiar to him and available to him outside the bankruptcy.

Section 7 of the Bankruptcy Act, 1914, provides in sub-s. (1) that, once a receiving order has been made,

> "... no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose."

Subsection (2) of s. 7 goes on:

> " But this section shall not affect the power of any secured creditor to

(3) [1914] 2 Ch. 68. (4) [1914] 2 Ch. at p. 75. (5) (1827), 2 Gl. & J. 330

realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Although the bankruptcy takes away the rights of ordinary creditors to sue for their dues and regulates their right of proof in the bankruptcy, the rights of secured creditors are unaffected under that section, and there is no reason why time should not continue to run under the Limitation Act, 1939, as regards those rights and remedies which the secured creditors have outside the bankruptcy.

In the present case, the second mortgagee's rights to recover possession of the subject-matter of the second mortgage arose not later than Aug. 13, 1930. From that time until the present time there has always been someone in possession of the property against whom the second mortgagee could have brought proceedings to recover possession of the land ; in fact throughout the period the third defendant has been in possession of the property.

Many more than twelve years have elapsed since the right of action accrued to the plaintiff and his predecessors in title in the present case, and it seems to me that his right to sue to recover possession of this land has long been barred, and was barred long before the date in 1958 when he served the notice under r. 13. Therefore the plaintiff, he and his predecessors having become debarred from foreclosing or recovering possession of the land, whether as against the trustee in bankruptcy or against the third defendant, was not in 1958 any longer a secured creditor within the meaning of the rules in Sch. 2 to the Bankruptcy Act, 1914, and at that date, it was not open to the plaintiff to give the notice which he gave. It may be that his right to sue on the covenant (which was merely a right to sue in debt) was a right with which the supervening bankruptcy interfered so as to prevent this becoming statute-barred, but that is not a matter in which I have any concern because that right alone would not, in my judgment, constitute the plaintiff a secured creditor within the meaning of the rules. A secured creditor (6) must, for present purposes, be somebody who has some interest in property which is security for his debt, and not merely the benefit of a covenant.

In those circumstances counsel's second submission also fails because, for the reasons which I have endeavoured to express, I think that the notice which was served in 1958 was served in circumstances in which the plaintiff was not entitled to serve it, and accordingly was of no effect. I therefore declare the plaintiff's right to redeem the first mortgage is no longer subsisting, and the plaintiff will have to pay the costs of the defendants.

Declaration accordingly.

Solicitors: *Wrentmore & Son*, agents for *Philip Evans & Co.*, Bournemouth (for the plaintiff); *Speechly, Mumford & Soames*, agents for *T. R. Plumer Price & Beswick*, Southampton (for the first and second defendants); *Lovell, White & King*, agents for *Hepherd, Winstanley & Pugh*, Southampton (for the third defendant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

---

(6) " Secured creditor " is defined in s. 167 of the Bankruptcy Act, 1914, to mean " a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor "; see 2 HALSBURY'S LAWS (3rd Edn.) 298, 299.

A

BERRY *v.* BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Diplock, J.), July 11, 13, 29, 1960.]

Malicious Prosecution—Damage necessary to support action—Charge of statutory offence punishable by fine only—Insufficient damage entailed to support action unless charge injures fair fame of plaintiff—What amounts to injury to fair fame—Whether difference between solicitor and client costs and costs awarded to a successful appellant in criminal proceedings is sufficient damage to support an action for malicious prosecution—Prosecution for pulling communication cord contrary to the Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 22.

B

In an action for malicious prosecution the plaintiff alleged in her statement of claim that the defendants, the British Transport Commission, through their agent, had without reasonable or probable cause laid a complaint against the plaintiff of contravening s. 22 of the Regulation of Railways Act, 1868, by pulling the communication cord on the train without reasonable and sufficient cause; that the plaintiff was convicted of the charge before the magistrates' court, and that she appealed against conviction to quarter sessions and the appeal was allowed. As special damage the plaintiff claimed the sum of £62 2s., being the costs of her defence at the magistrates' court and of her appeal to quarter sessions less fifteen guineas which was the amount of costs which the recorder at quarter sessions, in his discretion, had awarded to the plaintiff.

C

D

The plaintiff did not allege that in awarding her costs the recorder took into account the means of the complainant. The plaintiff also claimed general damages. An offence under s. 22 of the Regulation of Railways Act, 1868, was punishable by fine only. On a preliminary issue whether the statement of claim disclosed any damage sufficient to found an action for malicious prosecution and therefore whether it disclosed a cause of action,

E

Held: there was no such damage (viz., damage within the relevant heads (1) and (3)* of damage laid down by HOLT, C.J., in *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374) as would support an action for malicious prosecution, and accordingly the statement of claim disclosed no cause of action, for the following reasons—

F

(i) as regards the first head of damage in *Savile* v. *Roberts*, supra, that is to say, " damage to a man's fame as if the matter whereof he is accused be scandalous "—

G

(a) on the more recent authorities a charge (followed by acquittal) of an offence punishable by fine would entail such damage as would support an action for malicious prosecution if, but only if, it was such as injured the " fair fame " of the person charged (see p. 327, letter G, post), viz., was a charge that was necessarily or naturally defamatory of the plaintiff (see p. 329, letter D, post); and in order to test whether the " fair fame " of the person charged had been injured the court was bound to consider whether there could be facts supporting a conviction of the relevant offence which would not injure " fair fame ", and, if there could, then the charge would not entail such damage as would support an action for malicious prosecution (see p. 328, letter E, post).

H

I

Wiffen v. *Bailey & Romford Urban Council* ([1915] 1 K.B. 600) and *Quartz Hill Gold Mining Co.* v. *Eyre* ((1883), 11 Q.B.D. 674) applied.

Rayson v. *South London Tramways Co.* ([1893] 2 Q.B. 304) considered and criticised.

(b) a person could be prosecuted successfully for an offence against s. 22 of the Regulation of Railways Act, 1868, on facts which would not injure

* See p. 325, letters E and F, post.

his " fair fame " (see p. 328, letter H, post); and, therefore, in the present case there was not such damage as supported the action.

(ii) as regards the third head of damage in *Savile* v. *Roberts*, supra (viz., money expended by a plaintiff in acquitting himself of the crime of which he was accused), the difference between the solicitor and client costs which the plaintiff in fact incurred and the fifteen guineas awarded to her by the recorder was not such damage as would support the action, since the award of costs made by the recorder in the exercise of his discretion had compensated the plaintiff for expense properly incurred in securing her ultimate acquittal in so far as the law chose to compensate her at all (see p. 330, letters H and I, post).

Dicta of BOWEN, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre* ((1883), 11 Q.B.D. at p. 690) applied.

QUAERE whether, if costs awarded to a plaintiff are reduced because of the means of the prosecutor, the amount by which they are so reduced is damage sufficient to support, and recoverable in, an action for malicious prosecution (see p. 331, letter A, post).

[As to what damage must be proved to support an action for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 360, para. 702; and for cases on the subject, see 33 DIGEST 506-508, *498-531*.

For the Regulation of Railways Act, 1868, s. 22, see 19 HALSBURY'S STATUTES (2nd Edn.) 793.]

Cases referred to:

Byne v. *Moore*, (1813), 5 Taunt. 187; 1 Marsh. 12; 128 E.R. 658; 33 Digest 469, *26*.

Cotterell v. *Jones*, (1851), 11 C.B. 713; 21 L.J.C.P. 2; 16 Jur. 88; 138 E.R. 655; 33 Digest 507, *505*.

Henley v. *Burstal*, (1657), T. Raym. 180; 83 E.R. 95.

Jones v. *Givin*, (1713), Gilb. 185; 93 E.R. 300; sub nom. *Jones* v. *Gwynn*, 10 Mod. Rep. 214; 33 Digest 469, *25*.

King v. *Lake*, (1667-70), Hard. 470; 145 E.R. 552; sub nom. *Lake* v. *King*, 1 Lev. 240; 1 Mod. Rep. 58; 1 Saund. 131.

Loe v. *Bordmore*, (1665), 1 Lev. 169; 83 E.R. 353; sub nom. *Low* v. *Berdmore*, 1 Sid. 261; T. Raym. 135; 33 Digest 474, *71*.

Nimmo v. *Lanarkshire Tramways*, 1912 S.C. (J.) 23; 49 Sc. L.R. 549; [1912] 1 S.L.T. 305; 6 Adam, 571; 43 Digest 351, *p*.

Ogden v. *Turner*, (1704), 6 Mod. Rep. 104.

Onslow v. *Turner*, (1771), 3 Wil. K.B. 177.

Ormiston v. *Great Western Ry. Co.*, [1917] 1 K.B. 598; 86 L.J.K.B. 759; 116 L.T. 479; 32 Digest 48, *554*.

Quartz Hill Gold Mining Co. v. *Eyre*, (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 33 Digest 468, *21*.

Rayson v. *South London Tramways Co.*, [1893] 2 Q.B. 304; 62 L.J.Q.B. 593; 69 L.T. 491; 58 J.P. 20; 33 Digest 470, *36*.

Savile v. *Roberts*, (1698), Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; 5 Mod. Rep. 394; 12 Mod. Rep. 208; Holt, K.B. 150, 193; 91 E.R. 1147; sub nom. *Roberts* v. *Savill*, 5 Mod. Rep. 405; Holt, K.B. 8; 33 Digest 507, *510*.

Sim v. *Stretch*, [1936] 2 All E.R. 1237; Digest Supp.

Sinclair v. *Eldred*, (1811), 4 Taunt. 7; 128 E.R. 229; 33 Digest 491, *306*.

Spencer v. *Shory*, (1599), Cro. Eliz. 709; 78 E.R. 944; 32 Digest 48, *551*.

Thorley v. *Kerry* (*Lord*), (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E.R. 367; 32 Digest 18, *90*.

Webb v. *Beavan*, (1883), 11 Q.B.D. 609; 52 L.J.Q.B. 544; 49 L.T. 201; 47 J.P. 489; 32 Digest 48, *550*.

Wiffen v. *Bailey & Romford Urban Council*, [1915] 1 K.B. 600; 84 L.J.K.B. 688; 112 L.T. 274; 79 J.P. 145; 33 Digest 470, *37*.

Preliminary Issue.

In an action by Betty Pamela Berry, the plaintiff, for damages for malicious prosecution in respect of proceedings brought against her in the magistrates' court by an employee of the defendants, the British Transport Commission, for unlawfully pulling the communication cord on a train, contrary to s. 22 of the Regulation of Railways Act, 1868, the defendants pleaded that the statement of claim disclosed no damage of which the plaintiff was entitled to complain in law and thus disclosed no cause of action. By an order of Master HARWOOD, dated Mar. 3, 1960, it was ordered that this point of law raised by the defendants be set down for hearing as a preliminary issue in the special paper list and disposed of before the trial of the issues of fact raised in the action. The pleadings are referred to in more detail in the judgment of DIPLOCK, J.

R. F. G. Ormrod, Q.C., and *T. K. Homer* for the plaintiff.
Neil Lawson, Q.C., and *P. M. O'Connor, Q.C.*, for the defendants.

Cur. adv. vult.

July 29. **DIPLOCK, J.**, read the following judgment: This case comes before me for the determination of a point of law raised on the pleadings. It is a difficult point of law, and I am much indebted to counsel on both sides for their assistance in elucidating it. The action is brought by the plaintiff for damages for malicious prosecution in respect of a statutory offence which is punishable not by imprisonment but by a monetary penalty only. She alleges that an employee of the defendants

> "maliciously and without reasonable or probable cause made before a justice of the peace for the County Borough of Brighton a complaint against the plaintiff of having on Jan. 4, 1959, unlawfully, wilfully and without reasonable and sufficient cause made use of the means of communication between the passengers and servants of the British Transport Commission provided on a certain train then being on the railway, contrary to the provisions of s. 22 of the Regulation of Railways Act, 1868, and procured the said justice to issue a summons directed to the plaintiff to appear before the court of summary jurisdiction for the County Borough of Brighton, on Feb. 13, 1959."

The statement of claim goes on to allege that the plaintiff was convicted of the charge before the magistrates, that she subsequently appealed to the recorder of Brighton, and that the appeal was allowed, and the said prosecution wholly determined in favour of the plaintiff. Paragraph 4 of the statement of claim is as follows:

> "By reason of the premises the plaintiff has been injured in reputation and has been held up to ridicule and has suffered pain of mind and has been put to expense in defending herself against the said charge, and has suffered loss and damage."

The particulars of the special damage are: "Costs of defence at magistrates' court as per account of Messrs. Gates & Co., £8 10s. Costs of appeal as per account of Messrs. Wright, Johnson & Cheales, £53 12s."—making a total of £62 2s. The prayer is for "damages" generally. Although it does not appear on the face of the statement of claim, I was informed that the plaintiff was awarded fifteen guineas costs against the complainant by the learned recorder, and that credit is given for this figure in the account of Messrs. Wright, Johnson & Cheales referred to in the statement of claim. The case has been argued before me on the basis that there is an allegation to this effect in the pleadings. For reasons which will appear (see *Cotterell* v. *Jones* (1)) the absence of such an allegation would, if anything, increase the legal difficulties of the plaintiff.

(1) (1851), 11 C.B. 713.

In the amended defence the defendants raise the question of law which I have to determine in the following form:

> "The defendants will contend that the statement of claim discloses no damage of which the plaintiff is entitled to complain in law and in the premises the statement of claim discloses no cause of action."

The action for malicious prosecution was an action on the case in consimili casu to the action brought by the old writ of conspiracy which lay only when there was a combination between two or more persons maliciously to indict the plaintiff for treason or felony. The action on the case for malicious prosecution was available against a single defendant, and could be founded on any form of legal proceedings, whether civil or criminal, brought maliciously and without any reasonable or probable cause against the plaintiff by the defendant. As the action was in case, however, damage was an essential ingredient. The early cases, which are conveniently summarised in the judgment of PARKER, C.J., in *Jones* v. *Givin* (2) had left it uncertain what kind of damage was necessary to found the action. This was finally settled in the classic judgment of HOLT, C.J., in 1698 in *Savile* v. *Roberts* (3), of which there are ten different reports (3), the most valuable being found in 1 Lord Raymond's Reports 374, and 5 Modern Reports 405. Although the former report is most frequently cited, there are phrases in it which raise apparent difficulties that are only soluble by comparing it with the other reports of the same judgment.

In *Savile* v. *Roberts* (3) the plaintiff had been indicted by Savile before the West Riding quarter sessions for riot and rout while engaged in stopping up a highway. He had been acquitted by the jury and brought his action for malicious prosecution. HOLT, C.J., said (4):

> "There are three sorts of damages, any of which would be sufficient ground to support this action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous . . . [but he added] there is no scandal in the crime for which the plaintiff in the original action was indicted. 2. The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty . . . [but he added] these kinds of damages are not ingredients in the present case. 3. The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge."

Most of the difficulties in the later cases on malicious prosecution seem to me to flow from the fact that *Savile* v. *Roberts* (3) is nearly always cited from Lord Raymond's report (5) of the judgment. HOLT, C.J., says in terms there that neither the first nor the second head of damages was an ingredient in the prosecution of Roberts for riot and rout. Yet these crimes were common law misdemeanours or, in the language of the seventeenth century, "trespasses", punishable with imprisonment, and one would have supposed that such a charge involved "scandal" even in 1698.

An examination of the other reports of *Savile* v. *Roberts* (6) and of contemporaneous cases of false imprisonment and slander, however, shows (i) as regards the first head of damages, that the expression "scandalous" was used as a synonym of "slanderous" in the sense of the kind of imputation which, if spoken, was at that date slander actionable per se; and (ii) as regards the second head of damages, that actual loss of liberty either by arrest on mesne process or final process in civil actions or by imprisonment pending trial or as a punishment in

(2) (1713), Gilb. 185.
(3) (1698), Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; 5 Mod. Rep. 394; 12 Mod. Rep. 208; Holt, K.B. 150, 193; sub nom. *Roberts* v. *Savill*, 5 Mod. Rep. 405; Holt, K.B. 8. (4) (1698), 1 Ld. Raym. at p. 378. (5) (1698), 1 Ld. Raym. 374.
(6) See footnote (3), ante.

criminal cases, had to be proved, and the mere fact that the charge exposed the plaintiff to risk of imprisonment if he were convicted was not enough to support the action under the second head.

As is clearly pointed out by PARKER, C.J., in *Jones* v. *Givin* (7), HOLT, C.J., was not saying that there were two categories of crime which, if charged, could give rise to an action for malicious prosecution, namely, (a) crimes which involved " scandal ", and (b) crimes which were punishable corporeally. He was saying that any legal proceedings brought maliciously and without any reasonable or probable cause were actionable if they caused damage to the plaintiff's property, to his person or to his fame, and that the test whether they caused damage to his fame was whether an oral accusation of the crime would have amounted to slander actionable per se. In 1698 a distinction was beginning to be drawn between libel and slander (see *King* v. *Lake* (8)), and possibly as a result of this a restricted view was current as to what oral accusations of crime amounted to slander actionable per se. HOLT, C.J., himself, as appears from his judgment in *Ogden* v. *Turner* (9), took the view that such accusation was only actionable if the crime involved an " infamous " or " villainous " punishment, that is, disqualified the convicted person from thereafter giving evidence in legal proceedings. That it was punishable by imprisonment was not enough. This is why he said in *Savile* v. *Roberts* (10) that the first head of damages was not present. This also, I apprehend, is the explanation of such contrasting seventeenth century cases as *Low* v. *Berdmore* (11), and *Henley* v. *Burstal* (12) in 1657. In the former case an indictment on a charge of rescue was held not to involve the first head of damages; in the latter, which was cited with approval in *Savile* v. *Roberts* (13), a charge against a justice of the peace for delivering a vagrant out of custody without examination contrary to law was held to involve the first head of damages, presumably because the oral accusation would have defamed the plaintiff in his office as a justice of the peace, and would have been actionable per se.

The restrictive interpretation current in the latter half of the seventeenth and early years of the eighteenth centuries on the categories of crime in respect of which an oral accusation constituted slander actionable per se gradually fell into disfavour, and the courts eventually (see *Webb* v. *Beavan* (14)), reverted to the ancient rule laid down in *Spencer* v. *Shory* (15), that the oral imputation of any crime punishable corporeally was slander actionable per se. (See also *Onslow* v. *Turner* (16), where DE GREY, L.J., as early as 1771, doubted the correctness of *Ogden* v. *Turner* (9).) Had the ratio decidendi of HOLT, C.J., in *Savile* v. *Roberts* (13) been followed, the category of crimes which, if charged, would involve the first head of damages in an action for malicious prosecution would have expanded correspondingly; but I can find no clear indication in the cases whether it did or not.

In 1813 one finds SIR JAMES MANSFIELD, C.J., in *Byne* v. *Moore* (17), regarding it as insufficient to show in an action for malicious prosecution for assault where damages were claimed only under the first head, that the crime charged was punishable corporeally. He regarded it as necessary that " scandal " also should be involved. What he in 1813 meant by " scandal " is not clear. SIR JAMES MANSFIELD adopted a conservative approach to defamation (see *Thorley* v. *Lord Kerry* (18) in which he regretted the distinction drawn in the course of the last 150 years between libel and slander), and it may well be that even as late as 1813 he regarded an oral accusation of assault, although punishable by imprisonment, as not constituting slander actionable per se.

(7) (1713), Gilb. 185, see, as regards damage, at pp. 202-204.
(8) (1667-70), Hard. 470.
(9) (1704), 6 Mod. Rep. 104.
(10) (1698), 1 Ld. Raym. at p. 378.
(11) (1665), T. Raym. 135.
(12) (1657), T. Raym. 180.
(13) (1698), 1 Ld. Raym. 374.
(14) (1883), 11 Q.B.D. 609.
(15) (1599), Cro. Eliz. 709.
(16) (1771), 3 Wil. K.B. 177 at p. 186.
(17) (1813), 5 Taunt. 187.
(18) (1812), 4 Taunt. 355.

It seems indeed likely that, but for the decision in *Rayson* v. *South London Tramways Co.* (19), the courts would have continued to follow the ratio decidendi of HOLT, C.J., in *Savile* v. *Roberts* (20), and would have regarded the action for malicious prosecution under the first head of damages as applicable to all crimes the oral accusation of which constituted slander actionable per se and as limited to such crimes.

In *Quartz Hill Gold Mining Co.* v. *Eyre* (21) BOWEN, L.J., drew attention to the analogy between malicious prosecution and slander actionable per se, and applied it to the imputation on the credit of a trading corporation involved in the bringing of a winding-up petition. He said (21):

> " Put those two classes together —the class of malicious prosecutions which the law recognises and the class of slanders which the law recognises— and although the two may not be based on exactly the same principles, perhaps a student may find material for pursuing the analogy between them."

In *Rayson* v. *South London Tramways Co.* (19), however, in which the only argument addressed to the court was on whether proceedings for a penalty under s. 51 of the Tramways Act, 1870, for travelling without payment of fare were proceedings in respect of a criminal offence, and in which *Savile* v. *Roberts* (20) was never even referred to, the Court of Appeal appeared to hold that any charge of a criminal offence, even if not punishable corporeally but only by a monetary penalty, was sufficient to found an action for malicious prosecution (thus departing wholly from any analogy with slander actionable per se). I say " appeared to hold " because the decision was whittled down in *Wiffen* v. *Bailey & Romford Urban Council* (22); but to whittle it down without overruling it, as being given per incuriam, involved what I think, with the greatest respect, was a misunderstanding of the judgment in *Savile* v. *Roberts* (20). BUCKLEY and PHILLIMORE, L.JJ., treated the first and second heads of damages as setting out two categories of crime which, if charged, can give rise to an action for malicious prosecution. They certainly regarded the second head as satisfied if the crime charged were punishable by imprisonment even although the plaintiff had not in fact been imprisoned. They regarded the first head as satisfied if the crime charged, although not punishable with imprisonment, conveyed an imputation on the plaintiff's fair fame.

I have given my reasons for thinking that this was not the true effect of HOLT, C.J.'s judgment in *Savile* v. *Roberts* (20), and that *Rayson's* case (19) and *Wiffen's* case (22) mark a departure from the old law. I am, of course, bound by those decisions. Their effect is that: (i) a charge of a statutory offence punishable by fine only does not of itself entail such damages as will support an action for malicious prosecution; but (ii) such a charge will do so if it injures the " fair fame " of the person charged.

What then is the test whether or not a charge injures the " fair fame " of the person charged? In *Wiffen's* case (22) it was expressed by BUCKLEY, L.J., as follows (23):

> " The matter is in a sense criminal, but that does not conclude the question. I have to see whether the institution of these proceedings necessarily and naturally conveyed an imputation affecting the plaintiff's fair fame."

PHILLIMORE, L.J. (24), put it in this way:

> " It seems to me that what one must look at is, not what might be proved in the course of a prosecution, but what is enough to support a conviction upon the information or indictment. If it will be enough to support a conviction upon the information or indictment that the person charged has done something which does not injure his fair fame, no scandal is involved

(19) [1893] 2 Q.B. 304.
(20) (1698), 1 Ld. Raym. 374.
(21) (1883), 11 Q.B.D. 674 at p. 692.
(22) [1915] 1 K.B. 600.
(23) [1915] 1 K.B. at p. 608.
(24) [1915] 1 K.B. at pp. 611, 612.

in the prosecution . . . Scandal, as the cases show, means something derogatory to the fair fame of the person charged . . ."

Finally, PICKFORD, L.J., said (25):

" It seems to me that we have not to consider what facts might be proved in order to support the prosecution, but whether the charge of itself as a necessary and natural consequence impairs the fair fame of the person against whom it is made."

The charge in that case was one of failure to comply with an abatement notice served in respect of a nuisance under s. 94 and s. 95 of the Public Health Act, 1875. All three of their lordships examined various hypothetical circumstances in which a prosecution might have been brought successfully under s. 95 of the Public Health Act, 1875, in which the facts proved would not reflect on the fair fame of the person charged. Having reached the conclusion that such circumstances might exist—irrespective of whether they in fact existed in the actual case in respect of which the action for malicious prosecution was brought—they came to the conclusion that " scandal " was not necessarily and naturally entailed in the institution of the proceedings.

The decision in *Rayson* v. *South London Tramways Co.* (26) was explained on the ground, of which no trace appears in the judgment of LORD ESHER, M.R., that the charge with which *Rayson's* case (26) was concerned, namely, of attempting to avoid payment of the proper fare, necessarily involved an intent to defraud which reflected on the fair fame of the person charged. This had in fact been decided, but only by the Scots courts, between the date of *Rayson's* case (26) and *Wiffen's* case (27): see *Nimmo* v. *Lanarkshire Tramways* (28).

It seems to me, therefore, that, under the law as laid down in *Wiffen's* case (27), the test that I have to apply is to consider whether there could be facts sufficient to support a conviction under s. 22 of the Regulation of Railways Act, 1868, which would not injure the " fair fame " of the person charged. If there could, the charge does not of itself entail such damages as would support an action for malicious prosecution. The allegations which were actually made against the plaintiff in the prosecution of which she complains are irrelevant for this purpose although, if the action lies at all, they would be very relevant to the issues of malice and absence of reasonable or probable cause. Section 22 of the Regulation of Railways Act, 1868, provides that:

" . . . Any passenger who makes use of the said means of communication [scilicet, a means of communication between the passengers and the servants of the British Transport Commission in charge of the train] without reasonable and sufficient cause shall be liable for each offence to a penalty not exceeding £5."

There are many circumstances in which a passenger might pull the communication cord without cause which was both reasonable and sufficient. He might, for instance, do so if he had been asleep and woke up to find the train starting to leave, on a non-stop journey of a hundred miles, the station at which he desired to alight, or if he discovered just as the train was leaving that he had left some valuable property behind him on the platform, or that some other traveller who had just alighted had left some valuable property in the carriage. He might indeed think it worth while paying the penalty to attain the result. Would a conviction on a set of facts such as these damage the " fair fame " of the person convicted? It is difficult to know what is the correct test. One is tempted to say that this is surely a question of fact for the jury and not a question of law for the judge, but in *Wiffen's* case (27) the jury had found a verdict for the plaintiff, and the matter was treated as a question of law. The case was not sent back for re-trial. I am accordingly bound to treat it as a question of law.

(25) [1915] 1 K.B. at p. 614. (26) [1893] 2 Q.B. 304. (27) [1915] 1 K.B. 600.
(28) 1912 S.C. (J.) 23.

Each of the members of the court in *Wiffen's* case (29) stated the test to be whether the plaintiff's "fair fame" would be affected, impaired or injured. This expression, which so far as I know is not a term of art with a precise legal meaning, is borrowed from the *Quartz Hill* case (30), where it was used by BRETT, M.R., without definition, and by BOWEN, L.J., with the suggestion that it was analogous to the words "actionable per se" in cases of slander, an analogy expressly approved by PHILLIMORE, L.J., in *Wiffen's* case (31). As a result of what I cannot but regard as the unfortunate decision in *Rayson's* case (32), this analogy, which in my view accurately expresses the ratio decidendi of the earlier decisions, is no longer perfect, since an accusation that a person had committed an offence under s. 51 of the Tramways Act, 1870, would not be actionable per se (cf. *Ormiston* v. *Great Western Ry. Co.* (33)), although a charge of such an offence would support an action for malicious prosecution.

I must assume, however, that the Court of Appeal in *Wiffen's* case (29) intended some test which could be applied as a matter of law in determining whether a charge was injurious to a person's "fair fame" so as to support an action for malicious prosecution. Although the court refrained from using the expression "defamatory"—a term of art which would have made their meaning clear—I think that, put at its highest in the plaintiff's favour, the test that they must have been intending to lay down was: Was the charge one which necessarily and naturally is defamatory of the plaintiff? In effect, I have to ask myself a question, which is the converse of the question of law involved in actions for defamation: Is the statement that the plaintiff was charged with the offence capable of a non-defamatory meaning? And to obtain the answer to that question I have to postulate all possible circumstances in which a person might be successfully prosecuted for the offence of which the plaintiff was charged, and ask myself if I can conceive of facts which, if stated of the plaintiff, would not be defamatory of her, that is, lower her in the estimation of right-thinking members of society generally (*Sim* v. *Stretch* (34)), although they would support a conviction for that offence. On such an approach, it seems to me that a statement alleging the sort of facts which I have indicated previously as being sufficient to support a conviction for an offence under s. 22 of the Regulation of Railways Act, 1868, would not be defamatory of the person alleged to be guilty of them. In my view, therefore, the matter whereof the plaintiff was accused was not "scandalous" and the action cannot be supported under HOLT, C.J.'s first head of damages (35).

This, however, does not dispose of the matter. The plaintiff has another string to her bow. I have next to consider whether the difference between the costs actually incurred by the plaintiff and those which she was awarded by the learned recorder constituted special damage under HOLT, C.J.'s third head (36). In *Quartz Hill Gold Mining Co* v. *Eyre* (30) it was held that in a civil action (in that case a winding-up petition) the difference between the actual costs incurred and party and party costs awarded could not be recovered as special damage. The ground for this decision, for which there is abundant authority in the earlier cases such as *Sinclair* v. *Eldred* (37), was that (38):

> ". . . the only costs which the law recognises, and for which it will compensate [a litigant], are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them; if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action,

(29) [1915] 1 K.B. 600. (30) (1883), 11 Q.B.D. 674. (31) [1915] 1 K.B. at p. 610.
(32) [1893] 2 Q.B. 304. (33) [1917] 1 K.B. 598. (34) [1936] 2 All E.R. 1237.
(35) As stated in *Savile* v. *Roberts*, (1698), 1 Ld. Raym. at p. 378.
(36) See p. 325, letter F, ante. (37) (1811), 4 Taunt. 7.
(38) Per BOWEN, L.J., (1883), 11 Q.B.D. at p. 690.

however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

This rule did not apply in criminal cases in which, originally, there was no power to award costs. Accordingly, where the malicious prosecution complained of was in respect of an indictable offence—and the industry of counsel has discovered no example of malicious prosecution in respect of a summary offence before *Rayson's* case (39) in 1893—the costs incurred by the plaintiff in defending himself were recoverable as special damage. In the case of summary offences, however, since 1848 the justices have had the power in their discretion to order that the prosecutor or complainant shall pay to the defendant " such costs as to such justices shall seem just and reasonable " (40). In *Wiffen's* case (41), the Court of Appeal, applying the decision in the *Quartz Hill* case (42), held that the difference between the solicitor and client costs incurred by the plaintiff and the five guineas costs that he was awarded by the magistrates did not for similar reasons constitute special damage sufficient to support an action for malicious prosecution. The matter was not argued in *Wiffen's* case (43) as counsel conceded, and the Court of Appeal accepted, that they were bound by the earlier decision in the *Quartz Hill* case (42). It has, however, been argued on behalf of the plaintiff in the present case that in these circumstances the expression of opinion in *Wiffen's* case (41) was per incuriam or obiter, and is not binding on me since the principles on which costs are awarded in criminal cases are not the same as those on which they are awarded in civil cases.

I do not think that any distinction is to be drawn in law between civil and criminal cases which are tried summarily. In the present case the costs were awarded by the learned recorder under the powers given to him by the Summary Jurisdiction (Appeals) Act, 1933. By s. 1 of that Act, which substitutes a new section for s. 31 of the Summary Jurisdiction Act, 1879, the court of quarter sessions, exercising its appellate jurisdiction, is given power to make such order as to costs to be paid by either party as they think just, and by s. 5 it is provided that a court of quarter sessions

" may, in the exercise of their power to award costs—(i) where they allow the appeal, direct that there shall be included in any costs to be paid by the respondent to the appellant the costs properly incurred by the appellant in the proceedings before the court of summary jurisdiction, or such fixed sum as the court of quarter sessions may consider reasonable in respect of the costs so incurred by him; (ii) in any case, in lieu of directing a taxation of costs, fix the sum to be paid by way of costs by either party to the appeal; and in fixing, for the purposes of this subsection, the amount of any costs to be paid by a party to an appeal shall have regard to his means."

Subject to the qualification that quarter sessions shall have regard to the means of the party whom they order to pay costs, this gives to quarter sessions a discretion to award such costs as they consider reasonable. The quarter sessions' discretion is in law no different from that of a High Court judge in a civil action under R.S.C., Ord. 65, r. 1, or the Court of Appeal under R.S.C., Ord. 58, r. 9. In the present case the learned recorder, exercising his discretion, awarded the plaintiff fifteen guineas costs. It seems to me that, in the words of BOWEN, L.J. (44):

" for the costs which the plaintiff has properly incurred in securing her ultimate acquittal she has already been compensated so far as the law chooses to compensate her."

---

(39) [1893] 2 Q.B. 304.

(40) The power of justices to award costs was originally contained in s. 18 of the Summary Jurisdiction Act, 1848. The power is now contained, as to criminal cases, in s. 6 of the Costs in Criminal Cases Act, 1952, and as to civil cases, in s. 55 of the Magistrates' Courts Act, 1952.

(41) [1915] 1 K.B. at pp. 607, 610.

(42) (1883), 11 Q.B.D. 674.

(43) [1915] 1 K.B. 600.

(44) See p. 329, letter H, ante.

A There is no allegation in the pleadings that, in fixing the amount of the costs which he awarded to the plaintiff, the learned recorder took into account the means of the complainant. Indeed, having regard to the fact that the British Transport Commission was responsible for the prosecution, it seems plain that no such allegation could have been made. If a case were to arise in which it was established that the costs awarded to the plaintiff had been reduced because of the B poverty of the prosecutor, a nice point would arise whether the amount by which the costs were so reduced constituted special damage recoverable in a subsequent action for malicious prosecution. A somewhat similar point arose in *Cotterell* v. *Jones* (45) where an action for malicious prosecution was brought in respect of the procuring of a civil action to be brought by an insolvent plaintiff. There is an interesting argument in the report whether the costs not recovered from the C plaintiff would constitute damages under HOLT, C.J.'s third head sufficient to support the action for malicious prosecution. But the question remained unsolved since the court decided the matter on the ground that there was no allegation that the successful defendant had asked for his costs, and that accordingly his failure to recover them was due to his own remissness and not to the insolvency of the plaintiff. As, however, there is no allegation in the present case that the D fifteen guineas costs awarded to her were reduced as a result of the learned recorder having regard to the means of the prosecutor, this problem does not appear to me to arise. In my view, the difference between the solicitor and client costs which the plaintiff in fact incurred and the fifteen guineas costs awarded to her by the learned recorder did not constitute such special damage as to found an action for malicious prosecution under HOLT, C.J.'s third head of damages (46).

E I accordingly hold that the statement of claim discloses no cause of action. The action is dismissed with costs.

Order accordingly; judgment for the defendants.

Solicitors: *Booth & Blackwell*, agents for *Wright, Johnson & Cheales*, Brighton (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

(45) (1851), 11 C.B. 713.

(46) See p. 325, letter F, ante.

INGRAM AND OTHERS *v.* LITTLE.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), June 27, 28, 29, 30, July 28, 1960.]

Contract—Offer and acceptance—Identity of party—Deception as to identity—Oral offer of car for sale on basis of payment by cheque—Purchaser present in person—Mistaken belief that he was another person of standing—Belief fraudulently induced by purchaser—Cheque accepted on basis of mistake—Whether contract formed.

Where, in negotiations for a contract conducted orally inter praesentes, apparent agreement is reached but there is deception as to the identity of a proposed party, the test by which to determine whether there is a contract despite the deception is to answer a question of fact, viz.—whether, contrary to the prima facie presumption that an offer is made to the person to whom it is addressed, the offeror is not contracting with the physical person to whom he utters the offer but with another individual whom he believes the person physically present to be (see p. 344, letter D, p. 341, letter F, and cf., p. 339, letter H, and p. 347, letter C, post).

In answer to an advertisement of a car being for sale, a swindler called on two sisters, joint owners with a third person of the car, and agreed with one of the sisters, E., who negotiated for the owners, to purchase the car for £717. On her categorically refusing to accept a cheque in payment, he tried to convince her that he was a reputable person and said that he was a Mr. P. G. M. Hutchinson and lived at Stanstead House, Stanstead Road, Caterham. While the discussion was going on, the other sister went to the local post office near by and returned to say that she had checked the name and address in the telephone directory. E. thereupon decided to accept the cheque, on which the swindler wrote the name and address of Hutchinson, and the owners parted with the car to him. The cheque was dishonoured and the man, who was not Mr. P. G. M. Hutchinson, disappeared. In an action by the owners to recover the car or its value from a purchaser to whom the swindler had sold it within a few days of obtaining it, and who had bought it in good faith, the court found that E. had intended to part with the property in the car to the swindler in the belief that he was the P. G. M. Hutchinson named in the telephone directory, but that otherwise the sisters would not have accepted the cheque or parted with the car. On appeal,

Held (DEVLIN, L.J., dissenting): the offer to sell on payment by cheque was made only to the person (Mr. P. G. M. Hutchinson) whom the swindler had represented himself to be, and, as the swindler knew this, the offer was not one which was capable of being accepted by him; therefore there had been no contract for the sale of the car by the plaintiffs and they were entitled to recover the car or damages from the defendant.

Phillips v. *Brooks, Ltd.* ([1919] 2 K.B. 243) considered and distinguished on the facts.

Appeal dismissed.

[Editorial Note. DEVLIN, L.J., dissented from the decision. He did not dissent, however, from the presumption stated at letter C, supra, that an oral offer is made to the person to whom it is spoken (see p. 347, letter C, post). The point of divergence between his view and the views of the majority was whether the presumption was rebutted in the circumstances of this case (see p. 347, letters G to I, post). SELLERS, L.J., adopting a view written by Dr. Goodhart, regarded the correct approach, where the formation of a contract was in question, to be expressed in the question " How ought the promisee to have interpreted the promise? " (see p. 340, letter B, post). The proposition expressed at letter C, supra, does not expressly include this but is thought

to be in accord with the expression of the legal position consequent on that approach and to formulate the test on which there was unanimity between the majority judgments.

As to mistake as to a party to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 81, para. 141, and 26 HALSBURY'S LAWS (3rd Edn.) 896, para. 1658; and for cases on the subject, see 35 DIGEST 97-99, *64-75*.]

Cases referred to:

Boulton v. *Jones*, (1857), 2 H. & N. 564; 27 L.J.Ex. 117; 157 E.R. 232; sub nom. *Bolton* v. *Jones*, 30 L.T.O.S. 188; 35 Digest 98, *66*.

Cundy v. *Lindsay*, (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; sub nom. *Lindsay & Co.* v. *Cundy*, 47 L.J.Q.B. 481; 35 Digest 98, *72*.

Denny, Mott & Dickson, Ltd. v. *Fraser (James B.) & Co.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; 12 Digest (Repl.) 450, *3394*.

Du Jardin v. *Beadman Brothers, Ltd.*, [1952] 2 All E.R. 160; [1952] 2 Q.B. 712; 3rd Digest Supp.

Edmunds v. *Merchants' Despatch Transportation Co.*, (1883), 135 Mass. Rep. 283.

Fawcett v. *Star Car Sales, Ltd.*, [1960] N.Z.L.R. 406.

Fibrosa Spolka Akcyjna v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 12 Digest (Repl.) 448, *3383*.

Gordon v. *Street*, [1899] 2 Q.B. 641; 69 L.J.Q.B. 45; 81 L.T. 237; 35 Digest 44, *393*.

Hardman v. *Booth*, (1863), 1 H. & C. 803; 32 L.J.Ex. 105; 7 L.T. 638; 158 E.R. 1107; 35 Digest 98, *67*.

Hirji Mulji v. *Cheong Yue S.S.Co* ., [1926] All E.R. Rep. 51; [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 17 Asp. M.L.C. 8; 12 Digest (Repl.) 436, *3332*.

King's Norton Metal Co., Ltd. v. *Edridge, Merrett & Co., Ltd.*, *Same* v. *Roberts*, (1897), 14 T.L.R. 98; 39 Digest 534, *1455*.

Lake v. *Simmons*, [1927] All E.R. Rep. 49; [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233; 35 Digest 97, *64*.

Phelps v. *McQuade*, (1917), 220 N.Y. 232.

Phillips v. *Brooks, Ltd.*, [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 39 Digest 533, *1451*.

R. v. *Pear*, (1779), 1 Leach, 212; 2 East, P.C. 685; 15 Digest (Repl.) 1040, *10,227*.

Scammell (G.) & Nephew, Ltd. v. *Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp.

Smith v. *Wheatcroft*, (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 35 Digest 98, *71*.

Sowler v. *Potter*, [1939] 4 All E.R. 478; [1940] 1 K.B. 271; 109 L.J.K.B. 177; 162 L.T. 12; 30 Digest (Repl.) 504, *1453*.

Appeal.

The defendant appealed against an order of SLADE, J., made on May 28, 1959, in favour of the plaintiffs, Miss Elsie Ingram, Miss Hilda Ingram and Miss Badger, in an action for a declaration that a Renault Dauphine motor car in the defendant's possession was the property of the plaintiffs and for the return of the car or for its value or for damages for its detention; and alternatively damages for conversion of the car. The grounds of appeal were (1) that the judge was wrong in law and in fact in holding (i) that the plaintiffs never sold the car to a person calling himself Hutchinson either before any cheque was tendered by him or on tender and acceptance of his cheque; (ii) that the property in the car never passed to Hutchinson; (iii) that there was any mistake such as to prevent a contract of sale from arising; and (iv) that the car was stolen from the plaintiffs by Hutchinson; (2) that the judge

was wrong in law and in fact in refusing to hold that Hutchinson acquired title to the car, albeit a voidable title; (3) that on the evidence the judge ought to have found that Hutchinson obtained the property in the car, albeit by false pretences; and (4) that, having found that the defendant bought the car from Hutchinson in good faith and without notice of any defect in his title, the judge ought to have held that the defendant acquired a good title thereto.

Stephen Chapman, Q.C., and *R. E. Hopkins* for the defendant.
C. Ingram Poole for the plaintiffs.

Cur. adv. vult.

July 28. The following judgments were read.

SELLERS, L.J.: In August, 1957, the plaintiffs were the joint owners of a Renault Dauphine motor car, ULJ 101. On Aug. 3, the Saturday before the August Bank holiday of that year, in a transaction with a man not inappropriately called "the rogue Hutchinson" by the learned judge, the plaintiffs parted with the car to him. By Aug. 6 the car was in Blackpool and there was a purported sale of it to the defendant by the rogue (as the judge found) then using the name Hardy. If the property in the car had passed on Aug. 3 to "the rogue Hutchinson", whatever his true name and identity was, then the defendant would have got a good title on the judge's findings that Hutchinson and Hardy were but one person, the rogue Hutchinson, and that the defendant through his servants bought the car in good faith and without notice of the seller's defect in title. SLADE, J., held that no contract had in fact been entered into between the plaintiffs and Hutchinson and that no title had passed to him, and therefore none was transferred to the defendant, and he gave judgment for the plaintiffs for £720 the agreed value of the car, as damages for conversion.

The defendant has appealed against this decision alleging that the learned judge was wrong both in law and in fact in so holding and it will be necessary to examine the facts found as well as the law applied. By a cross-notice of appeal the plaintiffs have challenged the findings that the man who sold the car to the defendant was the same man who had obtained it from them and that the defendant bought the car in good faith. It was submitted to us that the findings were unjustified, but I agree so fully with what the learned judge has said and held on both these matters that I do not review the evidence or the argument afresh on the plaintiffs' contentions. The defendant and his servants, like so many who buy and sell second-hand motor cars, might have been more astute and more careful, but it requires more than that to justify a finding of bad faith. The inference that there had been no transaction with the car intervening between that with the plaintiffs and that with the defendant seems reasonable and probable and therefore sufficiently established as the judge has held.

The decision in this case turns solely on whether Hutchinson entered into a contract which gave him a title to the car which would subsist until it was avoided on the undoubted fraud being discovered. There was no evidence from the other alleged contracting party Hutchinson, the alleged buyer, for he is apparently unknown and untraced, but the learned judge found the plaintiffs' evidence satisfactory and reliable and the judgment sufficiently and accurately makes these findings:

> "About 2.15 p.m. the rogue Hutchinson called at the house where the two Misses Ingram and Miss Badger were living. He was, I think, actually admitted by Miss Hilda Ingram. He told her he was Hutchinson, and Miss Hilda Ingram accordingly introduced him to her sister Miss Elsie Ingram as Hutchinson. He looked at the car, and asked Miss Elsie Ingram to take him for a run in it, and she did so. During the run he was very talkative. He told Miss Elsie Ingram that he came from Surrey. He talked about his family, who he said were then in Cornwall, and he said that his home

was at Caterham. At that time he had given no further information, nor, I believe, had he even given his initials; he was merely Mr. Hutchinson.

"After the drive they came back to the house and discussed the sale of the car. As I have said, the asking price in the advertisement was £725 or near offer. Hutchinson offered Miss Elsie Ingram £700, and she refused. He then offered £717. Miss Ingram was prepared to accept £717 in cash, and I need hardly say that the price of anything which is sold is a price in cash unless anything else is said to the contrary. At that moment the rogue Hutchinson pulled out a cheque book and Miss Elsie Ingram immediately realised that he was proposing to pay the £717 by cheque. She told him that she would not in any circumstances accept a cheque, and that she was only willing to sell the car for cash. She told him that so far as she was concerned the proposed deal was finished. She said she was not prepared to accept a cheque. She had expected cash, and she made as though to walk out of the room.

"The rogue Hutchinson started to talk and try to convince her that he was a most reputable person, and then for the first time he gave his initials. He said he was a Mr. P. G. M. Hutchinson. He said he had business interests in Guildford, and that he lived at Stanstead House, Stanstead Road, Caterham. At that moment Miss Hilda Ingram, who had been in the room, slipped out of the room and after a short time she returned.

"I pause there for a moment to say what she had done while she was out of the room. She in fact went to the Parkstone Post Office, which was only about two minutes from their house, and she had looked in the main directory covering the district of Caterham. In that directory she saw the entry, 'Hutchinson, P.G.M., Stanstead House, Stanstead Road, Caterham 4665', and she believed that that was the man who at that moment was with her sister in their house.

"Miss Hilda Ingram returned to the house and to the room where Miss Elsie Ingram was still discussing the proposed sale, and Miss Hilda told Miss Elsie that she had checked with the telephone directory at the Lower Parkstone Post Office, and that there was such a person as Mr. P. G. M. Hutchinson, Caterham, living at that address, i.e., Stanstead House, Stanstead Road. Having received that information, she and Miss Hilda decided that they would let the rogue Hutchinson have the car in exchange for the cheque. She said that she did so because they believed that he was the person he said he was."

It was clearly proved that "Hutchinson" was not Mr. P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham, who had nothing whatever to do with the transaction in question and knew none of the parties connected with it. This gentleman banked with a branch of Lloyds Bank in London. It appears that the rogue Hutchinson opened an account on Aug. 2, 1957, at a branch of the Westminster Bank in Guildford with a deposit of £10, acquired a cheque book from which he drew cheques on this account to the extent of nearly £4,000 including the cheque of Aug. 3 for £717 made payable to the plaintiffs, none of which cheques was honoured. Unlike the Mr. P. G. M. Hutchinson he purported to be, he was not a man of substance with an established address in Caterham.

During the conversation from which a contract if any has to be derived, Hutchinson knew he was not the person the plaintiffs believed him to be and to whom alone they made their offer to sell the car and to whom alone they intended to give possession of it in exchange for his cheque. Hutchinson knew that the offer to sell the car in exchange for a cheque was not made to him, as he was, but only to an existing person whom he represented himself to be. If the plaintiffs are to be regarded as the acceptors of Hutchinson's offer to pay by cheque, he knew full well that it was not his cheque that they were

accepting but the cheque of the man whom they thought that he was by reason of his persuasion and deceit. A

The learned judge finds that Miss Elsie Ingram intended to part not merely with possession but with the property in the car, but that she did so believing that the person to whom she was selling the car was Mr. P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham, with a number in the telephone directory and he further holds that, if the entry in the telephone directory had not been confirmed by Miss Hilda Ingram, the two sisters would not have accepted the cheque in payment or parted with the car. B

If Hutchinson had paid cash for the car, then it seems clear that there would have been a concluded and unimpeachable transaction in which the identity and financial stability of the buyer would have been of no moment. This is not a case where the plaintiffs wished to withhold their car from any particular person or class of persons. Their desire, made quite obvious in the negotiations, was to ensure that they received payment, and unless cash was paid the person with whom they were dealing was of major importance truly only as to his credit-worthiness and this fact was equally clear to Hutchinson from the course which the negotiations took. C

It does not seem to me to matter whether the right view of the facts is, as the judge has held and as I would agree, that there was no concluded contract before the cheque book was produced and before the vital fraudulent statements were made or that there was a concluded contract which Hutchinson at once repudiated by refusing to pay cash and that this repudiation was accepted by the plaintiffs and the transaction was then and there at an end. The property would not have passed until cash had been paid and it never was paid or intended to be paid. D E

Was there a contract of sale subsequently made which led to the plaintiffs' taking Hutchinson's cheque and in exchange for it handing over the car and its log book? The judgment holds that there never was a concluded contract, applying, as I understand it, the elementary factors required by law to establish a contract. The learned judge, treating the plaintiffs as the offerors and the rogue Hutchinson as the offeree, finds that the plaintiffs in making their offer to sell the car not for cash but for a cheque (which in the circumstances of the Bank Holiday week-end could not be banked before the following Tuesday, Aug. 6) were under the belief that they were dealing with, and therefore making their offer to, the honest Mr. P. G. M. Hutchinson, of Caterham, who they had reason to believe was a man of substance and standing. Hutchinson, the offeree, knew precisely what was in the minds of the two ladies, for he had put it there and he knew that their offer was intended for Mr. P. G. M. Hutchinson, of Caterham, and that they were making no offer to and had no intention to contract with him, as he was. There was no offer which he, Hutchinson, could accept and therefore there was no contract. The judge pointed out that the offer which the plaintiffs made was one which was capable of being accepted only by the honest Mr. P. G. M. Hutchinson, of Caterham, and was incapable of acceptance by the rogue Hutchinson. In all the circumstances of this case I would accept the learned judge's findings. Indeed the conclusion so reached seems self-evident. F G H

Is the conclusion to be held wrong in law? If it is, then, as I see it, it must be on the sole ground that as Hutchinson was present, albeit making fraudulent statements to induce the plaintiffs to part with their car to him in exchange for his worthless cheque and was successful in so doing, then a bargain must have been struck with him personally, however much he deceived the plaintiffs into thinking they were dealing with someone else. I

Where two parties are negotiating together and there is no question of one or the other purporting to act as agent for another and an agreement is reached, the normal and obvious conclusion would no doubt be that they are the contracting parties. A contrary finding would not be justified unless very clear

evidence demanded it. The unfortunate position of the defendant in this case illustrates how third parties who deal in good faith with the fraudulent person may be prejudiced. The mere presence of an individual cannot, however, be conclusive that an apparent bargain which he may make is made with him. If he were disguised in appearance and in dress to represent someone else and the other party, deceived by the disguise, dealt with him on the basis that he was that person and would not have contracted had he known the truth, then, it seems clear, there would be no contract established. If words are substituted for outward disguise so as to depict a different person from the one physically present, in what circumstances would the result be different?

Whether the person portrayed, by disguise or words, is known to the other party or not is important in considering whether the identity of the person is of any moment or whether it is a matter of indifference. If a man said his name was Brown when it was in fact Smith, and both were unknown to the other party, it would be difficult to say that there was any evidence that the contract was not made and intended to be made with the person present. In *King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.* (1), one Wallis fraudulently described himself as Hallam & Co., making it appear a substantial firm with a large factory. The court held that the use of an assumed name by the buyer did not prevent a finding that the plaintiffs, the sellers of some brass rivet wire, had contracted with him. But personal knowledge of the person fraudulently represented cannot I think be an essential feature. It might be a very strong factor, but the qualities of a person not personally known might be no less strong. If a man misrepresented himself to be a Minister of the Crown or a stockbroker, confidence in the person so identified might arise, although the individual so described was wholly unknown personally or by sight to the other party.

It would seem that there is an area of fact in cases of the type under consideration where a fraudulent person is present purporting to make a bargain with another and that the circumstances may justify a finding that, notwithstanding some fraud and deceit, the correct view may be that a bargain was struck with the person present or on the other hand they may equally justify, as here, a finding the other way.

Some of the difficulties and perhaps confusion which have arisen in some of the cases do not in my view arise here. If less had been said by the rogue, and if nothing had been done to confirm his statements by Miss Hilda Ingram, who communicated what she had learnt to Miss Elsie, who was doing the main negotiation, the result might have been different, for the sellers' concern about the stability and standing of the buyer might not have been revealed and it might have been held that an offer in such circumstances was to the party present, whatever his true identity would be.

In *Phillips* v. *Brooks, Ltd.* (2) the rogue North had apparently been in the shop some time inspecting goods which were brought and displayed for sale to him without any regard to his identity—he was a "customer" only. The judgment of HORRIDGE, J., is, as I read it, based on a finding of fact that Phillips intended to deal with North as a customer. VISCOUNT HALDANE, in *Lake* v. *Simmons* (3), has taken the view that the case could be explained on the ground that the fraudulent misrepresentation was not made until after the parties had agreed on a sale. That opinion has been criticised, mainly I think by academic writers, but, if, as must be conceded, it is a possible view, and as *Phillips* v. *Brooks, Ltd.* (2) has stood for so long and is, as I think, a decision within an area of fact, I would not feel justified in saying that it was wrong. It is not an authority to establish that where an offer or acceptance is addressed to a person (although under a mistake as to his identity) who is present in person, then it

(1) (1897), 14 T.L.R. 98. (2) [1919] 2 K.B. 243.
(3) [1927] All E.R. Rep. 49; [1927] A.C. 487.

must in all circumstances be treated as if actually addressed to him. I would regard the issue as a question of fact in each case depending on what was said and done and applying the elementary principles of offer and acceptance in the manner in which SLADE, J., directed himself.

The judgment quotes extensively from the article by Dr. Goodhart, the learned editor of the LAW QUARTERLY REVIEW, called "Mistake as to identity in the law of contract," ((1941), Vol. 57, p. 228) and I would join the learned judge in his expression of indebtedness to him. Referring to *Phillips* v. *Brooks, Ltd.* (4) Dr. Goodhart asks (at p. 240):

> "Did the shopkeeper believe that he was entering into a contract with Sir George Bullough and did North know this? If both answers are in the affirmative then it is submitted that there was no contract."

I think that there may be a doubt in that case whether both the answers should have been in the affirmative but on the facts of the present case I feel no doubt and I would uphold the learned judge's view of no contract. Dr. Goodhart may well be right when he says that "There is no branch of the law of contract which is more uncertain and difficult" than that involved in this case, and I am conscious that our decision here will not have served to dispel the uncertainty.

The recent case in the New Zealand courts, *Fawcett* v. *Star Car Sales, Ltd.* (5), has also produced a division of opinion, PRESIDENT GRESSON taking a different view from NORTH, J., and CLEARY, J., in the appellate court, who upheld the judgment of HARDIE BOYS, J., that a mistake by a purchaser as to the identity of a person with whom he is dealing does not necessarily invalidate any sale which takes place. NORTH, J., put the question thus (6):

> "Does the purchaser of a chattel who pays the price asked by the true owner and takes delivery of the chattel from the true owner acquire a good title if it so happens that he is told and believes he is dealing with the previous owner who he wrongly thinks is still the true owner?"

In that case which was also the case of the purchase of a motor car, the purchase of the car had not been completed by the purchaser and judgment had been obtained against him. In the action he was seeking to establish that no contract of sale of the car had been made by the purchaser. NORTH, J., said (7):

> "In my view, the vital and, indeed, all-important matter was the representation made by Mrs. Davies that she was the true owner of the motor car. The name of 'Mrs. Fawcett' meant nothing to the purchaser. All he was interested in was to ensure that he was dealing with the true owner, and indeed he was. His eyes as well as his mind rested on Mrs. Davies. In my opinion, then, the representation that the person present negotiating the sale was 'Mrs. Fawcett' amounted to no more than a false description."

CLEARY, J., said (8):

> "Mr. Gould believed that the woman before him was Mrs. Fawcett (which she was not) and was the owner of the car (which for the present purposes she was). He was in fact dealing with a person able to make title to the car. In my view, there was not merely one side to a contract, but a contract in fact, voidable it is true, but one under which the property passed from the owner to the purchaser notwithstanding the false name assumed by the owner."

The majority of the court therefore could not accept the view that a contract was not entered into, That case reveals the difficulties of the problem. It turns, I think, on the view taken of the facts and apart from a comprehensive review of the authorities made by PRESIDENT GRESSON, I do not think that it is helpful in the present case.

---

(4) [1919] 2 K.B. 243. (5) [1960] N.Z.L.R. 406. (6) [1960] N.Z.L.R. at p. 425.
(7) [1960] N.Z.L.R. at p. 426. (8) [1960] N.Z.L.R. at p. 431.

The question in each case should be solved in my opinion by applying the test which SLADE, J., applied: "How ought the promisee to have interpreted the promise?" in order to find whether a contract has been entered into. I am in agreement with the learned judge when he quotes, accepts and applies the following passage from Dr. Goodhart's article (LAW QUARTERLY REVIEW (1941), Vol. 57, at p. 231):

> "It is the interpretation of the *promise* which is the essential thing. This is usually based on the interpretation which a reasonable man, in the promisee's position, would place on it, but in those cases where the promisor knows that the promisee has placed a peculiar interpretation on his words, then this is the binding one. The English law is not concerned with the motives of the parties nor with the reasons which influenced their actions. For practical reasons it has limited itself to the simple questions: what did the promisor promise, and how should this be interpreted?"

Phillips v. *Brooks, Ltd.* (9) is the closest authority on which the defendant relies. Once that is distinguished on its facts, without going so far as to say it is wrong, authority leans strongly in favour of the judgment appealed from. *Cundy* v. *Lindsay* (10) on the findings of the Court of Appeal and the House of Lords, was to the same effect as the present case. The plaintiffs intended to sell to Blenkiron & Co., but Blenkarn fraudulently assumed the position of the buyer. Therefore, an offer to sell to Blenkiron & Co. was knowingly "accepted" by Blenkarn and there was no contract. But, as the learned authors of CHESHIRE & FIFOOT ON THE LAW OF CONTRACT (5th Edn.) at p. 197, point out, another view of the facts of that case might have been that

> "the plaintiffs, though deceived by the fraud of Blenkarn, intended or were at least content to sell to the person who traded at 37, Wood St., from which address the offer to buy had come and to which the goods were sent. If this were the true position there was a contract with Blenkarn of 37, Wood St., though one that was voidable against him for his fraud."

Blenkiron & Co.'s address was 123, Wood Street, and the three judges of the Queen's Bench Division had taken this view.

Hardman v. *Booth* (11) more closely supports the judgment in the present case. One of the plaintiffs was fraudulently persuaded by Edward Gandell that he was a member of Gandell & Co., which in fact consisted only of Thomas Gandell. It was held that there was no contract, since the plaintiff's offer was made to Thomas only as Edward knew to be the fact, and therefore he could not accept it himself.

The legal position is, I think, well illustrated by Dr. Goodhart in the article already referred to. There is a difference between the case where A makes an offer to B in the belief that B is not B but is someone else and the case where A makes an offer to B in the belief that B is X. In the first case B does in fact receive an offer, even though the offeror does not know that it is to B to whom he is making it, since he believes B to be someone else. In the second case A does not in truth make any offer to B at all; he thinks that B is X, for whom alone the offer is meant. There was an offer intended for and available only to X. B cannot accept it, if he knew or ought to have known that it was not addressed to him.

The judgment has quoted and referred to Pothier's statement of the law and I have observed that Dr. Goodhart concludes his article (LAW QUARTERLY REVIEW (1941), Vol. 57, at p. 244) by saying that "it is certainly time that Pothier's statement was firmly and finally buried." SLADE, J., would have held equally for the plaintiffs if he had applied the subjective test which Pothier seems to stipulate. Pothier's statement has been cited in several English cases

(9) [1919] 2 K.B. 243. (10) (1878), 3 App. Cas. 459. (11) (1863), 1 H. & C. 803.

—by FRY, J., in *Smith* v. *Wheatcroft* (12), a case of specific performance, and in this court in *Gordon* v. *Street* (13), followed in *Sowler* v. *Potter* (14). Having regard to the judge's finding that whichever view he takes it does not affect his decision, I do not feel that the occasion is appropriate to consider further the part that Pothier's views should play in English law.

If it is the formation of a contract which calls for consideration, as it is here, "How ought the promisee to have interpreted the promise?" is in my opinion the correct approach, as the judge has held; but I recognise that the correct answer may not always prove as ascertainable as I believe it to be in the present case. I would dismiss the appeal.

PEARCE, L.J.: I agree. The question here is whether there was any contract, whether offer and acceptance met. For, as PRESIDENT GRESSON said in *Fawcett* v. *Star Car Sales, Ltd.* (15) "a void contract is a paradox; in truth there is no contract at all." Much argument has ranged round Dr. Goodhart's illuminating article of which the learned judge made considerable use in arriving at his conclusion. The learned author rightly points out that the often quoted passage from Pothier is misleading. For it seems to substitute for the objective English test: "How ought the promisee to have interpreted the promise?" the entirely different subjective test: "What did the promisor intend when he made the promise?", and if taken literally it seems to involve "an inquisition into the feelings", and into the motives of the promisor.

When an offeror seeks to avoid an apparent contract on the ground of mistaken identity, the investigation must start with his actual state of mind. For it would be absurd if he could avoid the contract when he was not really mistaken in his own mind as to the offeree's identity or when the apparent contract was not induced by mistake, when he was equally prepared to make the contract had he not been mistaken. That, as it seems to me, is a preliminary essential. But the courts, in deciding the question whether the apparent contract is non-existent owing to mistake in identity, apply the usual objective test (see HOLMES ON THE COMMON LAW, lecture 9) rather than a subjective test which would gravely impair the certainty and stability of contracts. The learned judge approached the matter on an objective basis. He pointed out, however, that he would have reached the same result by approaching the matter on the subjective test suggested by Pothier. In cases such as this, the cheat is fully aware of the offeror's actual state of mind. Moreover, he could not be heard to say that he was not aware of the offeror's state of mind when he has himself deliberately and fraudulently induced it. Thus the objective and subjective tests produce the same result in such a case, and it is the offeror's intention which provides the answer. It is for that reason, I think, that in such cases as this so many observations have been made that are equally referable to the subjective and objective test.

The real problem in the present case is whether the plaintiffs were in fact intending to deal with the person physically present who had fraudulently endowed himself with the attributes of some other identity or whether they were intending only to deal with that other identity. If the former, there was a valid but voidable contract and the property passed. If the latter, there was no contract and the property did not pass. The cases on this difficult subject have been very fully set out in an interesting dissenting judgment of PRESIDENT GRESSON in *Fawcett* v. *Star Car Sales, Ltd.* (16), but the facts in that case, though they concern the fraudulent sale of a motor car, are dissimilar in certain ways that make the decision itself inapplicable to the present case.

The judge dealt with the matter as if the plaintiffs were the offerors and the cheat was the acceptor and for convenience I do likewise. The question which

(12) (1878), 9 Ch.D. 223. (13) [1899] 2 Q.B. 641.
(14) [1939] 4 All E.R. 478; [1940] 1 K.B. 271. (15) [1960] N.Z.L.R. at p. 412.
(16) [1960] N.Z.L.R. at p. 411 et seq.

A was offeror and which was offeree makes no difference to the principle. There are no doubt cases where the answer to that question might throw some light on the facts but in this case no help is derived from it. Here it may well be that the ultimate offeror was the false Hutchinson and the plaintiffs were the "acceptors"; in which case the problem is whether the plaintiffs were intending to deal with or accept an offer from the false Hutchinson physically present or the B real Hutchinson of Stanstead House.

The mere fact that the offeror is dealing with a person bearing an alias or false attributes does not create a mistake which will prevent the formation of a contract (*King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.* (17)). For in such a case there is no other identity for which the identity of the offeree is mistaken; see per A. L. SMITH, L.J., in the case last cited (18):

C "There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him."

Where, however, a cheat passes himself off as another identity (e.g., as someone with whom the other party is accustomed to deal) it is otherwise. In *Cundy* v. *Lindsay* (19) LORD CAIRNS, L.C., said (20):

D "... I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any E contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."

An apparent contract made orally inter praesentes raises particular difficulties. The offer is apparently addressed to the physical person present. Prima facie, he, by whatever name he is called, is the person to whom the offer is made. F His physical presence identified by sight and hearing preponderates over vagaries of nomenclature. "Praesentia corporis tollit errorem nominis" said LORD BACON. Yet clearly, though difficult, it is not impossible to rebut the prima facie presumption that the offer can be accepted by the person to whom it is physically addressed. To take two extreme instances. If a man orally commissions a portrait from some unknown artist who had deliberately passed G himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the impostor could not accept the offer. For, though the offer is made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that identity was of vital importance to the offeror. At the other end of the scale, if a shopkeeper sells goods in a normal cash transaction to a man H who misrepresents himself as being some well known figure, the transaction will normally be valid. For the shopkeeper was ready to sell goods for cash to the world at large, and the particular identity of the purchaser in such a contract was not of sufficient importance to override the physical presence identified by sight and hearing. Thus the nature of the proposed contract must have a strong bearing on the question whether the intention of the I offeror (as understood by his offeree) was to make his offer to some other particular identity rather than to the physical person to whom it was orally offered.

In our case the facts lie in the debatable area between the two extremes. At the beginning of the negotiations, always an important consideration, the name or personality of the false Hutchinson were of no importance and there was no other identity competing with his physical presence. The plaintiffs were

(17) (1897), 14 T.L.R. 98.
(18) (1897), 14 T.L.R. at p. 99.
(19) (1878), 3 App. Cas. 459.
(20) (1878), 3 App. Cas. at p. 465.

content to sell the car for cash to any purchaser. The contractual conversation was orally addressed to the physical identity of the false Hutchinson. The identity was the man present, and his name was merely one of his attributes. Had matters continued thus there would clearly have been a valid but voidable contract.

I accept the learned judge's view that there was no contract at the stage when the man pulled out his cheque book. From a practical point of view negotiations reached an impasse at that stage. For the vendor refused to discuss the question of selling on credit. It is argued that there was a contract as soon as the price was agreed at £717 and that from that moment either party could have sued on the contract with implied terms as to payment and delivery. That may be theoretically arguable, but in my view the judge's more realistic approach was right. Payment and delivery still needed to be discussed and the parties would be expecting to discuss them. Immediately they did discuss them it became plain that they were not ad idem and that no contract had yet been created. But, even if there had been a concluded agreement before discussion of a cheque, it was rescinded. The man tried to make Miss Ingram take a cheque. She declined and said that the deal was off. He did not demur but set himself to reconstruct the negotiations. For the moment had come which he must all along have anticipated as the crux of the negotiations, the vital crisis of the swindle. He wanted to take away the car on credit against his worthless cheque but she refused. Thereafter the negotiations were of a different kind from what the vendor had mistakenly believed them to be hitherto. The parties were no longer concerned with a cash sale of goods where the identity of the purchaser was prima facie unimportant. They were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance. She now realised that she was being asked to give to him possession of the car on the faith of his cheque.

This was an important stage of the transaction, because it demonstrated quite clearly that she was not prepared to sell on credit to the mere physical man in her drawing room, though he represented himself as a man of substance. He proceeded to " give to airy nothing a local habitation and a name " (21). He tried to persuade her to sell to him as P. G. M. Hutchinson, of Stanstead House, a personality which no doubt he had selected for the purpose of inspiring confidence into his victim. This was unsuccessful. Only when she had ascertained (through her sister's short excursion to the local post office and investigation of the telephone directory) that there was a P. G. M. Hutchinson, of Stanstead House, in the directory did she agree to sell on credit. The fact that the man wrote the name and address on the back of the cheque is an additional indication of the importance attached by the parties to the individuality of P. G. M. Hutchinson, of Stanstead House.

It is not easy to decide whether the vendor was selling to the man in her drawing room (fraudulently misrepresented as being a man of substance with the attributes of the real Hutchinson) or to P. G. M. Hutchinson, of Stanstead House (fraudulently misrepresented as being the man in her drawing room). Did the individuality of P. G. M. Hutchinson, of Stanstead House, or the physical presence of the man in the room preponderate? Can it be said that the prima facie predominance of the physical presence of the false Hutchinson identified by sight and hearing was overborne by the identity of the real Hutchinson on the particular facts of this case?

The learned judge said:

> " I have not the slightest hesitation in reaching the conclusion that the offer which the plaintiffs through the Misses Ingram made to accept the cheque for £717 was one made solely to, and one which was capable of being accepted only by, the honest Mr. Hutchinson—i.e., Mr. Philip Gerald Morpeth

(21) Said by Theseus in Midsummer Night's Dream, Act 5, scene 1.

Hutchinson, of Stanstead House, Stanstead Road, Caterham, Surrey, and that it was incapable of being accepted by the rogue Hutchinson."

In view of the experience of the learned judge and the care which he devoted to this case, I should hesitate long before interfering with that finding of fact and I would only do so if compelled by the evidence or by the view that the judge drew some erroneous inference. Where, as here, a border-line case is concerned with ascertaining the intention of the parties, the views of the trial judge who hears the witnesses should not lightly be discarded. I am not persuaded that on the evidence he should have found otherwise.

It is argued that the judge should have come to a contrary conclusion by following the case of *Phillips* v. *Brooks, Ltd.* (22). I do not find that case easy to evaluate, because the facts are far from clear. It appears from the report that the name of Sir George Bullough was not mentioned until after the deal had apparently been concluded, and the cheque in payment of the goods had been or was being written out. Then, apparently, as a postscript or variation of the transaction, the false Sir George obtained leave to take off one of the articles without waiting for the cheque to be cleared, and the vendor thereby relinquished his lien on that article. The plaintiff in re-examination had said that he had no intention of making any contract with any other person than Sir George, but these words could hardly be true literally, since he had apparently made a contract with the man before he was told that he was Sir George. VISCOUNT HALDANE in *Lake* v. *Simmons* (23) said of the case (24):

> "HORRIDGE, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment."

In my view it was a border-line case decided on its own particular facts and is in nowise decisive of the case before us.

Hardman v. *Booth* (25) was decided the other way. There the plaintiffs, going to the place of business of Gandell & Co., which consisted only of Thomas Gandell, were fraudulently misled at interviews with his son Edward, an unauthorised clerk in the business, into invoicing goods to Edward Gandell & Co. and paying with a bill of exchange similarly made out. It was held that there was no contract. POLLOCK, C.B., said (26):

> "It is difficult to lay down any general rule by which, at all times and under all circumstances, it may be determined whether or no there is a contract voidable at the option of the party defrauded, but in this case I think it clear that there was no contract. Mr. Hawkins contended that there was a contract personally with Edward Gandell, the individual with whom the conversations took place. It is true that the words were uttered by and to him, but the plaintiffs supposed that they were dealing with Gandell & Co., the packers, to whom they sent the goods; the fact being that Edward Gandell was not a member of that firm and had no authority to act as their agent. Therefore at no period of time were there two consenting minds to the same agreement."

WILDE, B., said (27):

> "It is clear that there was no sale to Gandell & Co., because they never authorised Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiffs never intended to deal with him personally."

---

(22) [1919] 2 K.B. 243. (23) [1927] All E.R. Rep. 49; [1927] A.C. 487.
(24) [1927] All E.R. Rep. at p. 54; [1927] A.C. at p. 501.
(25) (1863), 1 H. & C. 803. (26) (1863), 1 H. & C. at p. 806.
(27) (1863), 1 H. & C. at p. 808.

That case, however, was a clearer case of there being no contract than is the present one, since there the plaintiffs had gone to the premises of Gandell & Co. to deal with that firm, and on those premises they had dealt with someone who duped them into believing that he was a member of the firm. Had the plaintiffs in the present case gone to Stanstead House especially to deal with the real Hutchinson and been duped on the premises by the false Hutchinson, their case would have been very clear.

In *Lake* v. *Simmons* (28), the court was dealing with a somewhat different problem, viz., whether a jeweller had " entrusted " possession of jewellery to a cheat, and it held that he had not. VISCOUNT HALDANE there said (29):

> " In circumstances such as these, I think that there was no such consensus ad idem as, for example LORD CAIRNS, in his judgment in *Cundy* v. *Lindsay* (30) declared to be requisite for the constitution of a contract. No doubt physically the woman entered the shop and pretended to bargain in a particular capacity, but only on the footing of being a different person from what she really was. There was never any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller."

Each case must be decided on its own facts. The question in such cases is this. Has it been sufficiently shown in the particular circumstances that, contrary to the prima facie presumption, a party was not contracting with the physical person to whom he uttered the offer, but with another individual whom (to the other party's knowledge) he believed to be the physical person present. The answer to that question is a finding of fact.

It is argued that, although such a finding might properly have been reached if the cheat had pretended to be some great man or someone known already to the vendor by dealing or by reputation, it could not be so in this case, since the vendor had no knowledge of Mr. P. G. M. Hutchinson, of Stanstead House. Had it not been for investigation of the telephone directory that might well be so; but here the entry represented an individual of apparent standing and stability, a person whom the vendor was ready to trust with her car against his cheque. His individuality was less dominating than that of a famous man would be, but that is a question of degree. It does not, I think, preclude the judge from finding that it was with him that the vendor was intending to deal.

The court is naturally reluctant to accept the argument that there has been a mistake in such a case as this, since it creates hardship on subsequent bona fide purchasers. The plaintiffs' unguarded transaction has caused loss to another; and unfortunately when the contract is void at common law the court cannot (as the law stands now) by its equitable powers impose terms that would produce a fairer result. However, in this case the subsequent purchasers, although the judge found that there was no mala fides, were no more wise or careful than the plaintiffs. The regrettable ease with which a dishonest person can accomplish such a fraud is partially due to the unfortunate fact that registration books are not documents of title and that registration and legal ownership are so loosely connected.

Although I appreciate the force of Mr. Chapman's very full and fair argument, he has failed to persuade me that the judge could not properly arrive at his conclusion. I agree that the appeal should be dismissed.

DEVLIN, L.J.: The point on which this case turns is the effect of deception about the identity of a contracting party. It is a difficult point on which I have the misfortune to differ from my brethren. On all other points I agree with them and shall add nothing. On the chief point I shall not attempt to

(28) [1927] All E.R. Rep. 49; [1927] A.C. 487.
(29) [1927] All E.R. Rep. at p. 53; [1927] A.C. at p. 500.
(30) (1878), 3 App. Cas. 459.

A analyse all the authorities; there is a very full discussion of them in the recent judgment of PRESIDENT GRESSON in *Fawcett* v. *Star Car Sales, Ltd.* (31) and I shall not need to repeat more than the essential facts.

The plaintiffs advertised their car for sale at £725 or nearest offer. The swindler, whose true name is unknown, called in answer to the advertisement and after an inspection and negotiation offered £717; and as soon as the figure B was agreed produced his cheque book. Miss Elsie Ingram, who was making the deal on behalf of the plaintiffs, at once said that she would not in any circumstances accept a cheque and she sought to bring the interview to an end. He went on talking. He had previously given his name as Hutchinson and said that he lived at Caterham; and it is common ground that, if he had been able and willing to pay cash, the plaintiffs would have required to know no more. C Hutchinson now said that he was a Mr. P. G. M. Hutchinson, that he had business interests in Guildford and that he lived at Stanstead House, Stanstead Road, Caterham. On hearing the name and address, Miss Hilda Ingram, who was in the room, slipped out and went round to the Post Office nearby, looked in the directory covering the district of Caterham and saw the entry, "Hutchinson, P.G.M., Stanstead House, Stanstead Road, Caterham 4665." She was away D five minutes or a little longer; and during that time the conversation between Hutchinson and Miss Elsie Ingram had continued. He had tried to convince Miss Ingram that he was indeed the Mr. Hutchinson he had mentioned. When Miss Hilda came back she told Miss Elsie that she had checked with the telephone directory and that there was such a person listed. They then decided that they would take his cheque and the deal was so concluded. The cheque was in due E course dishonoured. Meanwhile, Hutchinson sold the car to the defendant.

The question is whether Hutchinson was able to pass the property in the car to the defendant so that he can resist a claim based on conversion; and that turns on whether the contract between the plaintiffs and Hutchinson was voidable or void. If the plaintiffs were induced to enter into a contract by Hutchinson's false representation as to his identity, the contract remains valid until the F plaintiffs elect to disaffirm it; since before they did that Hutchinson had parted with the car to the defendant, he was in a position to give them a good title to it. If, however, mistake as to identity prevented the contract being made at all, the property in the car did not pass to Hutchinson and so he could give no title to the defendant.

In the text-books cases of mistaken identity are to be found both in the G chapters that deal with the formation of contract and in those that deal with the effect of mistake. Whichever way it is looked at, the essential question is the same: Has a contract been made? If the fatal defect goes to form, the question is answered with a simple negative, and the case is put under the head of formation. If the defect is one of substance, i.e., where the outward form is complete but the necessary consensus is vitiated by mistake, the question is answered H by saying that the contract is void. It may be objected that a void contract is a meaningless expression; but it is a useful one to describe a contract that is perfect in form but void of substance. There is also this practical difference. It is for the plaintiff to prove offer and acceptance in form. But mistake is a ground of defence and it is for the defendant to plead it and assert that the contract is not what it seems to be. If the contract is complete on the surface, I as when it is a formal document, the burden will be on him from the outset. But in oral contracts it may well be in question whether that is a contract even in appearance.

So the first thing for a judge to do is to satisfy himself that the alleged contract has been properly formed, and Dr. Goodhart in the article that the learned judge has adopted has shown how easy it is to fall into error if one does not begin with that. There must be offer and acceptance. The offer must be

(31) [1960] N.Z.L.R. at p. 411 et seq.

addressed to the offeree, either as an individual or as a member of a class or of the public. The acceptance must come from one who is so addressed and must itself be addressed to the offeror. *Boulton* v. *Jones* (32), for example, is a simple case in which an offer was accepted by someone to whom it was not addressed. The classic case of *Cundy* v. *Lindsay* (33) was one in which the acceptance was not addressed to the offeror. The offer, as in the instant case, was addressed to a person who held himself out as willing to do business. But the offer was made by Blenkarn and the acceptance addressed to Blenkiron. The fact that there was a real Blenkiron whom Blenkarn was pretending to be showed that it was not a case of falsa demonstratio non nocet. It is noteworthy that the word "mistake" is not mentioned in the judgments of either of these cases.

Before therefore I consider mistake, I shall inquire whether there is offer and acceptance in form. There is no doubt that Hutchinson's offer was addressed to Miss Ingram and her acceptance was apparently addressed to him. But, it is argued, the acceptance was in reality addressed to P. G. M. Hutchinson, who was not the offeror, and therefore no contract was made. There can be no doubt on the authorities that this argument must be settled by inquiring with whom Miss Ingram intended to contract: Was it with the person to whom she was speaking or was it with the person whom he represented himself to be? It has been pressed on us that this is a question of fact and that we ought to give great weight to the answer to it provided by the trial judge. It is, I think, a mixed question. I am sure that any attempt to solve it as a pure question of fact would fail. If Miss Ingram had been asked whether she intended to contract with the man in the room or with Mr. P. G. M. Hutchinson, the question could have no meaning for her since she believed them both to be one and the same. The reasonable man of the law—if he stood in Miss Ingram's shoes—could not give any better answer. Whether it is fact or law, it is not a question that the trial judge is any better equipped to answer than we are. In saying that, I must acknowledge that I am with diffidence refusing the guidance offered by VISCOUNT SUMNER in *Lake* v. *Simmons* (34):

> "The conclusion that his state of mind was an appearance of consent produced by the trick and not a real consent induced by fraud is a judicial conclusion from the circumstances proved, from the evidence of the victim as to what was said and done, what he believed, and what he would or would not have done in the absence of that belief, and finally, from the judge's own view of the ability of the witness himself to analyse and explain his own mental processes with tolerable exactness. A conclusion from these materials is greatly assisted by seeing him and judging what manner of man he is."

I hope that I am not diminishing the province of the trial judge which I should always wish to honour and respect. But I cannot understand how observation of the witness can detect whether his consent was produced by a trick or induced by fraud; I doubt whether an analysis of his mental processes would help either. All that Miss Ingram or any other witness in her position can say is that she did in fact accept the offer made to her; and that, if she had not been tricked or deceived, she would not have accepted it.

Courts of law are not inexperienced in dealing with this sort of situation. They do so by means of presumptions. Let me take as an example the law that governs a contract. This depends on the intentions of the parties, but no one ever attempts to ascertain their intentions by question and answer. The answer would almost invariably be that neither of the parties had thought about the matter at all. If one of them were pressed to say what law he would have chosen if he had thought about it, he would naturally tend to opt for the law that would be most favourable to him in the circumstances of the dispute that had brought him to court. In the present type of case, the answer to a similar

(32) (1857), 2 H. & N. 564. (33) (1878), 3 App. Cas. 459.
(34) [1927] All E.R. Rep. at p. 55; [1927] A.C. at p. 503.

type of question might be equally misleading; as the deceived party in the present case, the plaintiffs want the contract declared void ab initio; as the deceived party in the recent case of *Fawcett* v. *Star Car Sales, Ltd.* (35), the defendant wanted it affirmed. The court therefore has to work on the presumed intention of the parties. In the case of conflict of laws, there is a number of presumptions which the court uses, such as that the parties are presumed to intend the law of the country where they have provided for arbitration, if such be the case, or the law of the place where the contract was made. Whether the court when it acts in this way is really ascertaining the intentions of the parties or whether it is simply providing a just solution of their difficulties is a theoretical question which I need not explore. LORD WRIGHT has some penetrating observations to make about the problem as it arises in cases of frustration: see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* (36) and *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co.* (37).

In my judgment the court cannot arrive at a satisfactory solution in this case except by formulating a presumption and taking it at least as a starting point. The presumption that a person is intending to contract with the person to whom he is actually addressing the words of contract seems to me to be a simple and sensible one and supported by some good authority. It is adopted in BENJAMIN ON SALE (8th Edn., p. 102), where two decisions in the United States are referred to, *Edmunds* v. *Merchants' Despatch Transportation Co.* (38), and *Phelps* v. *McQuade* (39). The reasoning in the former case was adopted by HORRIDGE, J., in *Phillips* v. *Brooks, Ltd.* (40) and the latter case is a decision of the New York Court of Appeals. All these three cases still stand as the law in their respective jurisdictions. CORBIN ON CONTRACTS (Vol. 3, s. 602) cites them and a number of others and states the general principle in the United States as follows:

> "The courts hold that if A appeared in person before B, impersonating C, an innocent purchaser from A gets property in the goods as against B."

I do not think that it can be said that the presumption is conclusive, since there is at least one class of case in which it can be rebutted. If the person addressed is posing only as an agent, it is plain that the party deceived has no thought of contracting with him but only with his supposed principal; if then there is no actual or ostensible authority, there can be no contract; *Hardman* v. *Booth* (41) is, I think, an example of this. Are there any other circumstances in which the presumption can be rebutted? It is not necessary to strain to find them, for we are here dealing only with offer and acceptance; contracts in which identity really matters may still be avoided on the ground of mistake. I am content to leave the question open and do not propose to speculate on what other exceptions there may be to the general rule. What seems plain to me is that the presumption cannot in the present case be rebutted by piling up the evidence to show that Miss Ingram would never have contracted with Hutchinson unless she had thought him to be Mr. P. G. M. Hutchinson. That fact is conceded and, whether it is proved simpliciter or proved to the hilt, it does not go any further than to show that she was the victim of fraud. With great respect to the learned judge, the question that he propounded as the test is not calculated to show any more than that. He said:

> "Is it to be seriously suggested that they were willing to accept the cheque of the rogue other than in the belief, created by the rogue himself, that he, the rogue, was in fact the honest Mr. P. G. M. Hutchinson of the address in Caterham with the telephone number which they had verified?"

In my judgment there is everything to show that Miss Ingram would never have accepted Hutchinson's offer if she had known the truth, but nothing to rebut the ordinary presumption that she was addressing her acceptance, in

(35) [1960] N.Z.L.R. 406. (36) [1942] 2 All E.R. at p. 140; [1943] A.C. at p. 70.
(37) [1944] 1 All E.R. 678; [1944] A.C. 265. (38) (1883), 135 Mass. Rep. 283.
(39) (1917), 220 N.Y. 232. (40) [1919] 2 K.B. 243. (41) (1863), 1 H. & C. 803.

law as well as in fact, to the person to whom she was speaking. I think therefore that there was offer and acceptance in form.

On my view of the law, it therefore becomes necessary to consider next whether there has been a mistake that vitiates the contract. As both my brethren are of opinion that there has been no offer and acceptance, the result of this further inquiry cannot affect the decision in this case or its ratio, and I shall therefore state my conclusions and my reasons for it as briefly as may be.

In my judgment there has been no such mistake. I shall assume without argument what I take to be the widest view of mistake that is to be found in the authorities; and that is that a mistake avoids the contract if at the time when it is made there exists some state of fact which, as assumed, is the basis of the contract and, as it is in truth, frustrates its object. Cases of mistaken identity have usually been dealt with in the authorities by the application of the test propounded by Pothier in his TRAITÉ DES OBLIGATIONS (1806, p. 13) where he says:

> "Whenever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys my consent and consequently annuls the agreement."

If this is wider than the principle that I have stated, I do not think that it can be part of the law of England, for I can see no reason why mistake as to identity should operate more easily to avoid a contract than any other sort of mistake. If Pothier is correctly interpreted, the word "ingredient" is very wide; but the examples which he gives to illustrate his proposition are examples in which mistaken identity would generally destroy a fundamental assumption and frustrate the object of the contract. The whole object of contracting for a portrait, for instance, is to have it done by the particular artist selected and so his identity is normally essential.

The fact that Miss Ingram refused to contract with Hutchinson until his supposed name and address had been "verified" goes to show that she regarded his identity as fundamental. In this she was misguided. She should have concerned herself with credit-worthiness rather than with identity. The fact that Hutchinson gave Mr. P. G. M. Hutchinson's address in the directory was no proof that he was Mr. P. G. M. Hutchinson; and, if he had been, that fact alone was no proof that his cheque would be met. Identity therefore did not really matter. Nevertheless, it may truly be said that to Miss Ingram, as she looked at it, it did. In my judgment Miss Ingram's state of mind is immaterial to this question. When the law avoids a contract ab initio, it does so irrespective of the intentions or opinions or wishes of the parties themselves. That is the rule in the case of frustration; see *Hirji Mulji* v. *Cheong Yue S.S. Co.* (42). It is the rule also in a case such as *G. Scammell & Nephew, Ltd.* v. *Ouston* (43), where the parties believed themselves to have contracted but had failed to reach agreement on essentials with sufficient particularity. This rule applies in the case of mistake because the reason for the avoidance is the same, viz., that the consent is vitiated by non-agreement about essentials. It is for the court to determine what in the light of all the circumstances is to be deemed essential. In my judgment, in this case Hutchinson's identity was immaterial. The credit-worthiness was not, but credit-worthiness in relation to contract is not a basic fact; it is only a way of expressing the belief that each party normally holds that the other will honour his promise.

I wish that I could conclude this judgment without any reference to *Lake* v. *Simmons* (44), for that is a case with which I find it very difficult to deal briefly. But if, as is often suggested, the ratio decidendi in the House of Lords is that enunciated by VISCOUNT HALDANE in the leading speech, I should find it

(42) [1926] All E.R. Rep. 51; [1926] A.C. 497.
(43) [1941] 1 All E.R. 14; [1941] A.C. 251.
(44) [1926] 1 K.B. 366; [1926] 2 K.B. 51; [1927] All E.R. Rep. 49; [1927] A.C. 487.

impossible to distinguish the present case satisfactorily. I must therefore embark on the difficult task of ascertaining what the true ratio is.

I do not think that the reasoning in the case can properly be analysed without some introductory observations about larceny by a trick. I base them on the judgment of SELLERS, J., in *Du Jardin* v. *Beadman Brothers, Ltd.* (45). The history of the offence is fully set out in RUSSELL ON CRIME (11th Edn., p. 1048), and I give below only the bare account of it that is necessary for my purpose. Larceny at common law required that there should be an asportavit or taking of the goods with intent to steal. This produced a difficulty in the case of a bailee who got possession of the goods lawfully; he could not thereafter be guilty of larceny by appropriating them, however dishonestly. This difficulty was finally removed by statute in 1857 when the offence of larceny by a bailee was created. As RUSSELL ON CRIME says (11th Edn., at p. 1041):

> "In the meantime the judges had found themselves forced to adopt strange contortions of reasoning in order to justify the conviction of dishonest men."

The difficulty which had to be got round was that the bailee had taken the chattel with the consent of the owner. In *R.* v. *Pear* (46) the court decided that, if a horse was hired with the intention of stealing it, the fraudulent intention of the bailee at the inception of the transaction in some way negatived in law the consent of the owner to do what he in fact did. Therefore, there was a taking without consent, which came to be called larceny by a trick. But the courts restricted this doctrine to the transfer of possession; and they always refused to apply it to a case where what was in issue was the transfer of property. It is perhaps for this reason that we have not been troubled here by any argument about larceny by a trick. But there has been a great difference of opinion whether this notion of consent should or should not be imported into other branches of the law, particularly liability under the Factors Act, 1889. Until recently the ruling judgments on this point have been obiter; but I trust that the law may now be regarded as settled by the decision of SELLERS, J., in *Du Jardin* v. *Beadman Brothers, Ltd.* (45), where he held that "consent" in the Factors Act, 1889, was not to be interpreted in an artificial way in order to bring it into harmony with the criminal law. I need not pursue the controversy further. Its only importance for my purpose is so that the speech of VISCOUNT SUMNER, which I think to be crucial in *Lake* v. *Simmons* (47), is properly understood.

The facts in *Lake* v. *Simmons* (47) centred round a woman who was living with a Mr. Van der Borgh and who had dealings with the plaintiff, a jeweller. She falsely represented to him that she was Mrs. Van der Borgh, and she obtained jewellery from him by falsely representing that she desired to show it to her husband for his approval and also to a person she named as Commander Digby, who did not in fact exist. She made away with the jewellery and the plaintiff sued to recover his loss under a Lloyd's policy, the defendant being an underwriter. The policy was against (inter alia) theft, but subject to an exception on which the argument turned. A convenient summary of its essential terms is given by VISCOUNT SUMNER (48):

> ". . . the exception clause takes out of the stipulated cover against 'thefts' generally . . . those committed by customers . . . but only when, the words 'in respect of goods entrusted to them by the assured' are satisfied."

All three courts held that there was a theft, i.e., larceny by a trick, and accordingly that the loss fell within the general words. There was, however, much difference of opinion about the operation of the exception. MCCARDIE, J., held

(45) [1952] 2 All E.R. 160; [1952] 2 Q.B. 712. (46) (1779), 2 East, P.C. 685.
(47) [1927] All E.R. Rep. 49; [1927] A.C. 487.
(48) [1927] All E.R. Rep. at p. 56; [1927] A.C. at p. 507.

(49) that the jewellery was not entrusted to the woman as a customer but that she received it as a mere agent or messenger for the purpose of showing it to others. He therefore decided in favour of the plaintiff. His decision was reversed by a majority in the Court of Appeal. None of the lords justices accepted his view that the woman was not a customer and the decision turned on the meaning of " entrusted ". BANKES and WARRINGTON, L.JJ., held that there was an entrusting within the exception so that the loss fell outside the policy. ATKIN, L.J., held that there was not. He said (50) that the word " entrust " implied a consensual act and that the fact of larceny negatived consent both in criminal and in civil matters. It would be absurd to hold, he thought, that the woman could both take the goods without the consent of the true owner for the purpose of larceny by a trick and be " entrusted " with the goods by the true owner.

In the House of Lords the decision of the Court of Appeal was reversed. VISCOUNT HALDANE said (51) that for the purpose of an entrusting within the meaning of the policy there must be a definite contract. He held that there was never any contract at all, because the plaintiff was entirely deceived as to the identity of the person with whom he was transacting; it was only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all. This is a bare summary of his reasoning; it is sufficient for my purpose to say that it is clear authority for the view from which I am dissenting. None of the rest of their Lordships expressly followed LORD HALDANE. LORD ATKINSON's opinion turned on the construction of the policy. He held that the entrusting within the exception could not mean the delivery in all good faith by a dealer of goods to a customer which that customer had planned to steal. He also inclined to MCCARDIE, J.'s view that the woman was not a customer. LORD BLANESBURGH based his conclusion on the simple ground that the woman was not a customer but entirely agreed with the judgment of VISCOUNT SUMNER. LORD WRENBURY simply concurred.

It is clear therefore that VISCOUNT HALDANE's reasoning can be accepted as the ratio decidendi only if it was assented to by VISCOUNT SUMNER. I know that the fault must be mine, but I find the speech of VISCOUNT SUMNER very difficult to interpret. I think that the operative part of his reasoning begins (52) after he has set out the policy. He gave a special meaning to the word " entrusted ", derived from the use of the same word in an earlier part of the policy. He held that it meant entrusted on the condition of sale or return. He held that there was not an entrusting to the woman on this condition; if there was an entrusting, it was either to Mr. Van der Borgh or Commander Digby, one of whom was imaginary and the other was not a customer. That was his first reason. The second reason (53) was, I think, an acceptance of ATKIN, L.J.'s view of the effect of larceny by a trick. Finally, he agreed that the woman was not a customer for the purpose of the exceptions clause.

But before he gave this statement of his reasons he made a number of observations that might suggest that he was agreeing with the view expressed by VISCOUNT HALDANE, though he never in fact said so. He says this (54):

> " Again, *if* Mr. Lake consented to nothing, analogies from the distinction between void and voidable contracts are beside the mark, and equally so are arguments which turn on consensus ad idem as an ingredient in the conclusion of a contract . . . As it is, there was no contract and nothing to avoid."

I have italicised the word " if ", because I think that what appears to be a positive statement that " there was no contract and nothing to avoid " is

(49) [1926] 1 K.B. at p. 382. (50) [1926] 2 K.B. at p. 71.
(51) [1927] All E.R. Rep. at p. 52; [1927] A.C. at p. 499.
(52) [1927] All E.R. Rep. at p. 56; [1927] A.C. at p. 507.
(53) [1927] All E.R. Rep. at p. 57; [1927] A.C. at p. 508.
(54) [1927] All E.R. Rep. at p. 55; [1927] A.C. at p. 505.

based on the hypothesis that Mr. Lake consented to nothing. I think this must be so, for in the next paragraph VISCOUNT SUMNER says (55):

> " . . . the next step is to consider whether anything can be imputed to Mr. Lake, which would be equivalent to his consent . . ."

I think that the clue to what VISCOUNT SUMNER is saying in this part of his speech is where he says (56):

> " Such facts may raise difficulties in deciding whether his frame of mind involved misplaced consent or was consistent with absence of any consent at all, but the conclusion that it was such as would negative the appearance of consent and so remove the difficulty in the way of proving an asportavit concludes the whole issue."

He elucidates this with three examples, one of which, a case of a confidence trick man, posing as a benevolent millionaire, would certainly not be a ground for avoiding a contract.

I think that LORD SUMNER is neither agreeing nor disagreeing with LORD HALDANE. What he is saying is that LORD HALDANE's reasoning is not to the point as he, LORD SUMNER, sees it. Distinctions between void and voidable contracts are beside the mark and so are arguments which turn on consensus. The thing is concluded by the fact that there is larceny by a trick. In other words, LORD SUMNER is agreeing with ATKIN, L.J., and is refusing to distinguish between the sort of lack of consent that goes to make larceny by a trick and the sort that avoids a contract, though he reserved his judgment (57) about " consent " in the Factors Act, 1889. In my judgment, therefore, the ratio decidendi of *Lake* v. *Simmons* (58) turns on the construction of the policy, and the only view for which there is a clear majority is the view that the woman was not a customer. Certainly there is no support for the opinion of LORD HALDANE in any of the other speeches and, though I recognise his great authority, I prefer to follow *Phillips* v. *Brooks, Ltd.* (59), the cases in the United States to which I have referred (60), and the decision of the majority of the Court of Appeal in the recent case in New Zealand, *Fawcett* v. *Star Car Sales, Ltd.* (61).

There can be no doubt, as all this difference of opinion shows, that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval. But here, contrary to its habit, the common law, instead of looking for a principle that is simple and just, rests on theoretical distinctions. Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend on voidness or voidability and on inferences to be drawn from a conversation in which the defendant took no part? The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided

(55) [1927] All E.R. Rep. at p. 56; [1927] A.C. at p. 505.
(56) [1927] All E.R. Rep. at p. 56; [1927] A.C. at p. 506.
(57) [1927] All E.R. Rep. at p. 58; [1927] A.C. at p. 510.
(58) [1926] 1 K.B. 366; [1926] 2 K.B. 51; [1927] All E.R. Rep. 49; [1927] A.C. 487.
(59) [1919] 2 K.B. 243.
(60) *Edmunds* v. *Merchants' Despatch Transportation Co.*, (1883), 135 Mass. Rep. 283; *Phelps* v. *McQuade*, (1917), 220 N.Y. 232.
(61) [1960] N.Z.L.R. 406.

between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part.

In saying this I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law. I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Corbin, Greener & Cook*, agents for *Charles Ingham, Clegg & Crowther*, Lytham St. Annes (for the defendant); *Gibson & Weldon*, agents for *B. A. Greenwood & Co.*, Poole (for the plaintiffs).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Practice—Persons under disability—Documents—Notice to be indorsed on documents for service—Additional provision where patient is to be served—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 66 (10), (13), *as substituted by Matrimonial Causes (Amendment) (No. 2) Rules*, 1960 (*S.I.* 1960 *No.* 1261), *r.* 3.

The notice required by r. 66 (10) and (13) of the Matrimonial Causes Rules, 1957 (as amended by the Matrimonial Causes (Amendment) (No. 2) Rules, 1960*), should be in the following form:—

"To . . . of . . .

"TAKE NOTICE that pursuant to r. 66 (10) and (13) of the Matrimonial Causes Rules, 1957, the contents or purport of this document are to be communicated to the respondent (or as the case may be) the said . . ."

with, in the case of a patient, being a person who, by reason of mental disorder within the meaning of the Mental Health Act, 1959†, is incapable of managing and administering his property and affairs, the following addition:—

"unless you are satisfied, after consultation with the responsible medical officer within the meaning of the Mental Health Act, 1959, or, where the patient is not liable to be detained or subject to guardianship under that Act, his medical attendant, that communication will be detrimental to his mental condition."

The amended rule comes into operation on Nov. 1, 1960.

Aug. 19, 1960.

B. LONG,
Registrar.

* The Rules of 1960 made amendments in the Rules of 1957, consequential on the prospective operation of the Mental Health Act, 1959, on Nov. 1, 1960. By r. 3 of the Rules of 1960 a new r. 66 is substituted for the original r. 66 of the Rules of 1957.

† For the Mental Health Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 961.

GLADSTONE *v.* BOWER.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), July 21, 22, 25, 27, 1960.]

Agriculture—Agricultural holding—Agreement to let land for fixed period of eighteen months—Whether land let for an interest less than a "tenancy from year to year"—Whether tenant entitled to notice to quit—Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6 *c.* 63), *s.* 2 (1).

A landlord let a farm to a tenant for a term certain of eighteen months from Nov. 1, 1955, to May 1, 1957, the letting being a letting of an agricultural holding within the meaning of s. 1 (1) of the Agricultural Holdings Act, 1948. He gave no notice to quit but at the expiration of the term brought an action for possession of the farm. The defendant tenant contended that the letting took effect as a tenancy from year to year by virtue of s. 2 (1) of the Agricultural Holdings Act, 1948*, and could only be terminated by notice to quit. Section 2 (1) applied only to a letting for an interest less than a tenancy from year to year.

Held: the reference in s. 2 (1) to a tenancy from year to year referred to the tenancy known to the common law by that name, and since this letting for eighteen months created an interest greater than a tenancy from year to year at common law, which could be terminated at the end of the first year, s. 2 (1) did not apply to the eighteen months' tenancy and the landlord was entitled to possession.

Decision of DIPLOCK, J. ([1959] 3 All E.R. 475) affirmed.

[As to the minimum term that may be created in respect of an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 256, para. 556.

For the Agricultural Holdings Act, 1948, s. 2 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 29.]

Cases referred to:

Breams Property Investment Co., Ltd. v. *Stroulger*, [1948] 1 All E.R. 758; [1948] 2 K.B. 1; [1948] L.J.R. 1515; 31 Digest (Repl.) 154, *2918*.

Edell v. *Dulieu*, [1924] A.C. 38; 93 L.J.K.B. 286; 130 L.T. 390; 2 Digest (Repl.) 13, *52*.

Goldsack v. *Shore*, [1950] 1 All E.R. 276; [1950] 1 K.B. 708; 2 Digest (Repl.) 7, *12*.

Land Settlement Assocn., Ltd. v. *Carr*, [1944] 2 All E.R. 126; [1944] K.B. 657; 114 L.J.K.B. 33; 171 L.T. 121; 2 Digest (Repl.) 7, *15*.

Appeal.

The tenant appealed against an order of DIPLOCK, J., made on Oct. 9, 1959, and reported [1959] 3 All E.R. 475, in favour of the landlord in an action for possession of the messuage, buildings, gardens, land and premises called the Manor Farm, situated in the parishes of Hawarden and Sattney, in the county of Flint. The defendant denied that her tenancy of the farm (for eighteen months) had expired by effluxion of time on May 1, 1957, and contended that the tenancy agreement took effect as an agreement for a tenancy from year to year by virtue of s. 2 (1) of the Agricultural Holdings Act, 1948, with the result that she was entitled to the security of tenure provided by the Act for tenants from year to year of agricultural land.

Anthony Cripps, Q.C., J. G. Le Quesne and *D. C. Jackson* for the tenant.
Lionel Blundell, Q.C., and *V. G. Wellings* for the landlord.

Cur. adv. vult.

July 27. The following judgments were read.

PEARCE, L.J., reading the first judgment at the request of SELLERS, L.J.: The defendant tenant appeals against a judgment for possession and mesne

* The terms of s. 2 (1) are printed at p. 354, letter I, post.

profits given in the plaintiff landlord's favour by DIPLOCK, J. By an agreement in writing dated Mar. 29, 1956, the landlord let a farm to the tenant for the term certain of eighteen months from Nov. 1, 1955, terminating on May 1, 1957. Both parties agree that this was a letting of an agricultural holding within the meaning of s. 1 of the Agricultural Holdings Act, 1948. To be within the Act a tenancy must by s. 1 (1) be "a contract of tenancy", which by definition (s. 94 (1)) means a letting of land or agreement for letting of land "for a term of years or from year to year". Both parties are agreed for the purposes of the case that (although the matter is not wholly free from doubt) this letting, being in excess of one year, comes within the definition of "a term of years" and the learned judge dealt with the matter on that basis.

No notice to quit was given. This was not necessary at common law, since the tenancy would automatically terminate on May 1, 1957. The tenant, however, contends that the tenancy took effect as a tenancy from year to year by virtue of s. 2 (1) of the Act, so that it continues until terminated by notice to quit and the landlord has therefore no right to possession. And, if the landlord in order to determine the tenancy is compelled to serve a notice to quit, the tenant will thereby be enabled to serve a counter-notice under s. 24 and obtain the security of tenure and other benefits conferred on tenants under the Act. The broad issue in the case, therefore, is whether the tenancy is entitled to the protection and benefits of the Act.

The Act in general gives protection to tenants of agricultural holdings. If the learned judge is right in holding that s. 2 (1) does not apply to this tenancy, there is a gap in that protection which he felt (as a guess) was probably due to an omission on the part of the legislature. The tenant argues there has been no such omission, that there is no gap in the general protection afforded to tenants, and that this tenancy is in fact protected. The learned judge gave a concise and clear summary of the antecedents of the Act, but he concluded that they provided no material either to support the tenant's argument or to destroy it. The protection afforded to tenants by the Agricultural Holdings Act, 1923, was less valuable and less general in its application than that given by the Act of 1948.

Counsel for the landlord argues that the wide words of s. 2 (1) of the Act of 1948 were not designed to give a general protection to tenancies for fixed terms of short duration, but were merely directed to preventing evasion on the lines of *Land Settlement Assocn., Ltd.* v. *Carr* (1), in which a periodic letting from 364 days to 364 days successfully avoided the provisions of the Act of 1923. One must therefore, he argues, approach the section on the basis that any omission of protection is a deliberate maintenance of the pre-existing position and that any protection of short terms, except so far as necessary to stop such evasions, is fortuitous. That ingenious argument does not persuade me. Counsel for the tenant admits that he can found no argument on the provisions of the earlier Act and I accept his submission that they provide no argument in the landlord's favour.

Section 2 (1) of the Act of 1948 provides that:

> "... where ... land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year."

(1) [1944] 2 All E.R. 126; [1944] K.B. 657.

A Section 3 (1) provides that:

> " A tenancy of an agricultural holding for a term of two years or upwards shall, instead of terminating on the expiration of the term for which it was granted, continue (as from the expiration of that term) as a tenancy from year to year . . ."

B If the letting for a term of eighteen months was not a letting " for an interest less than a tenancy from year to year " under s. 2 (1), it escapes from both sections; and the tenant does not enjoy the protection of the Act.

At common law a tenancy for eighteen months clearly does not create an interest less than a tenancy from year to year. For the latter may be determined at the end of one year while the former continues for eighteen months certain. C But it is argued for the tenant that a tenancy from year to year under the Act, unlike a tenancy from year to year at common law, is in fact equivalent to a tenancy for two years, since it cannot be determined until two years have expired; and the standard of comparison under s. 2 (1) is a tenancy from year to year under the Act and not a common law tenancy from year to year. That being so, it is argued, the eighteen months' tenancy creates an interest less than a D tenancy under the Act and is therefore within the provisions of s. 2 (1). The basis of this argument is s. 23 (1) which provides to tenants from year to year, inter alios, additional protection in that (with certain exceptions contained in the proviso):

> " A notice to quit an agricultural holding or part of an agricultural E holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy."

Thus in practice a tenancy from year to year cannot normally be determined until two years after its commencement.

F This argument would read the words

> " where . . . land is let to a person for use as agricultural land for an interest less than a tenancy from year to year "

as meaning " where land is let to a person for use as agricultural land for an G interest less than a tenancy from year to year, as enlarged by the Agricultural Holdings Act so as to be equivalent to a tenancy of two years ". Tenancies less than two years would thus be protected under s. 2 (1) and tenancies for two years and upwards would be protected under s. 3 (1). So one would get universal and logical protection instead of a capricious protection that omits to cover tenancies for more than one year or less than two. The power of the Minister H to give his approval to some tenancies, and allow them to escape the effects of s. 2 (1), is used in argument as a confirmation of the view that s. 2 (1) is meant to cover every tenancy that is not covered by s. 3 (1). Moreover, it is said, by so reading the section one achieves a comparison of like with like, a comparison of one tenancy under the Act with another tenancy under the Act. There is clearly much attraction and force in such an argument.

I It is further contended that comparison with a common law tenancy from year to year cannot have been intended by s. 2 (1) because in that case it would have been so simple to say " less than a year " instead of the more cumbersome " less than a tenancy from year to year ". But that argument applies a fortiori against counsel's own contention. It would have been far simpler to say " less than two years " with their cryptic implication of the rider " as enlarged by the Agricultural Holdings Act so as to be equivalent to a tenancy of two years ". Moreover, this would have been far more apt in juxtaposition with s. 3 (1), which simply speaks of tenancies for a term of two years or upwards.

The landlord's argument, which the judge accepted, was this. Whereas a common law tenancy from year to year had certain and invariable characteristics which made it a reasonable yardstick, the tenancy from year to year of an agricultural holding under the Act had no such invariable characteristics and could not have been intended as a yardstick.

In deciding whether land is let for an interest less than a tenancy from year to year one clearly takes for comparison the minimum period of a tenancy from year to year. The minimum period of such a tenancy at common law is one year. For the tenancy can be determined by notice taking effect at the end of the first year. The interest of such a tenancy has been clearly established and its characteristics have been defined by law. Although it is not a convenient yardstick against which to measure a letting for a fixed term, it has the advantage of certainty in its attributes. But the special year-to-year tenancy under the Act for which counsel for the tenant contends has no such certainty. Nor is it a definite or definable interest. It is a common law tenancy from year to year which the landlord may according to the circumstances be unable to terminate by notice to quit before the expiry of two years.

There is nothing in the Act to alter the tenant's interest where he is a tenant from year to year under it. Under s. 23 (1), there is merely a fetter on the landlord's right to give a valid notice to quit in all cases except those specified in the proviso. Nor does that section purport to deal with year-to-year tenancies in particular. It deals generally with every kind of tenancy. Admittedly that fetter will apply in the majority of cases of year-to-year tenancies, and, therefore, counsel for the tenant argues, the cases where the fetter applies should be regarded as the normal Agricultural Holdings Act tenancy. But the exceptions under the proviso are not unsubstantial. The fetter does not apply (a) where the tenant becomes bankrupt, or, (b) where a provision in the contract allows resumption of possession for some specified purpose other than the use of the land for agriculture, or, (c) where a sub-tenancy is being determined, or, (d) in certain transitional cases where the contract of tenancy preceded the Act, or, (e) where s. 149 of the Law of Property Act, 1925, applies. This temporary fetter on the giving of certain notices to quit does not alter the nature of the tenant's interest (see *Breams Property Investment Co., Ltd.* v. *Stroulger* (2)).

Therefore, in spite of Mr. Cripps' able argument, I can see no justification for construing the words of s. 2 (1) in any other than their normal sense. The words " a tenancy from year to year " must be taken to mean the tenancy that is known to the common law under that name. They cannot be read as meaning some other interest not known to the law, whose identity can only be derived from the average effect of a temporary fetter imposed in most (but by no means all) cases on the giving of notice to quit. I arrive at this conclusion with reluctance, but it seems to me inevitable. If the gap in the protection given by the Act was accidental and leads to the evasions which counsel for the tenant envisages, it is for Parliament to remedy the matter. I wholly agree with the learned judge's lucid judgment and would dismiss the appeal.

DEVLIN, L.J.: In my judgment DIPLOCK, J., has given to this Act the only meaning which it can possibly bear. I could not, of course, hope to equal the clarity and economy of his reasoning and I propose therefore to adopt exactly what he says in the central part of his judgment and to incorporate it in mine. He said (3):

> " The question which I have to determine is whether this tenancy for a fixed period of eighteen months or one and a half years is a letting for an interest less than a tenancy from year to year. It is thus a question of the applicability of sub-s. (1) of s. 2 of the Act of 1948 to the agreement between the parties as distinct from its operation in relation to that agreement,

(2) [1948] 1 All E.R. 758; [1948] 2 K.B. 1.
(3) [1959] 3 All E.R. at p. 478; [1960] 1 Q.B. at p. 176.

A a distinction which counsel on both sides contend. This court has jurisdiction to determine that matter, notwithstanding the arbitration provisions in sub-s. (2); see the decision of the Court of Appeal in *Goldsack* v. *Shore* (4).

" At common law a tenancy for a fixed period of one and a half years clearly creates an interest not less than a tenancy from year to year. This is because the tenant's interest under such a tenancy must continue for more B than one year, whereas his interest under a tenancy from year to year may determine at the end of one year. The fact that under a tenancy from year to year it may continue for more than one year must be irrelevant to the test laid down in sub-s. (1) of s. 2, otherwise any lease for a fixed term, however long, would create an interest less than a tenancy from year to year, and take effect by virtue of s. 2 as a tenancy from year to year, which is C inconsistent with the provisions of s. 3 of the Act of 1948. Counsel for [the tenant], while conceding that this is so at common law, says that it is not so in the case of land occupied for use as agricultural land, to which alone s. 2 relates, for a tenancy from year to year of such land cannot, by virtue of s. 23 (1) of the Act, be determined before the expiration of the second year. Any letting of land for use as agricultural land for a fixed period of less than D two years is therefore for an interest less than a tenancy from year to year of such land.

" There is, I think, a fallacy in this attractive argument. It is in the first place to be observed that s. 23 is not in terms dealing with tenancies from year to year. It has been held that it applies to any tenancy where the tenant's leasehold interest is determinable by notice, such as determination E under a ' break ' clause in a lease for a fixed term, see *Edell* v. *Dulieu* (5). Furthermore, as the provisos show, it does not apply to all tenancies from year to year, see provisos (c) and (d), nor to all notices to quit under tenancies from year to year, see proviso (b). What the section does is to invalidate certain notices which would otherwise determine a tenant's interest in agricultural land, whether under a tenancy from year to year or some other F form of tenancy, and one of its consequences is that in the case of most—but not all—tenancies from year to year, the tenant's interest must continue for at least two years.

" The expression ' an interest less than a tenancy from year to year ' in sub-s. (1) of s. 2 is quite general. The expression ' tenancy from year to year ' was used by the draftsman to describe an interest which had certain in- G variable characteristics which would enable one to say that other interests are greater or less than it. A tenancy from year to year at common law is an interest which does possess certain invariable characteristics without which it is not a tenancy from year to year and which constitute a standard by which the magnitude of other interests may be judged: it must last for one year and, unless determined at the end of the first year by notice (either H six months' notice or whatever other length of notice, if any, is expressly provided for in the contract of tenancy), will be renewed by operation of law for successive periods of one year each, until determined at the end one of such yearly period by such a notice.

" If counsel for the [tenant] is right, the ' tenancy from year to year ' referred to in the subsection has no such invariable characteristics. Whether I it can be determined at the end of the first year depends not only on who are the parties (see paras. (c) and (d) of the proviso to s. 23 (1) of the Act) but also on the purpose for which it is determined (see para. (b)). What he is really seeking to do is to read the words ' tenancy from year to year ' in s. 2 (1) as if they were ' a tenancy from year to year of agricultural land which is not terminable by a notice to quit, to which the proviso to s. 23 (1) of this Act applies '.

---

(4) [1950] 1 All E.R. 276; [1950] 1 K.B. 708. (5) [1924] A.C. 38.

" In my view the expression ' tenancy from year to year ' in s. 2 (1) must mean a tenancy which creates an interest which has invariable characteristics, namely, those which I have indicated are common to all tenancies from year to year at common law. Furthermore, I do not think that s. 23 can properly be said to transform the interest created by a tenancy from year to year of an agricultural holding into an interest greater than that created by a tenancy from year to year at common law. The subsection modifies the way in which the parties to such a tenancy may exercise some of the rights incidental to that interest. The lease in the present case, being for eighteen months, is, in my view, for an interest greater than a tenancy from year to year."

I am, of course, concerned about the fact that an Act as interpreted in this way applies to tenancies over two years or under one year but not to those between one and two years. I can see no sense in this distinction and cannot believe it to be intended. Counsel for the landlord has shown us by reference to previous legislation how the gap works. It never occurred to the legislature that anybody would want an agricultural tenancy for any period that was not measured by the year and indeed nobody would want one except for the purpose of defeating the objects of the enactment which the legislators were engaged in making. Accordingly, Parliament must have thought that, when it provided first for tenancies from year to year, i.e., at least one year, and secondly for tenancies of two years and upwards, that could be terminated only by their notice to quit, it had covered the ground. The court held in *Land Settlement Assocn., Ltd.* v. *Carr* (6) that a tenancy for 364 days—i.e., less than one year—was not covered by the enactment (7). Section 2 (1) of the Agricultural Holdings Act, 1948, which we have to construe, was doubtless aimed at this decision in *Carr's* case (6) and as a result of it tenancies under one year can now be terminated only by a notice to quit. Counsel for the landlord argues that Parliament could not have overlooked the existence of what I have called the gap, the period between one and two years, and must have intended to preserve it so as to provide for a carry-over lease, i.e., a short lease which, as in the present case, was intended to cover the period while the proposed incumbent was still a minor. I cannot accept that. The carry-over lease might be for a period from a few months to a few years and, as counsel for the tenant suggested, Parliament probably intended that exceptional cases of this sort should be covered by the provisions in the section which enable the Minister, if he so desires, to relax the rule providing that the lease or grant is submitted to him before the agreement is entered into.

I think, therefore, that this is simply casus omissus and the Act is defective. If it were ever permissible for the court to repair a defective Act of Parliament, I should be very glad that the court should do so in this case so far as the court could. The court will always allow the intention of a statute to override the defects of wording but the court's ability to do so is limited by the recognised canons of interpretation. The court may, for example, prefer an alternative construction which is less well fitted to the words but better fitted to the intention of the Act. But here for the reasons given by the learned judge there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for casus omissus. I may be sure in this case that I know exactly what Parliament would do if it perceived a gap. But, if the rule were to be relaxed, sooner or later the court would be saying what Parliament meant and might get it wrong and thus usurp the law-making function. It is a matter of keeping within the recognised canons and they do not permit the court to

(6) [1944] 2 All E.R. 126; [1944] K.B. 657.

(7) Agricultural Holdings Act, 1923, s. 57 (1) definition of " contract of tenancy ". The Act of 1923 was superseded in this respect by the Agriculture Act, 1947, s. 40, which was subsequently reproduced in s. 2 (1) of the Agricultural Holdings Act, 1948.

supply words if the only (and I emphasise only) ground for their admission is to give legislative efficacy to a statute. For these reasons I agree that the appeal should be dismissed.

SELLERS, L.J.: The submission for the tenant is certainly attractive, having the advantage, if it is correct, of creating uniformity and overcoming what may otherwise be an unintentional omission in regard to the security of tenure in agricultural holdings, but I have reached the same conclusion as my Lords. I agree with what they have said and with the clearly expressed and carefully reasoned judgment under appeal and I cannot usefully add to the reasoning that these judgments embody. I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Ellis & Fairbairn*, agents for *Walker, Smith & Way*, Chester (for the tenant); *Theodore Goddard & Co.*, agents for *Llewellyn-Jones & Armon Ellis*, Rhyl (for the landlord).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

H. J. RORKE, LTD. *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* H. J. RORKE, LTD.

[CHANCERY DIVISION (Cross, J.), July 12, 13, 1960.]

Profits Tax—Computation of profits—Deduction—Capital expenditure—Payments under lease—Payments for right of entry and compensation for damage—Opencast coal mining—Transient and recurrent operation—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 137.

The taxpayers carried on the business of opencast coal mining and, in order to employ fully their staff and the different classes of special plant and machinery which it required at different stages of the operations, they needed to have three or four sites actively producing coal at the same time. In accordance with the procedure and method of operating commonly and generally followed by persons carrying on the business, their practice was to pay a landowner £5 for permission to prospect a promising site and for an option for a lease and if it proved suitable to take a lease and obtain a licence from the National Coal Board and consent from the local authority. They then installed their plant and machinery on the site, removed and stacked the topsoil and subsoils, and extracted the coal, the whole operation lasting six to nine months, and they finally replaced the topsoil but not hedges, trees and walls or permanent drainage. In pursuance of this practice they obtained a lease from a landowner which provided for a payment of £250 to the landowner for the right to enter on the site and of a second £250 as compensation for diminution of the value of the land and the destruction of land drains, etc. The terms of the lease and in particular the provision for the payments were such as were normally and commonly made in such leases, the payments being a normal and recurrent incident in any business of opencast coal mining. The two payments of £250 were admittedly "wholly and exclusively laid out . . . for the purposes of the trade" of the taxpayers within s. 137 (a) of the Income Tax Act, 1952.

Held: the taxpayers were not entitled to deduct the two payments of £250 in computing their profits for profits tax purposes because, being payments for acquiring rights which enabled the taxpayers to get circulating capital (viz., the coal), as distinct from payments for the direct acquisition of the circulating capital itself, the payments were of a capital nature (*Stow Bardolph Gravel Co., Ltd.* v. *Poole*, [1954] 3 All E.R. 637, followed), notwithstanding the transience of the operations (*Knight* v. *Calder Grove Estates* (1954), 35 Tax Cas. 447, applied) or their recurrence.

Appeal dismissed, cross-appeal allowed.

[As to items that are not allowable deductions in computing profits since they are of a capital nature, see 20 HALSBURY'S LAWS (3rd Edn.) 162, 163, para. 281; and for cases on the subject, see 28 DIGEST (Repl.) 115-124, *431-480*.

As to the application of income tax principles in computing profits for the purposes of the profits tax, see 20 HALSBURY'S LAWS (3rd Edn.) 618, para. 1207.

For the Income Tax Act, 1952, s. 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.]

Cases referred to:

British Insulated & Helsby Cables, Ltd. v. *Atherton*, [1925] All E.R. Rep. 623; [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; 28 Digest (Repl.) 133, *499*.

Eastmans, Ltd. v. *Shaw, Eastmans, Ltd.* v. *Inland Revenue Comrs.*, (1928), 14 Tax Cas. 218; 28 Digest (Repl.) 119, *456*.

Knight v. *Calder Grove Estates*, (1954), 35 Tax Cas. 447; 28 Digest (Repl.) 58, *225*.

Stow Bardolph Gravel Co., Ltd. v. *Poole*, [1954] 2 All E.R. 661; *revsd.* C.A., [1954] 3 All E.R. 637; 35 Tax Cas. 459; [1954] 1 W.L.R. 1503; 28 Digest (Repl.) 123, *476*.

Vallambrosa Rubber Co., Ltd. v. *Farmer* (*Surveyor of Taxes*), (1910), 5 Tax Cas. 529; 28 Digest (Repl.) 105, *281*.

Case Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to profits tax in the sums of £2,550 and £200 for the chargeable accounting periods from May 1, 1957, to Mar. 31, 1958, and from Apr. 1, 1958, to Apr. 30, 1958, respectively. The grounds of appeal were that certain disbursements under lease agreements made by the taxpayers in the course of carrying on their business of opencast coal mining and quarrying had not been allowed as expenses in computing their profits or gains for the purposes of the assessments contrary to law. The taxpayers contended that they should be deducted by virtue of s. 137 of the Income Tax Act, 1952, as applied for profits tax purposes, as constituting an ordinary incident of carrying on their opencast coal mining business, of a kind so extensively adopted as to constitute a custom of the trade, and as being part of the ordinary expense of getting and mining the coal, and of a revenue nature, resulting in no benefit of an enduring nature to the company. The Crown contended that the sums should not be deducted by virtue of s. 137 (f) of the Act of 1952 as applied for profits tax purposes. The commissioners held that payments made in respect of a right of entry on the land or to work coal conferred by the lease were not deductible as being payments made on capital account but that payments fell to be deducted as income payments which were made in respect of compensation to the landowners, for diminution in the value of the land and adjoining access land (destruction of land drains and a natural spring, of roadways and a boundary wall, for destruction of and damage to drains, fences and watercourses and diminution of value from letting down of the surface of the land and otherwise, and for damage to growing crops and reinstating the ground to its former state of fertility and for re-seeding). The taxpayers appealed by way of Case Stated against the former part of the decision and the Crown cross-appealed against the latter part.

R. E. Borneman, Q.C., and *P. W. I. Rees* for the taxpayers.

F. N. Bucher, Q.C., and *A. S. Orr* for the Crown.

CROSS, J.: This case raises the familiar problem whether certain expenditure is to be regarded as expenditure on revenue account or capital expenditure. The appellant taxpayers, H. J. Rorke, Ltd., were incorporated on Feb. 19, 1955, and carry on the business of opencast coal mining. All coal is now vested in the National Coal Board, but the taxpayers obtain licences from the National Coal Board to extract it on payment of a royalty and have also to enter into arrangements with the landowner under the surface of whose land the coal lies to enable

A them to enter on to the land to get the coal. The payments in question in this case are certain lump sum payments made by the taxpayers under the terms of three leases entered into between the taxpayers and two landowners.

The Case says that opencast coal mining became generally practised as a trade in the United Kingdom from 1942 to 1943 onwards, and that at the relevant time there were about a hundred operators of whom the taxpayers are one. B The trade required specialised machinery, and the taxpayers owned all their own plant and machinery, different plant being used at different stages in operations. In order to employ economically and fully the staff, machinery and equipment of the taxpayers, it was necessary to have three or four sites actively producing coal at the same time. The method of operating employed by the managing director and staff of the taxpayer company was as follows. C In order to find a beneficial site they first obtained information locally from farmers and miners of the presence of a coal seam; and then they studied the geological maps, in so far as there were any available, to see whether they confirmed the local information. If a site seemed promising, they approached the landowner concerned, who was usually a farmer, and endeavoured to enter into an agreement whereby in return for an immediate payment of £5 they D were granted permission to prospect the site, with an option to take a lease if it was found suitable. Then they conducted boring operations on the site to see whether or not it was worth exploiting. The Case says that the boring operations were lengthy, and that they might involve there being a period of between one and six months from the time when the taxpayers got to know of a possible site until they decided to work it. As soon as they decided that a site was E worth working, they exercised their option and made an agreement for a lease with the landowner or farmer, subject to their getting a licence from the National Coal Board to exploit the coal and the permission of the local planning authority.

On obtaining the National Coal Board licence and the consent of the local authority, the company would install their plant and machinery on the site and remove and stack up the topsoil and subsoils. A site normally produced coal F within two or three weeks after being entered and, weather permitting, the whole operation was completed in about six to nine months. After extracting the coal, the company was obliged to replace the topsoil, but it could not replace hedges, trees and walls except at considerable expense, nor could it replace the natural drainage; so that the result of the whole operation was a definite and permanent impairment to the site from an agricultural point of view. The G Case contains this sub-paragraph, on which counsel for the taxpayers relies:

> "(4) The procedure leading to the winning of coal by opencast mining and the method of operating set out above was similar to that commonly and generally followed by other persons carrying on the trade or business of opencast coal mining."

H

The Case then proceeds to set out the leases in question, which were substantially in the same form. The first was an agreement made on Dec. 16, 1957, between a Mr. Parker, the lessor, and the taxpayers. Clause 1 provided that the lessor, being the owner of the land in question (four acres and five perches of agricultural land in Yorkshire) should let the land to the lessee—i.e., the appellant I taxpayers—from Nov. 5, 1957, for one year, paying therefor a royalty of 1s. 3d. per ton for all coal recovered from the demised land and accepted by the coal sales department of the National Coal Board, or the sum of £312 10s., whichever was the greater, such payment to be made by calendar monthly instalments. There is, of course, no doubt that those rents or royalty payments would be allowable as deductions on revenue account. Clause 2 of the agreement says that it is the intention of the lessee (the taxpayers) to obtain coal from the demised land by opencast coal workings and that the lessee shall within three calendar months after completion of the works restore the surface of the land in a proper

and efficient manner. Clause 3 provides for the payments which are in question in this case and is in these terms: A

> " The lessee shall upon the signing hereof pay to the lessor (a) the sum of £250 for the right to enter upon the demised land for the purpose of working and getting the said coal and (b) the further sum of £250 as compensation for the diminution in value of the demised land and the destruction of the land drains therein as a result of the working and getting of the said coal and B of the adjoining land belonging to the lessor used as a means of access to the demised land and for the destruction of the roadway at present existing upon the demised land."

Finally, cl. 4 provides that the lessee (the taxpayers) will within three calendar months from the completion of the works re-sow the whole of the demised land and replace the fencing disturbed by the works in a proper and efficient manner C and to the satisfaction of the lessor. As a guarantee for the due performance of the works—i.e., the re-sowing and so on—the lessee will deposit with the lessor the sum of £80 on the signing of the agreement. In default of the completion of the works within the time and in the manner aforesaid, the lessor shall be at liberty to give notice to the lessee of his intention personally to carry out the same. On his giving that notification, the lessor shall be entitled to retain the D £80 on account of and towards the cost, and the lessee shall be released from all liability in connexion therewith.

No question is raised in this case with regard to that payment of £80. I do not know whether the taxpayers did the work themselves and therefore had the £80 returned to them, or whether the work was done by the lessor. The only payments under the lease with which this case is concerned are the two lump E sum payments of £250 for the right of entry and £250 for compensation for diminution in value.

Then the Case sets out an oral agreement entered into with Mr. Parker shortly afterwards with regard to another plot of land, which was in substantially the same terms, mutatis mutandis. It provided for a rental payment and for lump sum payments of the same character as the other agreement, i.e., a payment for the F right to enter and a payment for diminution in value, each to be made on the signing of the agreement. Finally, the Case also sets out a third agreement with a Mr. Norton made on Jan. 18, 1958, which again is mutatis mutandis on the same lines.

Having set out the three agreements, the Case contains a sub-para. (8), on which counsel for the taxpayers strongly relies and which I should read in full. G It is in these terms:

> " The provisions contained in the first Parker agreement [i.e., the written agreement] the second Parker agreement [i.e., the oral agreement] and the Norton agreement were drawn in similar terms to those commonly and normally found in agreements for leases entered into between the [tax- H payers] and farmers, and between farmers and other persons carrying on the trade or business of opencast coal mining, particularly the provisions relating to the payment of a sum of money by the lessee to the lessor upon the signing of the agreement for the right to enter upon the land for the purpose of working and getting the coal, and the payment of a further sum estimated as compensation for the diminution in the value of the land and damage I likely to be caused as a result of working and getting the coal. The payments so provided to be made were a normal and recurrent incident in the trade or business of opencast coal mining as carried on by the company and other persons in the industry."

The Case then sets out the total amounts as to which the dispute has arisen. They are legal and advisory expenses in connexion with the granting of the leases, £188; exploitation rights—i.e., payments for the right of entry on the land—£900; and payments for diminution in value, £1,016.

A It was contended on behalf of the taxpayers that all those payments should be allowed as revenue expenditure, and it was contended on behalf of the Crown that they should all be disallowed because they were in the nature of capital payments. The Commissioners of Income Tax, having heard those submissions, gave a decision in which they made a distinction, which I gather was not suggested to them by counsel on either side, between the payments for the exploita-
B tion rights—i.e., payments for the right of entry—and the payments in respect of compensation for diminution in value. They held that the right of entry payments were capital payments and could not be allowed as deductions, but that the payments for diminution in value were of a revenue nature and could be allowed. Having drawn that distinction between the payments, they thought it appropriate to apportion the legal and advisory expenses in connexion with
C the leases and said that half of them should be treated as capital expenditure and half of them as income expenditure. Neither side was satisfied with that decision, and I have before me an appeal by the taxpayers and a cross-appeal by the Crown. Unfortunately, the commissioners do not say in the Case why they distinguished as they did between the two sorts of payments, and counsel have not been able to suggest to me any logical basis for drawing that distinction.
D I cannot see any reason for drawing it. If one of these sums is capital, I should have thought that it followed that the other was capital and vice versa.

What is said now by counsel for the taxpayers is that, having regard to the findings in the Case as to the methods of operating and that the making of payments of this nature were normal and recurrent incidents of the trade, both payments should be treated as revenue payments. He referred me to
E LORD DUNEDIN'S words in *Vallambrosa Rubber Co., Ltd.* v. *Farmer* (*Surveyor of Taxes*) (1):

> "... in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure
F is a thing that is going to recur every year."

These payments, he argued, were not going to be made once and for all. On the contrary, payments of the same nature were being made constantly, year in and year out.

Then he referred me to another test suggested by VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (2). After quoting the words
G of LORD DUNEDIN which I have just read (1), LORD CAVE went on to say (3):

> " But when an expenditure is made, not entirely once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an
H expenditure as properly attributable not to revenue but to capital."

If one applied that test here, said counsel, how could one say that an asset or advantage had been brought into existence for the enduring benefit of the trade? These leases were only for a year or, at the most, two years, and the work of extracting the coal only lasted for six to nine months. Then the soil was put back and the company went somewhere else. It could not be said that any
I asset or advantage had been brought into existence for the enduring benefit of the trade. From a common-sense point of view, he argued, whether one looked at the transient character of the operations or at the constant recurrence of similar operations and the making of similar payments, these payments should be regarded as of a revenue nature.

Counsel for the Crown does not dispute that the payments in question were

---

(1) 5 Tax Cas. at p. 536. (2) [1925] All E.R. Rep. 623; 10 Tax Cas. 192.
(3) [1925] All E.R. Rep. at p. 629; 10 Tax Cas. at p. 192.

within the words of s. 137 (a) of the Income Tax Act, 1952, "wholly and exclusively laid out or expended for the purposes of the trade". But he says that, notwithstanding the transient character of the operations and the constant recurrence of similar payments, they are nevertheless to be regarded as capital payments and so within para. (f). He says that here what was being acquired by these lump sum payments (or what these payments were helping to acquire) was not stock-in-trade but rights which would enable the company to obtain stock-in-trade, i.e., coal. They were not payments for the purchase of coal but payments to put the company into the position to get coal. Lump sum payments of that character, he says, are necessarily of a capital nature, and the fact that the leases lasted only for a very short time, that the operations were very transient, and that fresh leases were constantly being entered into and payments of this character constantly being made to farmers or landowners is nihil ad rem.

The cases, the most recent of which is *Stow Bardolph Gravel Co., Ltd.* v. *Poole* (4), undoubtedly draw a distinction between payments made to acquire stock-in-trade and payments made to acquire rights which will enable one to get stock-in-trade for oneself. In the *Stow Bardolph* case (4), the appellant taxpayers carried on the business of dealers in sand and gravel and, in order to supply themselves with sand and gravel, they entered into an agreement with a landowner, Luddington Estates, Ltd., under which the landowner was to sell and the company was to purchase the deposit of gravel and sand contained in and on certain lands. The landowner was to allow the gravel company free access to the land with or without carts, lorries or vehicles for the purposes of removing the sand ballast, and there was a right for the gravel company to take machinery and haulage equipment on to the land for the purpose of excavating and carrying away the gravel and sand ballast. Then an option was given for a period of five years to purchase additional deposits of gravel and sand ballast on adjoining land of the landowner, and finally there was a provision that no legal estate in the land should be created by virtue of the agreement. The agreement, that is to say, gave a licence to enter and a right to remove the sand or gravel—a profit à prendre.

HARMAN, J., decided the case in favour of the taxpayers on the ground that the agreement amounted substantially to an agreement for the purchase of stock-in-trade from the landowner. The Court of Appeal, however, reversed that decision on the ground that the agreement was not an agreement for the direct acquisition of circulating capital but an agreement giving rights under which the taxpayers could, if they chose to use them, obtain circulating capital, viz., gravel, for themselves. That case, which followed a number of earlier cases, illustrates the distinction for which counsel for the Crown here argued. JENKINS, L.J., in his judgment pointed out that it was not a distinction which would commend itself to all minds, but was a distinction which was clearly drawn in the cases. This case is really a stronger case from this point of view than the *Stow Bardolph* case (4), because here there was a lease granting a legal interest in the land, not merely a lease and a profit à prendre.

However, the *Stow Bardolph* case (4) did not raise the problems of transience and frequent recurrence of the operations which are raised here. There was nothing in the facts of that case as reported to show how long the particular operation was going to last or whether the taxpayers were at the same time conducting similar operations under which they had to make similar payments to other landowners. Counsel for the taxpayers here therefore says that, as that aspect of the matter was not canvassed in the case at all, it does not assist counsel for the Crown very much.

The questions of transience and recurrence in connexion with operations of this character were raised before UPJOHN, J., in *Knight* v. *Calder Grove Estates* (5). The headnote there reads:

(4) [1954] 3 All E.R. 637; 35 Tax Cas. 459. (5) 35 Tax Cas. 447.

A "The respondents, who carried on in partnership the trade of opencast coal mining, purchased the freehold in ten acres of land for £2,000. The conveyance included covenants under which they undertook after getting the coal to reinstate the land and the vendor undertook to repurchase the land for £500 after mining operations were completed."

B There is considerable similarity between that case and this. Although the traders purchased the land and did not simply lease it, the conveyance contained a provision for the repurchase of the land by the landowner at a much reduced price after the operation was finished and the land reinstated as far as it could be. The difference in price, £1,500, represented in part at least the diminution in the value of the land brought about by the operations. The headnote goes on:

C "On appeal against assessments to income tax under Case I of Sch. D for the years 1948-49 and 1950-51, the respondents contended that the cost of the land was a revenue charge in the ordinary course of business, and that the price on resale was a receipt on revenue account."

The General Commissioners accepted that contention, but the Crown appealed to the court and UPJOHN, J., held that the payments must be regarded as capital D payments and the receipt as a capital receipt. Counsel for the taxpayers put forward two arguments which have some bearing on this case. There was a finding in the Case that the taxpayers had purchased other land for the purpose of carrying on their opencast mining business. The Case referred to two other conveyances, but they were conveyances which did not contain any provision for reconveyance by the purchasers to the vendor after the operations were E concluded. In reliance on that paragraph in the Case, counsel for the taxpayers argued, as has been argued here, that it was a case of a recurring expenditure which ought to be treated as revenue expenditure. The judge, however, decided that he had not enough facts to enable him to deal with that aspect of the matter and that in all the circumstances it would not be right to send the Case back for a further finding of fact. The most, therefore, that counsel for the taxpayers F here can say about that aspect of the case is that it did not strike UPJOHN, J., as hopeless to contend on suitable facts that the frequency of operations of this character might make the payments revenue payments rather than capital payments.

The judge then dealt with another argument of counsel for the taxpayers based on the transience of the operation, on the footing that there was no question of G recurrence in the case at all. The relevant passage in the judgment is as follows (6):

"I come next to what I may call [counsel for the taxpayer's] main point. He submits that this expenditure of £2,000, or, if you like, £1,500 net, was really a purely transitory matter. The transaction should be looked upon as one and the expenditure of £1,500 net should be regarded as H the expense of getting and winning the coal. It is submitted that that was the view taken by the commissioners and that it ought not to be disturbed. He points to, and relies upon, the contrast put by LORD CAVE, L.C., in *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (7)."

Then the judge read the words from LORD CAVE's speech which I have already read and went on (6):

I "Here it is said that there is no purchase with a view to bringing into existence any asset for the enduring benefit of the trade, but it is a purely transitory purchase in order that coal may be won from that particular area and, when won, the area will go back to its normal use of being used by Mr. Thompson as farming land. I am quite unable to accept that submission. The case seems to me a perfectly plain one. The parties, being

(6) 35 Tax Cas. at p. 453.
(7) [1925] All E.R. Rep. at p. 629; 10 Tax Cas. at p. 192.

minded to get and win coal from this particular area by opencast methods, purchased the land. They could have done it by some other means, but that is the means they chose—that of purchasing the land. That adventure in the nature of things is not likely to continue for more than two or three years, and they prudently arranged for the sale of this land when the adventure in relation to it comes to an end. No one suggests that the purchase of this land is circulating capital or stock-in-trade or anything of that sort. It is a purchase of land for the adventure, and so, on ordinary principles, the transaction must be regarded as a capital expenditure, just as when you buy land and put a factory on it, or buy land and sink a shaft. In my judgment, the fact that the adventure is not likely to continue for many years is quite irrelevant."

Counsel for the taxpayers in the present case sought to distinguish that part of the judgment on the ground that there was a purchase (albeit coupled with an obligation to repurchase when the operation was concluded), whereas here there is not a purchase but a lease for a short period with these lump sum payments made on the signing of the lease. I cannot see that there is any distinction on this aspect of the matter between a purchase and a lease. If there had been only one transaction here, if this company had simply entered into one lease for the purpose of opencast mining, and had made these initial payments to get the lease, the fact that the whole operation was only to last a few months would, I think, have made no difference. The point would have been covered by UPJOHN, J.'s judgment with which I entirely agree.

That leaves the question of recurrence which UPJOHN, J., left open. Counsel for the taxpayers has in his favour the finding of fact that the payments made were a normal and recurrent incident in the trade or business of opencast coal mining; and he says truly that the Crown has not been able to point to any case in which, in face of a finding that the payments were a normal and recurrent incident in the trade or business in question, it has yet been held that they were capital payments. Logically, however, I cannot see that the recurrence of the payments makes any difference. If once one accepts—as I must—the distinction between buying circulating capital and acquiring rights which enable one to get circulating capital, it seems to me that these payments are marked as being of a capital nature, and, if once one finds that, the fact that the trader is conducting many transactions of a similar kind cannot really make any difference. In arriving at that conclusion, I get some help from *Eastmans, Ltd.* v. *Shaw* (8). The facts were very different, but I think that what ROWLATT, J., said (9) does tend to support the view that I have taken. Again, if the mere recurrence of similar operations made a difference, a very large concern could apparently be in a better position than a small one to argue that expenditure of the sort in question was revenue expenditure. In the result, therefore, I come to the conclusion that I must dismiss the appeal and allow the cross-appeal.

Appeal dismissed. Cross-appeal allowed.

Solicitors: *Nordon & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

(8) 14 Tax Cas. 218.

(9) 14 Tax Cas. at p. 224.

ACKLAND & PRATTEN, LTD. (in Liquidation) *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Cross, J.), July 19, 20, 25, 1960.]

Profits Tax—Distribution—Gross relevant distribution—Repayment or return of share capital—Exclusion of distribution of capital—Company in voluntary liquidation—Transfer of assets to new company—Direction that profits tax be computed as if capital not previously increased—Validity—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *s.* 20 (2) (*b*)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 35 (1) (*c*), *s.* 36 (4)—*Finance Act,* 1951 (14 *&* 15 *Geo.* 6 *c.* 43), *s.* 32 (1), (3), (4).

A private limited company had a nominal share capital of ten thousand £1 preference shares and fifty thousand £1 ordinary shares, all the preference shares and 36,002 of the ordinary shares being issued and being held by a small number of shareholders. For several years it had retained a substantial part of its profits and so had enjoyed non-distribution relief substantially reducing its profits tax liability. In July, 1957, it passed resolutions increasing its capital by 190,000 £1 ordinary shares and capitalising £198,011 being part of the amount standing to the credit of its profit and loss appropriation account and applying the sum in paying up in full at par 198,011 unissued £1 ordinary shares to be allotted to shareholders in proportion to their holdings. In November, 1957, it went into voluntary liquidation on the ground that a reconstruction was desirable and entered into an agreement with a new company under which the shares in that company were distributed in the liquidation substantially to its shareholders, and it transferred to that company all its undertaking, assets and goodwill except securities and bank balances totalling (after a reserve for taxation) £150,795, i.e., less than its nominal paid-up share capital as increased under the resolutions. The two companies then gave notice to the Commissioners of Inland Revenue that the provisions of s. 36 (4) of the Finance Act, 1947, should apply to the agreement, with the result that the distribution of shares in the new company to shareholders of the old company in its liquidation did not count as a distribution for profits tax purposes by the old company under the decision of the Court of Appeal in *Inland Revenue Comrs.* v. *Pollock & Peel, Ltd.* ([1957] 2 All E.R. 483) as was pointed out by letter from the company's accountants. Payment of the sum of £150,795 to the shareholders of the old company in the process of liquidation also would not be such a distribution, being less than the paid-up share capital of the company as increased. The Commissioners of Inland Revenue made a direction under s. 32 (1) and (3) of the Finance Act, 1951, that the profits tax liability of the old company " for the chargeable accounting period ended Nov. 28, 1957 " (the date of liquidation) should be computed as if for the purposes of s. 35 (1) (c) of the Finance Act, 1947, the total nominal amount of the paid-up ordinary share capital was £36,002, on the ground that avoidance or reduction of liability to the profits tax was the main purpose of the transaction, or, being the main benefit which might be expected to accrue from it, was deemed to be the main purpose or one of the main purposes of it. As a result of the direction any excess distribution over the £36,002 by the liquidator to ordinary shareholders became liable to the profits tax. The Special Commissioners of Income Tax dismissed an appeal against the direction in which the company called no evidence.

Held: the direction must be upheld because—

(i) the commissioners were justified in finding that avoidance or reduction of profits tax liability had been one of the main purposes for which the transactions had been effected, particularly as the probability that tax relief was contemplated in July, 1957, had not been negatived by evidence of the directors within whose knowledge the matter peculiarly lay (see p. 375, letters F, G and I, post).

(ii) further, the test under s. 32 (3) of the Finance Act, 1951, was an objective one for which the commissioners had to be satisfied only that a reasonable man would expect the main benefit accruing from the transaction to be the avoidance of tax (*Crown Bedding Co., Ltd.* v. *Inland Revenue Comrs.*, [1946] 1 All E.R. 452, applied) which test was manifestly satisfied (see p. 376, letter C, post); and although s. 32 (3) referred to benefit in the " three years immediately following " and the period down to Nov. 27, 1957, was the last chargeable accounting period, yet these words in s. 32 (3) predicated only that during the next three years there should be some saving in profits tax.

(iii) the direction specified sufficiently for the purposes of s. 32 (4) " the adjustments as respects liability ", for all that was necessary was an indication of the method that was to be followed in assessing the company to the profits tax and the direction showed the hypothesis on which the computation was to be made (see p. 376, letter H, post); nor was it necessary that the relevant chargeable accounting period of the company should have been determined by the commissioners under s. 20 (2) (b) of the Finance Act, 1937, before the direction was given (see p. 377, letter A, post).

(iv) the provision in s. 36 (4) of the Act of 1947 whereby any distribution relief to which the old company became entitled was to be taken into account as if given to the new company " except so far as it has already operated to increase a distribution charge on the " old company, did not result in the old company being freed on liquidation from all further liability to tax in respect of unexhausted non-distribution relief (see p. 377, letter E, post).

Appeal dismissed.

[As to treatment of sums applied in reducing share capital as distributions for purposes of the profits tax, see 20 HALSBURY'S LAWS (3rd Edn.) 635, para. 1243; and for cases on the subject, see 28 DIGEST (Repl.) 378, 379, *1651-1657*.

For the Finance Act, 1937, s. 20 (2) (b), and the Finance Act, 1947, s. 35 (1) (c), s. 36 (4), see 12 HALSBURY'S STATUTES (2nd Edn.) 376, 779, 781; for the Finance Act, 1951, s. 32 (1), (3), (4), see 30 HALSBURY'S STATUTES (2nd Edn.) 175, 176; and for the repeal of s. 35 (1), s. 36 (4), of the Act of 1947, see Finance Act, 1958, s. 40 (5) and Sch. 9; 38 HALSBURY'S STATUTES (2nd Edn.) 507, 513, cf., p. 372, letter D, post.]

Cases referred to:

Crown Bedding Co., Ltd. v. *Inland Revenue Comrs.*, [1946] 1 All E.R. 452; 34 Tax Cas. 107; 28 Digest (Repl.) 441, *1928*.

Inland Revenue Comrs. v. *Pollock & Peel, Ltd.*, [1957] 2 All E.R. 483; 37 Tax Cas. 240; [1957] 1 W.L.R. 822; 28 Digest (Repl.) 379, *1656*.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against a direction made on it by the Commissioners of Inland Revenue under s. 32 (1) of the Finance Act, 1951, that the liability to profits tax of the company for the chargeable accounting period ended Nov. 28, 1957, should be computed as if, for the purposes of s. 35 (1) (c) of the Finance Act, 1947, the total nominal amount of the paid-up ordinary share capital of the company was £36,002. The company contended (i) that the direction was bad for the following reasons: (a) the four heads set out in the direction were separate and distinct and capitalisation of undistributed profits considered as a separate operation could not give rise to avoidance or reduction of liability to profits tax, nor could the combined effect of the four heads taken together have any such result; (b) the direction did not contain a computation of the profits tax on the basis on which it stated tax should be computed; (c) the commissioners had not determined a chargeable accounting period as required under s. 20 (2) (b) of the Finance Act, 1937, which the direction was required to specify; (d) the direction was premature, since the amount of distribution by the liquidation could not be known until the liquidation was complete and since it could not be issued until it was known whether the new company formed in connexion with the reconstruction of the company would

become liable to profits tax by reference to the non-distribution relief enjoyed by the company under s. 36 (4) of the Finance Act, 1947: (ii) that s. 32 of the Finance Act, 1951, did not strike at the transactions concerned, which were dealt with by s. 31; and (iii) that the commissioners had failed to discharge the onus on them of proving that avoidance or reduction of liability to profits tax was the main purpose or one of the main purposes of the transactions. The Crown contended (i) that the direction was competent and (ii) that the only inference to be drawn from the evidence was that the main purpose of the transactions was avoidance or reduction of the company's liability to profits tax or that the main benefit which might have been expected to accrue from the transactions was such avoidance or reduction of liability and that that must therefore be deemed to have been the main purpose or one of the main purposes of the transactions. The commissioners held that the direction was competent. The four heads of the direction were clearly linked together. Section 32 of the Act of 1951 was applicable to the transactions and nothing in s. 31 prohibited its being applicable. Nothing in s. 32 made a computation of the amount of profits tax on the basis set out in the direction essential to the validity of the direction and the objection that the commissioners had not determined an accounting period was bad. Nor was the direction premature. On the evidence the main purpose or one of the main purposes of the transactions was avoidance or reduction of the company's liability to profits tax. Alternatively, the main benefit which might have been expected to accrue from the transactions was such avoidance or reduction of liability and therefore that was their main purpose or one of their main purposes. The appeal against the direction therefore failed. The company appealed by way of Case Stated to the High Court.

P. J. Brennan for the taxpayer company.
Peter Foster, Q.C., and *A. S. Orr* for the Crown.

Cur. adv. vult.

July 25. **CROSS, J.,** read the following judgment: This case concerns the profits tax liability of the taxpayer company, Ackland & Pratten, Ltd., for the chargeable accounting period Jan. 1, 1957, to Nov. 28, 1957, when the company went into voluntary liquidation. Profits tax was first imposed, under the name of "national defence contribution", by s. 19 of the Finance Act, 1937, on the profits arising in each chargeable accounting period from any trade or business to which the section applied. Section 20 (2) of the Act provided, inter alia, that for purposes of profits tax the accounting periods of a trade or business should be determined as follows:

> "(a) in a case where the accounts of the trade or business are made up for successive periods of twelve months, each of those periods shall be an accounting period; (b) in a case where the accounts of the trade or business have been made up as aforesaid but have ceased to be so made up, the accounting periods from the end of the last period of twelve months for which they were so made up shall be such periods not exceeding twelve months as the Commissioners of Inland Revenue may determine."

There then follows a sub-para. (c), which is not relevant to this case.

The nature of the tax was drastically altered by the Finance Act, 1947, in that the rate of tax was made to depend on the amount of profits distributed to proprietors. Section 30 of that Act provided:

> "(2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to [a certain percentage] of the difference.

" (3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of [a certain percentage] on the amount of the difference.

" (4) The reductions falling to be made under sub-s. (2) of this section and the charges falling to be made under sub-s. (3) thereof are hereafter in this Act respectively referred to as ' reliefs for non-distribution ' and ' distribution charges '."

Section 34 of the Act defined " net relevant distributions " as a portion therein defined of " gross relevant distributions ", the meaning of which was set out in s. 35.

Section 35 (1), so far as material to this case, was as follows:

" Subject to the provisions of this and the two next succeeding sections, the gross relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body, are the total distributions to the members of the body corporate, society or other body, not being distributions allowable as deductions in computing the profits of the trade or business for any period for the purposes of the profits tax, and being either—(a) dividends declared not later than six months after the end of that period which are expressed to be paid in respect of that period or any part thereof; or (b) distributions (other than dividends which, under para. (a) of this subsection, are to be treated as part of the gross relevant distributions to proprietors for any previous chargeable accounting period) made in the period; or (c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this subsection applies) as is not a distribution of capital, and, for the purposes of para. (c) of this subsection, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

Section 36 (1) deals principally with the meaning of distributions. It is to be noted that the proviso to that section stated:

" Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

I must read the greater part of s. 36 (4) in view of an argument which has been addressed to me in this case. It is as follows:

" Where—(a) as part of a scheme of amalgamation or reconstruction a trade or business carried on by a body corporate (in this subsection referred to as ' the first company ') is transferred to another body corporate (in this subsection referred to as ' the second company '); (b) the consideration for the transfer consists wholly or mainly of shares in the second company; and (c) the first and second companies jointly so elect by notice in writing given to the commissioners within six months after the transfer or such longer time as the commissioners may in any case allow, the provisions of this Part of this Act shall apply subject to the following modifications, that is to say—(i) any distribution of those shares to any person in a winding-up of the first company shall, notwithstanding anything in sub-s. (1) of this section, not be deemed for the purposes of the last preceding section to be a

distribution to that person; and (ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company or other person assessable to profits tax on the profits of the trade or business of the first company shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company . . ."

Then there are some other words which I do not think I need read.

I must now read parts of two sections in the Finance Act, 1951, which related to profits tax. The first is s. 31, which provided that, in certain conditions, a return or repayment of capital was to be treated as a distribution. I think that the relevant part is as follows:

"(1) Subject to the provisions of this section, where—(a) whether before or after the passing of this Act but after Apr. 6, 1949, a body corporate, unincorporated society or other body capitalises any distributable sum; and (b) then or thereafter, whether before or after the passing of this Act but after Apr. 10, 1951, any sum is applied in reducing its capital, there shall be deemed for the purposes of s. 35 of the Finance Act, 1947 (which defines the expression 'gross relevant distributions to proprietors' for profits tax purposes), to be a distribution to the members of the body corporate, society or other body of an amount equal to the sum so applied or to the total amount of the distributable sums previously capitalised by it as aforesaid, whichever is the less, taking place when the sum is so applied."

Section 31 (5) defines "distributable sum" and "capitalise", and then states:

". . . references to the reduction of capital shall be deemed to include references to the repayment or return of share capital and the repayment or redemption of loan capital, other than loan capital issued for full consideration paid in cash to the body corporate, society or other body or redeemable preference shares so issued."

Then one goes to s. 32, which is the section primarily in issue in this case. Subsection (1) is as follows:

"Where the commissioners are of opinion that the main purpose or one of the main purposes for which any transaction or transactions was or were effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to the profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to the profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to the profits tax which would otherwise be effected by the transaction or transactions."

Then there is a proviso, which I need not read; and I need not, I think, read sub-s. (2).

Subsection (3) is as follows:

"If it appears in the case of any transaction or transactions, being a transaction which involves, or transactions one or more of which involve—(a) the transfer or acquisition of shares in or debentures of a company; or (b) a change or changes in the person or persons carrying on a trade or business or part of a trade or business; or (c) a change or changes in the directors of a company the directors whereof have a controlling interest therein, that, having regard to the provisions of the law relating to the profits tax other than this section which were in force at the time when the transaction or transactions was or were effected, the main benefit which might have been expected to accrue from the transaction or transactions in

the three years immediately following the completion thereof was the avoidance or reduction of liability to the tax, the avoidance or reduction of liability to the profits tax shall be deemed for the purposes of this section to have been the main purpose or one of the main purposes of the transaction or transactions."

Then sub-s. (4):

"Any direction of the commissioners under this section shall specify the transaction or transactions giving rise to the direction and the adjustments as respects liability to the profits tax which the commissioners consider appropriate."

Then, finally, to complete this history, s. 25 (1) of the Finance Act, 1958, which operated from Apr. 1, 1958, provided:

"... the profits tax shall be charged on the profits arising in any chargeable accounting period from a trade or business to which s. 19 of the Finance Act, 1937, applies at the rate of ten per cent. on the amount of those profits, subject to [certain provisions for abatement] but without any relief for non-distribution or any distribution charge for chargeable accounting periods ending after the beginning of that month."

So from that time onwards the elaborate two-tier system introduced by the Act of 1947 came to an end. However, the transactions with which I am concerned took place before the Act of 1958 was passed.

Now on May 24, 1957, the Court of Appeal gave judgment in *Inland Revenue Comrs.* v. *Pollock & Peel, Ltd.* (1). What had happened in that case, briefly, was this. In November, 1952, the company's issued capital was increased from 2,004 shares of £1 each to 30,060 of £1 each in pursuance of a special resolution passed on Nov. 6, 1952, in the following terms:

"Capitalisation of profits:—That it is resolved that it is desirable to capitalise the sum of £28,056 being part of the amount standing to the credit of a capital reserve account and a profit and loss appropriation account and that such sum be capitalised accordingly and used for the purpose of paying up as fully paid bonus shares 28,056 ordinary shares of £1 each and that such bonus shares be issued and allotted to the existing shareholders of the company on the basis of fourteen new bonus shares for each ordinary share now held."

On Oct. 31, 1953—i.e., nearly a year afterwards—the company went into voluntary liquidation. A new company subsequently took over the assets of its business, except a sum of cash, in consideration for shares in that company, the distribution of which to the members of the old respondent company did not, by virtue of an election by the two companies made under s. 36 (4) of the Finance Act, 1947, which is one of those I have read, affect its liability to profits tax. After paying all the debts and the costs of the winding-up, the liquidator was left with £15,030 in cash, which he distributed to the members of the company as a final step in the liquidation—and it is to be noted that, of course, that sum was less than the nominal amount of the share capital of the company as increased by the resolution passed in November, 1952. The amount of £15,030 was included in the gross relevant distributions in an assessment to profits tax made on the company for the last chargeable accounting period of its trade or business, ending on Oct. 31, 1953, on the footing that s. 31 of the Finance Act, 1951, the relevant parts of which I have read, applied.

On appeal to the Special Commissioners of Income Tax, the company contended, among other things, that s. 31 did not override the provisions of s. 35 (1) of the Finance Act, 1947, limiting the amount of distributions made after the last chargeable accounting period which might be treated as gross relevant distributions to the excess over the nominal amount of the paid-up share capital.

(1) [1957] 2 All E.R. 483; 37 Tax Cas. 240.

A Of course, there was no excess in that case. Secondly, it contended that the sum in question was not applied in reducing share capital so as to give rise to a distribution under s. 31. It said, in effect, that it was an abuse of language to say that money paid by a liquidator in a liquidation was a sum applied in reducing share capital.

The Court of Appeal, upholding the judgment of Upjohn, J., held that those B contentions were perfectly right. It held, first, that the payment was not a repayment or return of share capital so as to be a " sum applied in reducing capital " within s. 31 of the Finance Act, 1951, and that it was a " distribution of capital " within s. 35 (1) of the Finance Act, 1947; and that, inasmuch as the amount distributed was less than the nominal amount of the share capital, no profits tax was chargeable. It is to be noted that s. 32 of the Finance Act, C 1951, was not invoked by the Revenue in that case at all.

That being the legal position in the middle of 1957 as regards these matters, I must now come to the transactions which are in question in this case. The taxpayer company, Ackland & Pratten, Ltd., was incorporated in 1920 as a private company, and carried on business as stationers. Up to July 24, 1957, its authorised capital was £60,000 divided into ten thousand £1 preference and fifty thousand D £1 ordinary shares. All the preference shares and 36,002 ordinary shares had been issued and were held by a small number of shareholders. In past years, the company had retained a substantial part of its profits, and its liability to profits tax had thereby been substantially reduced by reason of non-distribution relief; but if these accumulated profits were to be distributed, it would incur liability to distribution charge.

E On July 24, 1957, certain special resolutions were passed by the company, the material ones being:

> " (a) that the share capital of the company be increased by £190,000 divided into 190,000 £1 ordinary shares; and (b) that £198,011 (being part of the amount standing to the credit of the company's profit and loss appropriation account) be capitalised and applied in paying up in full at par F 198,011 unissued £1 ordinary shares, such fully paid up shares to be allotted to the existing shareholders in the proportion of eleven new shares for every two ordinary shares already held by them."

The Case Stated by the commissioners proceeds to state, in para. 7:

> " On Oct. 14, 1957, instructions were issued to inspectors of taxes that the G commissioners were not seeking leave to appeal to the House of Lords in the case of *Inland Revenue Comrs.* v. *Pollock & Peel, Ltd.* (2), and that the decision of the Court of Appeal in that case should be applied in appropriate cases."

It is to be noted, however, as counsel for the company pointed out, that there was no finding that those instructions, which presumably were of a confidential H nature, were communicated to the company.

On Oct. 21, 1957, which was in fact about a week after those instructions were issued, the shares referred to in the resolutions passed on July 24, 1957, were duly issued and allotted to the shareholders. Then, on Nov. 27, 1957—i.e., only a little more than a month afterwards—the company went into voluntary liquidation on the ground that a reconstruction was considered desirable, and the I liquidator was authorised to agree to the registration of a new company and to enter into an agreement with the new company when incorporated. The new company was duly incorporated, the shareholders being substantially the same as those in the old company, and the liquidator entered into an agreement with the new company on Nov. 28, 1957. By this agreement the company and the liquidator transferred to the new company all its undertaking, assets and goodwill, with the exception of certain government securities and bank balances, the

(2) [1957] 2 All E.R. 483; 37 Tax Cas. 240.

total value of which was £161,517 odd. Out of this sum there was reserved £10,721 odd for taxation, so that there was left available for distribution by the liquidator of the old company—as well, of course, as the shares in the new company—the sum of £150,795 odd—which, it is to be observed, was, of course, less than the then share capital, the nominal share capital, of the company, as increased by the July resolutions.

Then, on Dec. 3, 1957, the old company and the new company gave notice to the commissioners that they elected (as, of course, Pollock & Peel, Ltd. (3) had done) that the provisions of s. 36 (4) of the Finance Act, 1947, should apply to the agreement of Nov. 28, 1957; with the result, of course, that the distribution to the shareholders of the old company of the shares in the new company, in the liquidation of the old company, would not count as a distribution by the old company. Then, on Jan. 17, 1958, the accountants of the old company, then in liquidation, wrote to their inspector of taxes setting out briefly the facts which I have detailed, and adding, as a final paragraph:

> "The assets remaining in the hands of the liquidator are government securities and the balance of the banking account. A part of the securities has already been realised, and a distribution of 5s. in the £ on the issued capital of £234,013 has already been made. The remaining assets will not be sufficient to repay the increased capital in full (excluding the share distribution) [which, of course, had to be excluded under s. 36 (4) of the Finance Act, 1947] and we presume that under the decision in *Pollock & Peel, Ltd.* (3) no distribution charge will be payable."

The Revenue authorities were, I suppose, somewhat disturbed by that letter. At all events, they considered the matter, and they thought that s. 32 of the Act of 1951, which they had not, of course, sought to apply in the *Pollock & Peel, Ltd.* case (3), might be appropriate to meet these circumstances. On Aug. 15, 1958, a direction under that section was made by the Commissioners of Inland Revenue, and it is as follows:

> "We, the undersigned, being two of the Commissioners of Inland Revenue, have had under consideration the following transactions: (a) The special resolution passed by the members of Ackland & Pratten, Ltd. (hereinafter called 'the company') at an extraordinary general meeting held on July 24, 1957, whereby it was resolved, inter alia, that the sum of £198,011, being part of the amount standing to the credit of the company's profit and loss appropriation account, should be capitalised and applied in paying up in full at par 198,011 unissued ordinary shares of £1 each in the capital of the company and that such shares so fully paid up be issued and allotted to the existing shareholders of the company in the proportion of eleven new shares for every two ordinary shares already held by them. (b) The application of the said capitalised sum and the allotment to the said shareholders of 198,011 shares in the manner directed by the said resolution and the consequent increase of the nominal amount of the paid-up ordinary share capital of the company from £36,002 to £234,013. (c) The special resolution passed at an extraordinary general meeting held on Nov. 27, 1957, whereby it was resolved, inter alia, that the company be wound up voluntarily. (d) The distribution to the said shareholders in due course of liquidation of the company of certain assets of the company.
>
> "And being of the opinion that avoidance or reduction of liability to the profits tax was, [that is a reference to s. 32 (1)] or as being the main benefit which might have been expected to accrue from the transaction in the three years immediately following the completion thereof is deemed to have been, [and that is a reference, of course, to s. 32 (3)] the main purpose or one of the main purposes of the transaction, direct, by virtue of the powers conferred

(3) [1957] 2 All E.R. 483; 37 Tax Cas. 240.

A upon us by s. 32 (1) of the Finance Act, 1951, that the liability to the profits tax of the company for the chargeable accounting period ended Nov. 28, 1957, [which was the date of the liquidation] shall be computed as if, for the purposes of s. 35 (1) (c) of the Finance Act, 1947, the total nominal amount of the paid up ordinary share capital of the company was at all relevant times £36,002 and no more."

B That, of course, would have the result that any excess distribution by the liquidator over and above the £36,002 would attract profits tax.

Now the company appealed against that direction, and the appeal was heard by the Special Commissioners on Mar. 10, 1959; and it is to be observed that no evidence was given on behalf of the company. The Special Commissioners decided that the direction was valid. The company was dissatisfied with that decision, C and asked for a Case to be stated, and that is the Case which has now come before me. I should point out that the Commissioners of Inland Revenue accept, as of course they must, the position that the onus is on them to establish that the conditions of s. 32 of the Finance Act, 1951, are satisfied.

Counsel for the company first argued that there was no evidence on which the Special Commissioners could properly come to the conclusion that this was a D case within s. 32 (1) at all. He pointed out, first, that the resolution of July 24, 1957, would not by itself reduce the profits tax liability at all; and, similarly, that the resolution to wind up would again not by itself reduce the liability to profits tax. Given, of course, that the company was going to pass both resolutions, the resolution to increase the capital would necessarily have to precede the resolution to go into liquidation; but he argued that it was not proper to infer that E both of them were part of a scheme, or should be linked together. He said that it might be, for all one knew, that in July the company resolved to increase its capital without any thought of subsequently going into liquidation, and then, in November, decided to go into liquidation for reasons that were quite unconnected with the previous resolution to increase its capital. He also urged that the state of the law was so obscure at the time that no reasonable man would in any F case have any confidence in the view that this increase of capital and subsequent going into liquidation would reduce the profits tax liability of the company.

I cannot accept those contentions. Why the company passed those resolutions was a matter peculiarly within the knowledge of the directors. They chose to give no evidence at all. Much the most likely explanation, especially in view of the terms of the company's own accountants' letter of January, 1958, was that G the transactions were connected and were part of a scheme. If, contrary to all probability, the liquidation was not contemplated in July, and tax relief was never in the mind of the parties at all until the whole matter was completed, then the directors could have said so; and if they did not say so, they ran the risk of the Special Commissioners drawing the obvious inference from their failure to do so.

H Then, again, apart from s. 32 (1)—if you put that aside—it seems to me that the chance of saving profits tax under the decision in *Inland Revenue Comrs.* v. *Pollock & Peel, Ltd.* (4) was very good indeed. It is perfectly true that the decision of the Court of Appeal might have been upset by the House of Lords, and I am prepared to assume that the directors of the company were not aware at the time of the liquidation that there would not be an appeal; but still the Court of I Appeal had upheld the decision of UPJOHN, J., and it seems to me that there was a very good chance at that time that profits tax would be avoided. Again, it was the view of the company's accountants, as one can see from the last paragraph of the letter which they wrote in January, that it would be avoided. I think that the commissioners were fully justified in finding that the conditions of s. 32 (1) were satisfied, and that the main purpose, or one of the main purposes, for which these transactions were effected was the avoidance or reduction of

(4) [1957] 2 All E.R. 483; 37 Tax Cas. 240.

liability to profits tax. In any case, however, it was not in fact necessary for them to find this. It was sufficient if, under sub-s. (3), A

> " the main benefit which might have been expected to accrue from the transaction or transactions in the three years immediately following the completion thereof was the avoidance or reduction of liability to the [profits] tax."

B

If they were satisfied of that, then the avoidance or reduction of liability to profits tax was to be deemed, for the purposes of the section, to have been the main purpose, or one of the main purposes, of the transaction or transactions.

Now these provisions in s. 32 of the Finance Act, 1951, reproduce, I think almost verbatim, similar provisions in the excess profits tax legislation, and it was pointed out by LORD GREENE, M.R., with reference to those provisions in *Crown Bedding Co., Ltd.* v. *Inland Revenue Comrs.* (5) that the test to be applied in considering s. 32 (3) is the objective test: Would a reasonable man in fact expect that the main benefit which would accrue from these transactions would be the avoidance of tax? It seems to me to be manifest that that is what an independent, objective third party would think was the main benefit to be expected from it. It was not a certainty, but it was, to my mind, more than a possibility. It was, indeed, a probability. C D

Counsel for the company argued that, whatever might be the position with regard to sub-s. (1), sub-s. (3) could not apply to this case because it contemplated a benefit to accrue " in the three years immediately following the completion thereof ". He argued that that was a reference to the tax which would have been payable in the next three years, and that therefore sub-s. (3) did not cover a case such as this, where the tax is chargeable in respect of a period before the liquidation of the company and where there will be no further chargeable accounting periods in respect of which the tax could be charged. I do not think that that argument is sound. To my mind, the words mean only that, during the next three years, whether or not there has been a liquidation, there will in fact be some saving of tax. I therefore reject that argument. But, as I have pointed out, in any case I do not think sub-s. (3) very much matters, because in my judgment the commissioners were fully justified in holding that sub-s. (1) applied. E F

Now counsel for the company next argued that the direction was premature, and in that connexion he referred to s. 32 (4). That, as I have said, provides:

> " Any direction of the commissioners . . . shall specify the transaction or transactions giving rise to the direction [it did that] and [and these are the words on which counsel relies] the adjustments as respects liability to the profits tax which the commissioners consider appropriate."

G

Counsel argued that it was necessary for the commissioners to go into much more detail than they did in this case, and for them to indicate what precisely the liability to tax was going to be; and that, of course, they would not be able to do until the liquidation had been completed. H

In my judgment, that submission is ill founded. I think that all that is needed under sub-s. (4) is an indication of the method which is to be followed in assessing the company to profits tax. The direction which they gave was that the profits tax for the chargeable accounting period ended Nov. 28, 1957, was to be computed on a certain hypothesis; i.e., as if, for the purposes of s. 35, the total amount of the paid-up capital was the unincreased amount and not the increased amount. That, in my judgment, is an ample specification of " the adjustments as respects liability to the profits tax which the commissioners consider appropriate." I

In this connexion, counsel for the company also argued, as a further formal objection to the direction, that in fact the commissioners had not at that time determined what was the last chargeable accounting period of the company

(5) [1946] 1 All E.R. 452; 34 Tax Cas. 107.

under s. 20 (2) (b) of the Finance Act, 1937. The chargeable accounting periods of this company were annual periods, from Jan. 1. to Dec. 31, and the last chargeable accounting period would of course be from Jan. 1, 1957, up to the date of liquidation. In point of fact, that last period has not yet been determined by the Commissioners of Inland Revenue under s. 20 (2) (b); but, again I do not think that that fact in any way invalidates the direction. The direction was:

> " . . . that the liability to the profits tax of the company for the chargeable accounting period ended Nov. 28, 1957, shall be computed as if ",

etc. In my judgment, those words simply mean " for whatever the last chargeable accounting period of the company running up to the date of liquidation shall in fact prove eventually to be ". I do not think that there can be any doubt in anyone's mind what at that time it would be.

Counsel for the company next founded an argument on the wording of s. 36 (4) of the Finance Act, 1947. Where an election is made under that section—as happened in this case, of course, and also in *Inland Revenue Comrs.* v. *Pollock & Peel, Ltd.* (6)—then the second way in which the provisions of the Act relating to profits tax are modified is this: that, in considering what distribution charge (if any) falls to be made on the second company, any non-distribution relief to which the first company became entitled is to be taken into account as if it had been given to the second company. Then, these are the words on which counsel for the company particularly relies: ". . . except so far as it has already operated to increase a distribution charge on the first company ". Counsel submits that the word " already " relates to the date of liquidation, and that therefore the second company, as it were, irrevocably takes over all the potential liability to tax resulting from any unexhausted non-distribution relief on the books, so to say, of the first company at the date of liquidation; and it must follow from this, he says, that the first company, on liquidation, is freed from all further liability to tax in respect of such unexhausted non-distribution relief.

In my judgment, that argument, which is an ingenious one, rests on a misconstruction of the word " already ". This part of s. 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company; and the word " already ", I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be considered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into account in estimating the liability of the second company as and when that liability falls to be determined. I appreciate that difficulties might arise in applying this provision to a case where the question of the distribution charge to be paid by the second company arises before the liquidation of the first company is completed, and where there is still a possibility of a future charge on the first company in respect of a future possible distribution of some assets not taken over by the second company, but such circumstances would, I think, be very unlikely to occur, and any difficulty which might arise if they did occur is to my mind no sort of justification for reading into the subsection a freeing of the first company from all liability to profits tax as from the date of liquidation, which I do not think was in the mind of the legislature for one moment.

Counsel for the company finally advanced another argument, to which I should refer. It was, as I understand it, that, as the Revenue authorities obviously thought that s. 31 covered a case such as this until the Court of Appeal showed them that they were quite wrong, this case ought not to be treated as within s. 32. For my part, I cannot follow that reasoning at all. The case, as I have tried to explain, appears to me precisely within s. 32, and the fact that the Revenue authorities thought, quite wrongly, that such a case was within s. 31, has, so far as I can see, nothing whatever to do with the matter. Now I think that I have

(6) [1957] 2 All E.R. 483; 37 Tax Cas. 240.

dealt, or that I have tried to deal, with all the arguments which were put before me. In the result, I think that the Revenue authorities have discharged the onus which was on them. I think that the Special Commissioners came to a right conclusion, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbot & Co.*, Bristol (for the taxpayer company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

Re THOMPSON'S WILL TRUSTS.

[CHANCERY DIVISION (Cross, J.), October 5, 1960.]

Trust and Trustee—Variation of trusts by the court—Investment clause—Enlargement to include power to invest in equities—Form of clause—Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 *c.* 53), *s.* 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

By their originating summons (as amended), the applicants, Jennifer Ann Thompson and Edward Martin Amphlett Thompson, as persons who were beneficially interested under the trusts of the will, dated June 18, 1930, of their grandfather, Albert Edward Thompson, deceased, applied for an order under s. 1 of the Variation of Trusts Act, 1958, approving an arrangement in the terms of the draft arrangement set forth in the schedule to the summons on behalf of (a) their youngest sister, Cecilia Leila Thompson (the second respondent), who was an infant, and (b) all persons unborn or unascertained who might become entitled to an interest under the trusts affecting the testator's residuary estate. The object of the application was to enlarge the trustees' powers of investment.

Under the terms of the will (and in the events which had happened) the trust funds settled by the will were held on trust to pay the income thereof to the testator's son, Sir Edward Thompson, during his life, and after his death to divide the capital of the funds equally between such of his children as should attain the age of twenty-one years. The testator died in 1937. By a deed, dated Apr. 28, 1953, his son, Sir Edward Thompson, assigned his interest in the income of the settled trust funds to trustees (the third and fourth respondents) and directed them to hold the income on certain trusts for the benefit of his four children (the applicants, the first respondent (Elizabeth Mary Thompson), and the second respondent). By a marriage settlement, dated Apr. 17, 1959, the second applicant, Edward Martin Amphlett Thompson, assigned to trustees (the fifth and sixth respondents) part of his beneficial interest under the will and under the deed of 1953 on certain trusts for the benefit of himself, his wife and the issue of the marriage. The sixth respondent and the seventh respondent were the present trustees of the testator's will.

The schedule referred to in the summons was as follows:

"ARRANGEMENT.

"The powers of investment conferred on the trustees for the time being of the said will of the said testator in respect of his residuary real and personal estate are hereby revoked and the trustees for the time being of the said will shall henceforth have power to invest trust moneys

"(a) in any investments which are from time to time authorised by law for the investment of trust funds or

A "(b) in any investments of whatsoever nature which at the date of purchase are or will upon allotment be dealt in or quoted upon any of the following stock exchanges that is to say the London, Liverpool, Manchester, Birmingham, Edinburgh, Glasgow, New York, Montreal, Paris, Amsterdam, Zurich and Johannesburgh stock exchanges including the over-the-counter markets in New York and Montreal.

B "Provided always as follows:—

"(i) No money shall be invested in the government securities of any foreign country except the United States of America or any state thereof or in the securities of any provincial municipal or other local government or public board or authority in any foreign country except as aforesaid; and for this purpose a foreign country means a country which is neither part of C Her Majesty's dominions nor comprised in the British Commonwealth of Nations

"(ii) No moneys shall be invested in any partly paid shares; but this prohibition shall not apply to the partly paid shares of any company incorporated in the United Kingdom carrying on banking or insurance business in the United Kingdom and shall not prevent an application for and part D payment in respect of shares offered for subscription to the public if the terms of issue are such that such shares or the stock representing the same will be fully paid within nine months from the date of allotment

"(iii) No money shall be invested in the ordinary or deferred shares or stock of any company unless at the time of investment such company shall have a paid-up capital of £500,000 at least or its equivalent at the rate of E exchange current at the date of investment and so that in the case of a company having shares of no par value such paid-up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the company's published accounts in respect of such shares; but this prohibition shall not prevent an application for and payment in respect of shares offered for subscription to the public if the full subscription for such shares would F cause the paid-up capital of the company concerned to amount to £500,000 at least or such equivalent as aforesaid."

B. L. Bathurst, Q.C., and *C. J. Slade* for the applicants.

W. J. C. Tonge for the first respondent.

J. Cunliffe for the second, third and fourth respondents.

E. F. R. Whitehead for the fifth respondent.

G *E. W. Griffith* for the sixth and seventh respondents.

B. L. Bathurst, Q.C., said that the investment clause was drafted on certain accepted lines, with the difference that it set out each stock exchange by name instead of using the phrase "any recognised stock exchange"*.

Having heard counsel for the adult respondents and counsel for the infant respondent, **CROSS, J.**, said that he would approve the arrangement as set out H in the schedule to the summons on behalf of the infant respondent and of all persons unborn or unascertained who might become entitled to an interest under the trusts affecting the testator's residuary real and personal estate.

Solicitors: *Payne, Hicks Beach & Co.* (for all parties).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

---

* See, for example, *Re Brocklehurst's Will Trusts* (Apr. 29, 1959), "The Times", Apr. 30, 1959.

R. *v.* GRUNWALD AND OTHERS.

[CENTRAL CRIMINAL COURT (Paull, J., and a jury), June 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, July 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 1960.]

Criminal Law—Inducement to enter into agreement to dispose of shares—"Reckless" making of any statement or promise—No offence unless statement or promise rash and unsupported by any real basis of facts—Prevention of Fraud (Investments) Act, 1958 (6 & 7 *Eliz.* 2 *c.* 45), *s.* 13 (1).

Before a defendant can be convicted of the "reckless" making of any statement or promise, under s. 13 (1)* of the Prevention of Fraud (Investments) Act, 1958, the jury must be satisfied of three things: (i) that the statement or promise was in fact made; (ii) that it was a rash statement to make or a rash promise to give; and (iii) that the defendant had no real basis of facts on which he could support the statement or the promise, for which purpose basis of fact must include what has been told to the defendant by apparently respectable and responsible persons. If any one of those three matters is not proved, the jury must find a verdict of not guilty (see p. 384, letter H, post). Carelessness may not in itself be sufficient to constitute recklessness, although it is a factor to be taken into account; but a statement may be reckless without being made dishonestly (see p. 384, letter G, post).

R. v. *Bates* ([1952] 2 All E.R. 842) and *R.* v. *MacKinnon* ([1958] 3 All E.R. 657) not followed.

[For the Prevention of Fraud (Investments) Act, 1958, s. 13 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 897.]

Cases referred to:

Akerhielm v. *de Mare*, [1959] 3 All E.R. 485; [1959] A.C. 789; [1959] 3 W.L.R. 108; 3rd Digest Supp.

Behn v. *Burness*, (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 122 E.R. 281; 35 Digest 6, *1*.

Derry v. *Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T.T. 265; 54 J.P. 148; 9 Digest (Repl.) 127, *685*.

R. v. *Bates*, [1952] 2 All E.R. 842; 36 Cr. App. Rep. 175; 3rd Digest Supp.

R. v. *Hinds, Musgrave & others* (July, 1950, C.C.C.), unreported.

R. v. *MacKinnon*, [1958] 3 All E.R. 657; [1959] 1 Q.B. 150; 123 J.P. 43; 43 Cr. App. Rep. 1; [1958] 3 W.L.R. 688; 3rd Digest Supp.

R. v. *Russell*, [1953] 1 W.L.R. 77; 97 Sol. Jo. 12; 3rd Digest Supp.

Williams Bros. Direct Supply Stores, Ltd. v. *Cloote*, (1944), 60 T.L.R. 270; 17 Digest (Repl.) 474, *259*.

Trial on Indictment.

The defendants, Friedrich Grunwald, Herbert Hugh Murray and Harry Oscar Jasper, were charged at the Central Criminal Court, before PAULL, J., and a jury, on an indictment containing twelve counts. Count 4 and count 11 charged Grunwald and Jasper with inducing agreement for disposal of securities by the making of reckless statements, contrary to s. 13 (1) (a) (i) of the Prevention of Fraud (Investments) Act, 1958. The particulars stated under count 4 were that Grunwald and Jasper, on July 20, 1959,

". . . by the reckless making of a statement and promise contained in a letter of offer to the shareholders of Lintang Investments, Ltd. which were misleading, false or deceptive, namely, the statement 'on behalf of our

* Section 13 (1) reads: "Any person who . . . by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into or offer to enter into—(i) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting securities . . . shall be guilty of an offence, and liable to imprisonment for a term not exceeding seven years."

clients H. Jasper & Co., Ltd. we offer to acquire all your shares of 5s. each in the capital of the above-mentioned company for 24s. per share ' and the promise ' If the offer becomes unconditional our said clients will make payment to the accepting shareholders in accordance therewith on Aug. 31, 1959,' induced Down Nominees, Ltd. to enter into an agreement for disposing of 2,750 shares of the said Lintang Investments, Ltd."

The particulars stated under count 11 were that Grunwald and Jasper, on Aug. 4, 1959,

". . . by the reckless making of a statement and promise contained in a letter of offer to the shareholders of the Ely Brewery Co., Ltd., which were misleading, false or deceptive, namely, the statement ' On behalf of our clients H. Jasper & Co., Ltd. we offer to acquire all your fully paid ordinary stock units of 3s. 6d. each in the capital of the above-mentioned company at 5s. per unit and all your 6d. paid-up units at 2s. per unit ' and the promise ' If the offer becomes unconditional our clients will make payment to the accepting stock holders in accordance therewith on Sept. 14, 1959,' induced Arthur Isadore Freedman to enter into an agreement for disposing of seven thousand shares of the said Ely Brewery Co., Ltd."

Count 12 charged Jasper alone with inducing agreement for disposal of securities by the making of reckless statements, contrary to s. 13 (1) (a) (i) of the Act of 1958, the particulars of offence being that Jasper, on Sept. 14, 1959,

". . . by the reckless making of a promise and statement which were misleading false and deceptive, namely, the promise on behalf of H. Jasper & Co., Ltd. that all assenting shareholders of Ely Brewery Co., Ltd. who had accepted an offer dated Aug. 4, 1959, would be paid in accordance with the terms of the said offer, and the statement that moneys were available for the purpose of making the said payments, induced Lazarus Nidditch to enter into an agreement for disposing of 486,724 shares of the said Ely Brewery Co., Ltd."

The report is confined to the ruling of His Lordship, Paull, J., on the meaning of " reckless " in s. 13 (1) of the Act of 1958, the direction to the jury in regard to the charges against Jasper, and the summing-up in regard to count 4 against Grunwald. Counts 2 and 6, which were referred to in the summing-up on count 4 against Grunwald, charged Grunwald and Murray with fraudulent conversion of property, contrary to s. 20 (1) (iv) (b) of the Larceny Act, 1916. The particulars of count 2 were that Grunwald and Murray on Apr. 30, 1957, having received twenty-four cheques for a total sum of £150,000 for or on account of the State Building Society, fraudulently converted the proceeds thereof to their own use and benefit. The particulars of count 6 were that Grunwald and Murray, on July 30, 1959, having received thirty-two cheques for a total sum of £3,255,500 for or on account of the State Building Society, fraudulently converted the proceeds thereof to their own use and benefit.

Grunwald, a solicitor, was a partner in the firm of Harewood & Co., and managing director of the Jasper group of companies. He had acted as solicitor for the State Building Society. Murray, an expert valuer, was the managing director and secretary of the State Building Society. Jasper was a director of H. Jasper & Co., Ltd., a firm of merchant bankers and licensed dealers in securities, and was chairman of the Jasper group of companies. The prosecution alleged that Murray and Grunwald were in a conspiracy with one another to use, temporarily, moneys of the State Building Society for the purpose of acquiring companies for themselves (i.e., " taking-over " companies by acquiring the majority of the shares in those companies); and that this procedure had been carried out successfully by them on a number of previous occasions, but in the case of Lintang Investments, Ltd. matters had not turned out as planned. Against Jasper, it was alleged that he had lent his name for the purpose of

appearing as a principal in the take-over transactions, but he was in fact merely a nominee; and it was not alleged that he knew that the State Building Society moneys were being used to purchase the shares.

J. M. G. Griffith-Jones, J. C. Mathew and *B. L. Leary* for the Crown.

F. W. Beney, Q.C., W. G. Wingate and *W. A. Macpherson* for the defendant Grunwald.

F. H. Lawton, Q.C., and *R. M. O. Havers* for the defendant Murray.

M. Finer and *M. D. Sherrard* for the defendant Jasper.

The trial commenced on June 15, 1960. On June 21, 1960, at the request of counsel for Jasper, the law in regard to s. 13 of the Prevention of Fraud (Investments) Act, 1958, was argued in the absence of the jury. PAULL, J., by way of introduction, said that he had read the decision of DONOVAN, J., in *R.* v. *Bates* (1) and that of SALMON, J., in *R.* v. *MacKinnon* (2), and that he had looked at the OXFORD ENGLISH DICTIONARY, where he found only one modern meaning of " reckless " as applied to actions and conduct, and that was " Characterised . . . by heedless rashness." He indicated that he did not propose to follow either of the decisions to which he had referred, but intended to adopt the statement in the OXFORD DICTIONARY.

Mervyn Griffith-Jones, for the prosecution, submitted that the decision in *R.* v. *Bates* (1) was right; " recklessness " meant a very high degree of negligence; dishonesty was not essential. *R.* v. *MacKinnon* (2) was wrongly decided. He referred to *Williams Bros. Direct Supply Stores, Ltd.* v. *Cloote* (3) and to *R.* v. *Hinds, Musgrave & others* (4) which was a case where a company was alleged to have issued a false prospectus. In that case HUMPHREYS, J., said in his summing-up:

> " Now we come to the question of ' reckless.' What does ' reckless ' mean? The learned Solicitor-General, in opening the case, said that it is an ordinary English word and most people know what it means. That is perfectly true. What I tell you about ' reckless ' is this. I am quite content to take the law as it was stated in [*Williams Bros. Direct Supply Stores, Ltd.* v. *Cloote* (3)] to which I was referred by Sir Walter Monckton, a case in which a man was . . . charged with making a reckless statement in a material particular, contrary to an order relating to rations. It was during 1943. Nobody suggested that he knew it was false, but he made it recklessly, and the statement was in fact false as to the number of coupons which had been used in the shop."

After citing two passages from the judgment of VISCOUNT CALDECOTE, C.J., in *Williams Bros. Direct Supply Stores, Ltd.* v. *Cloote* (3), HUMPHREYS, J., continued:

> " Let me say at once that I cannot agree with Sir Walter Monckton for a moment when he says to you that the real question in this case is whether Mr. Musgrave was dishonest. His honesty is not challenged in this case. He is not charged with knowing that the statements which were made were false. It is said of him that in the position which he was occupying he was reckless in not finding out they were false, which is a totally different thing. Whether you agree or not, I do not know. Certainly I suggest to you that it does not touch the honesty of a man at all. The word ' reckless ' is used in other statements. It is used, for instance, in the motor car Acts, where it is said that if a person recklessly drives a motor car on the streets he may be convicted. It is obvious that there is nothing against the man's honesty if he drives a motor car recklessly, but he is guilty of an offence."

Counsel further referred to *R.* v. *Russell* (5).

---

(1) [1952] 2 All E.R. 842.
(2) [1958] 3 All E.R. 657; [1959] 1 Q.B. 150.
(3) (1944), 60 T.L.R. 270.
(4) (July, 1950, C.C.C.), unreported.
(5) [1953] 1 W.L.R. 77.

A *F. W. Beney, Q.C.*, for the defendant Grunwald, referred to *Akerhielm* v. *de Mare* (6) and submitted that whether a statement or promise was reckless was a subjective matter; it was necessary to look into the mind of the person who made the statement or promise; it was not reckless merely because another person on the existing facts would disagree with the person making the statement in issue. *R.* v. *MacKinnon* (7) was rightly decided.

B *Morris Finer*, for the defendant Jasper, submitted that one had to look at the facts as they were known to the defendant at the time when he made the statement and whether he honestly believed that they existed. Negligence by itself was not enough. The phrase from *Derry* v. *Peek* (8), " careless whether it be true or false ", was the right test. After referring to the history of the Act of 1958, counsel submitted that the real object was to make share-pushing an offence.

C At the conclusion of the argument, the jury returned to court and the case for the Crown continued.

July 1. Further submissions were made, in the absence of the jury.

F. W. Beney, Q.C., referred to *Behn* v. *Burness* (9), the speech of LORD HERSCHELL in *Derry* v. *Peek* (10), and to 26 HALSBURY'S LAWS OF ENGLAND

D (3rd Edn.) 847, para. 1576.

Morris Finer submitted that there was no evidence that Jasper consented to or connived in the sending of the letter of July 20, 1959, within the meaning of s. 19 of the Prevention of Fraud (Investments) Act, 1958. He referred to the regulations made under the Prevention of Fraud (Investments) Act, 1939, regarding the conduct of the business of a licensed dealer (S.R. & O. 1939 No. 787), which

E remained in force by virtue of s. 28 (2) of the Act of 1958. These regulations dealt only with offers for sale of shares by dealers. The offer by Down Nominees, Ltd. was not accepted in time, and, therefore, the effect of the letter of July 20, 1959, was exhausted.

July 4. PAULL, J., in the presence of the jury, gave the following ruling on the submissions in regard to the meaning of " reckless " in s. 13 (1) of the Act of

F 1958, and then directed the jury in regard to the charges against the defendant Jasper.

PAULL, J.: In this case the prosecution evidence has taken over a fortnight. At the end of that evidence counsel made certain submissions to me, some of them based on the contention that there was no evidence on which the defendants

G could be convicted. Chiefly the matter concerns the defendant Jasper. It is important to realise that Jasper is charged only under three counts. There is no count against Jasper alleging that he was a party to any fraudulent conversion. The counts relate only to certain statements or promises which he is alleged to have made or given. It is said that those statements or promises were reckless statements and, so far as they consisted of promises, were reckless promises.

H Section 13 (1) of the Prevention of Fraud (Investments) Act, 1958, makes it an offence to make a reckless statement or give a reckless promise with the object of inducing some other person either to purchase shares or to sell shares. The word " reckless " is a word which is not easy precisely to define. Indeed, there has been a difference of judicial opinion with regard to its meaning. DONOVAN, J., has taken the view (11) that the word " reckless " is really the equivalent of

I " careless ". SALMON, J., has taken the view (12) that, before a person can be convicted of making a reckless statement, the prosecution must show that there was some dishonesty with regard to the statement made. I regret to say that I do not altogether agree with either of my brethren. I regret it because it means

(6) [1959] 3 All E.R. 485; [1959] A.C. 789.
(7) [1958] 3 All E.R. 657; [1959] 1 Q.B. 150.
(8) (1889), 14 App. Cas. at p. 374, per LORD HERSCHELL.
(9) (1863), 3 B. & S. 751. (10) (1889), 14 App. Cas. 337.
(11) In *R.* v. *Bates*, [1952] 2 All E.R. 842.
(12) In *R.* v. *MacKinnon*, [1958] 3 All E.R. 657; [1959] 1 Q.B. 150.

that I bring at any rate to discussion yet a third meaning of the word " reckless ", but, as I have reached in my own mind a perfectly clear conclusion, it is my duty to express that conclusion. It is a word used in an Act of Parliament, and primarily words used in Acts of Parliament mean precisely what they say. " Reckless " is a word which is in quite common use, and the ordinary citizen, when asked whether there was any difficulty in defining the word " reckless ", would, I venture to think, say " No ". He is accustomed to it in many ways—reckless driving, reckless conduct, and now, in the Act of 1958, a reckless statement or a reckless promise.

The first point to note is that the word " reckless ", in s. 13 (1) of the Act of 1958, is not applied to the person who makes the statement or gives the promise. You have not got to consider whether the person was a reckless sort of person. What you have got to consider is whether the statement or the promise has been proved to be a reckless statement or promise. If you look up the meaning of the word " reckless " in the OXFORD ENGLISH DICTIONARY, a dictionary which is the result of tremendous research and of great learning, you will find with regard to such things as statements or promises that there is only one meaning given and that meaning is " Characterised . . . by heedless rashness." In other words, the statement or promise must be a rash statement or promise and must be made heedless of whether the person making it has any real facts on which to base the statement or the promise. Facts, of course, may include what one has been told by apparently responsible persons, and I do not think that it would be right to import into the word " reckless " a meaning which might include a statement made as a result of an apparently responsible person having given one the information on which one makes the statement or gives the promise. Of course, if one knows facts outside what one has been told, that must be taken into consideration.

I want to say something else. A man may honestly and strongly hold an opinion with which others disagree. Provided that he bases that opinion on facts which he has reason honestly to believe exist and makes the statement or gives the promise because of the existence of those facts, then, in my judgment, that statement or promise is not reckless. He has reckoned, although he may have reckoned wrongly or may even have been somewhat careless in the conclusion to which he has come. Carelessness, in my judgment, may not in itself be sufficient to constitute recklessness, although, of course, it is one of the factors which have to be taken into account. Clearly, a statement or promise cannot be both careful and reckless. On the other hand, I do not think that it is necessary to find dishonesty. A statement or promise may be reckless although the person making it, in some somewhat vague way, thinks that the statement is true and the promise is warranted.

I would sum it up in this way. Before a jury can convict under s. 13 (1) of the Prevention of Fraud (Investments) Act, 1958, they must be satisfied of three things: (i) that the statement or promise was in fact made; (ii) that it was a rash statement to make or a rash promise to give; and (iii) that the person who made the statement or gave the promise had no real basis of facts on which he could support the statement or the promise. If those three matters are proved to the satisfaction of a jury, then, in my judgment, the jury may convict. If any one of those three matters is not proved, then the jury must find a verdict of not guilty. In considering the matter, bases of fact, may, and, indeed, must, include that which has been told to the person charged by apparently respectable and responsible persons.

I propose to apply that principle to the charges against Jasper. The first of those charges is contained in count 4, which alleges that on July 20, 1959, in a letter of offer to the shareholders of Lintang Investments, Ltd., signed by Harewood & Co., of whom Grunwald was a partner, it is stated: " On behalf of . . . H. Jasper & Co., Ltd. we offer to acquire . . . your shares . . . for 24s. per share

A . . . ", and in that letter the promise is given that, if the offer becomes unconditional, payment will be made on Aug. 31, 1959. I am prepared to accept that there is some evidence that that letter was sent out with the full knowledge of Jasper, although it is true that, when Mr. Brueckmann, his partner, gave evidence, Mr. Brueckmann seemed to give the impression that he, Mr. Brueckmann, was the person who was primarily dealing with the matters in connexion with B Lintang Investments, Ltd. on behalf of H. Jasper & Co., Ltd. But I will assume that point against Jasper, and then I ask myself this question: Is there any evidence that that statement was made rashly without any real basis of fact to support it? Was the promise given rashly without any real basis of fact to support the promise?

The facts are these. Grunwald, a partner in Harewood & Co., had been the C person who organised—and I use that word advisedly because the precise position is a matter of dispute, I think, between Grunwald and Murray—a number of what are known as " take-over proceedings "; in other words, organised a way in which certain companies could be taken over in the sense that the shareholders should be bought out and the shares should go into the possession of a group of persons of whom Grunwald was, I think, one. In each of those fourteen D cases H. Jasper & Co., Ltd. had acted. Each of those fourteen cases had been successful, and there had been no difficulty in finding the money, so that when H. Jasper & Co., Ltd. were approached once more to use their name as the licensed offeror to purchase the shares of Lintang Investments, Ltd.—because one must be licensed before one offers to purchase shares in this way (13)—Jasper knew that there had been a record of success so far as take-overs were E concerned in which Grunwald was involved. There is, however, this to be said against him: this take-over was going to be a very much larger take-over than any which had taken place so far. The largest take-over up to that moment was a take-over involving something like three-quarters of a million pounds. This one would involve something like eight, or possibly, nine, million pounds, certainly something in excess of £7,000,000. If Jasper had without more ado authorised F that letter, I should, for my part, hold that there was certainly evidence to go to the jury that the statement made and the promise given were reckless. That, however, is not the position. Jasper's first reaction was to say to Grunwald, according to Jasper's statement (which, of course, is not strictly evidence but which has been put in by the prosecution against him), that this was crazy. I think that one has to realise exactly what was meant by the word " crazy ", G and, when one looks at Jasper's statement, what he is saying is that it is crazy to pay that amount of money to obtain Lintang shares; but he was assured by Grunwald that the matter had been gone into very carefully. His next step was to inquire who lay behind Grunwald. According to Jasper's own statement, he was told Lloyds Bank, but, according to evidence given by Mr. Brueckmann, Jasper and Mr. Brueckmann were told that there was really a consortium con- H sisting of Grunwald, Murray, the Bergers and Lloyds Bank.

I say at once, because this point is one of the points which the jury have subsequently to decide, that that statement may have been a complete lie. It may be that we shall find (I do not know, and I do not forecast) that the fact that Murray was alleged to have been a person involved was not a true statement. It does not matter. So far as Jasper is concerned, there was no reason at that I moment why he should disbelieve that statement. Murray was a man who already held (and here there is no dispute) something like £2,000,000 worth of shares in the Jasper companies. It is undisputed that the Bergers were people who, if I may say so, do not appear to have been anxious to part with their money, but, if pressed, could find something in the neighbourhood of £7,000,000 or £8,000,000. Mr. Berger was asked whether he was not one of the largest property

(13) See s. 1 of the Prevention of Fraud (Investments) Act, 1958: 38 HALSBURY'S STATUTES (2nd Edn.) 886.

owners in England. He demurred from that, but confessed that, if his properties were valued at £7,000,000 or £8,000,000, that would not be too great a sum. In addition, there was Lloyds Bank. If a person is solemnly assured that persons like that lie behind a take-over transaction, I cannot see that it can be said that there is evidence to put before the jury of a reckless statement or promise if the person who makes the statement or promise says "We offer to acquire your shares for 24s. a share and payment will be made on Aug. 31, 1959." So far as he would know at the moment, there was no reason why it should not have been met.

Then it is pointed out for the prosecution that other matters became known to Jasper. Between July 20 and Aug. 4, which is the date on which count 11 is founded, certain events had happened. Count 11 is, again, a charge of making a reckless statement, and the reckless statement on this occasion is contained, or alleged to be contained, in a letter of offer to the shareholders of Ely Brewery Co., Ltd. In that letter it is stated on behalf of H. Jasper & Co., Ltd.: "We offer to acquire . . . your . . . ordinary stock units of 3s. 6d. each . . . at 5s. per unit and . . . your 6d. . . . units at 2s. per unit," and the promise is given that, if the offer becomes unconditional, payment will be made on Sept. 14, 1959.

It is true that, before Aug. 4, Grunwald told Jasper that they were having difficulty with Lloyds Bank. But further circumstances must be borne in mind. Jasper left for a holiday in Switzerland before the end of July and before this letter was sent out, and undoubtedly it was Mr. Brueckmann who took the whole of the part, so far as H. Jasper & Co., Ltd. were concerned, in sending out this letter. Jasper himself was in Switzerland. It is quite true, as the prosecution say, that there were, no doubt, telephone conversations going on between him and his partner, but, if the only difference which Jasper could know was that Lloyds were causing some difficulty, there were still the Bergers, there was still Murray, there was still Grunwald, and, for all Jasper knew, there were others. I see no evidence to prove that by Aug. 4 the position was such that Jasper, even if he had been in England, could not make such a statement or give such a promise without it being a reckless statement. I must be satisfied that there is some evidence on which the jury could so find. I am very doubtful whether a man can be said to have made a statement or given a promise when he was in Switzerland and the whole matter was dealt with by the other director; but I will assume that against Jasper for the purpose of my judgment.

I pause there to say that, although I think that there is no evidence of recklessness with regard to the statements made in those letters of offer, I am very far from saying that H. Jasper & Co., Ltd. cannot be criticised. Mr. Brueckmann (and it was Mr. Brueckmann, not Jasper) wrote a letter to say that they had £3,000,000 when they certainly did not have £3,000,000. But that was after this event; it was after this letter was written, and I do not think that it can be evidence against Jasper.

If that be right on those two charges against Jasper (count 4 and count 11), there is still the third charge, count 12. That count alleges that on Sept. 14, 1959, Jasper made a reckless statement and a reckless promise, when he was in England, in relation to the actual paying of the directors of Ely Brewery Co., Ltd. as the result of the offer which had been made by the letter of Aug. 4. In order to see what the position is there, it is necessary to consider carefully what happened. The actual count is based on, and, indeed, states the effect of, a letter which Jasper, while he was in Cardiff, gave to Mr. Nidditch, who was the managing director of Ely Brewery Co., Ltd. In that letter he said that moneys were available to pay all the assenting shareholders of the company who had accepted the offer dated Aug. 4, 1959, and promised that all shareholders who had accepted the offer should be paid accordingly. There is no doubt at all that, before Jasper went down to Cardiff on Sept. 13, 1959, for the purpose of paying out the directors of Ely Brewery Co., Ltd., he well knew that there were grave financial difficulties; and, if the evidence were that, with those grave financial difficulties, he simply

A sat down and wrote a letter in which he made that statement and gave that promise, I should have no hesitation in leaving the matter to the jury. I should have no hesitation in saying that there was ample evidence on which the jury could convict. But that is not what happened. When Jasper went down on Sept. 13, he knew that Mr. Nidditch wanted two things. He wanted the money which was due to the directors to be paid on the Monday (Sept. 14), and he wanted a B letter from a bank to say that the money which would later have to be paid to the shareholders was lying secure in the bank. When Jasper went down he knew that the second part could not be fulfilled, that the money was not in the bank. On the evening of Sunday, Sept. 13, there was a dinner at which the matter was discussed. At that dinner Mr. Nidditch said that he wanted the letter with regard to the shareholders' money before he accepted his money and resigned C as director. Jasper there and then, quite frankly and quite honestly, indicated that he thought that there would be difficulties about that letter because he did not believe that the money was lying in the bank. He was quite open about it. He did not try to conceal that fact, and, in effect, Mr. Nidditch said: " No letter, no deal tomorrow ". Later, when Jasper and Mr. Rose (14), who had gone down with him, were discussing the matter in the hotel, they were both D extremely worried, and Jasper said: " Well, we shall not get that letter tomorrow. The bank representative will come down with the draft for the directors, but he will not come down with a letter saying that the money for the shareholders is in the bank, because it is not, and I know it is not in the bank." Then, sure enough, on the next day that situation arose.

Now, once more, let us see. Mr. Nidditch said: " I will not complete ". If E then and there Jasper had signed the letter to say that the money was available, it would be a reckless statement, but he did nothing of the sort. Both he and Mr. Rose twice spoke on the telephone to Mr. Kanter, who was a partner in Harewood & Co. and, therefore, a partner of Grunwald. As far as the evidence goes, because I have to decide on the evidence which is now before me, there was no reason why Jasper should not have thought that Mr. Kanter knew as much of F the matter, or very nearly as much of the matter, as Grunwald knew. The fact is that on that Sunday (Sept. 13) Grunwald had left this country, and Mr. Kanter knew that at 8 a.m. on the Monday morning. Therefore, when Mr. Rose and Jasper telephoned Mr. Kanter, the situation was that Grunwald had left the country. If Mr. Kanter had said " I am sorry, but my partner has left the country ", everybody would have known that there was something wrong, because Grunwald G had said, only a day or two earlier, that he was going down to the take-over proceedings at Cardiff. But Mr. Kanter did not say so. He merely said that his partner was not available, and to the ordinary person that would mean that the partner was out on some other business, was not in the office, or, if he were in the office, was busy with some other client. Jasper and Mr. Rose, who had both spoken to Mr. Kanter on the telephone (they were both very worried men), had, H in effect, asked Mr. Kanter what they should do. Jasper told Mr. Kanter that there was no letter saying that the money was available, and there was a conversation, into which I need not go in detail, in which Jasper indicated to Mr. Kanter that he thought that there might well be difficulties in finding the money. There was certain money available which could not be used legally. Jasper knew it and he told Mr. Kanter so. Then the situation arose as to what Jasper and I Mr. Rose should do: should they just leave the matter uncompleted and come back, or what should happen? Thereupon Mr. Kanter, in effect, dictated to Mr. Rose the very letter which Jasper signed. He said that it would be proper and right to sign such a letter, and Jasper knew that Mr. Kanter knew the facts which he, Jasper, knew, namely, that the money was not in the bank and that there were certain moneys which could not be used. Mr. Kanter assured Jasper that it would be quite in order to sign a letter in the terms of the one which is the

(14) A chartered accountant and company secretary.

subject of the charge under count 12, and actually, if he did not dictate the very words, dictated the meaning of the clause.

Mr. Kanter has given evidence. He has said that the letter which Jasper wrote is a letter which he authorised him to give. And so one comes to the extraordinary position in which a letter is given by a worried man on the direct authority and advice of a solicitor who is a perfectly respectable solicitor (no charge is made against Mr. Kanter), and who presumably, so far as Jasper knew, knew the facts which Jasper knew, and, moreover, without Mr. Kanter disclosing to Jasper the fact that Grunwald had left the country. I cannot feel that a statement made in those circumstances can be described as being reckless. I do not think that that evidence is sufficient evidence to put before the jury on a charge of recklessness.

I have already defined "reckless", and I ask myself two questions: First, was it rash? Well, it may well have been rash. That, I think, it might well be. But was it made without any real basis of fact to support it? The answer is "No", because Jasper had the very solid basis of fact that a responsible solicitor, who (as far as he knew) knew all the circumstances, told him that it was a proper letter to write and give to Mr. Nidditch. In those circumstances, I think that those three counts fail against Jasper and that he should be discharged.

[The jury then returned a verdict of not guilty in respect of the defendant Jasper and he was discharged.

The case proceeded against the defendants Grunwald and Murray.]

July 22. **PAULL, J.,** in his summing-up to the jury on the charge against the defendant Grunwald under count 4 (for the terms of which see p. 380, letter I, ante), read the letter of July 20, 1959, to the shareholders of Lintang Investments, Ltd., referred to the ruling which he had already given (15) on the meaning of the word "reckless" in s. 13 (1) of the Prevention of Fraud (Investments) Act, 1958, and continued: The test which I give to you is this: you must be satisfied that Grunwald, when he made that promise to pay the shareholders the money on Aug. 31, 1959, had no real basis of fact on which that promise could be made. If you are satisfied about that, convict him. If you think that there is a real doubt about it, acquit him.

Let us come to the facts. On July 20 what exactly did Grunwald know? That is what we have to think about with regard to this charge. Grunwald says quite bluntly: "I intended to use the State Building Society's three-and-a-quarter million pounds." Indeed, he goes further and says: "At that date Murray had promised me that he would provide at least £4,000,000 finally and probably up to £5,000,000. If that promise had not been made to me and if I had not understood from Murray that he was prepared to pay me that money over from the State Building Society's coffers for me to use for the purchase of the shares, I would never have started the transaction at all."

Of course, you may take the view that that was a complete lie, that Grunwald has been lying to you. You may take the view that that may very well be true, and you may take the view—I do not know; it depends entirely on the view which you take with regard to these two defendants (Grunwald and Murray)—that the truth of the matter is that there was an arrangement between them whereby this money, the three-and-a-quarter million pounds, should be used as a basis for paying for the directors' shares.

Assume for the moment that you take that view. You may very well say to yourself, in the first place: "Well, if Grunwald did have that promise, prima facie, in the first instance, looking at it just off-hand, he had the beginnings of a basis for that statement." After all, if the State Building Society were to advance £5,000,000 towards the eight and a half million pounds, it did not leave so very much over if Mr. Berger were to give a million and if somebody else were

(15) See p. 384, letter H, ante.

A to advance other moneys, and you may, therefore, think, " Well, in that case, can it be said that it was reckless?"

That, however, is leaving out one very important consideration. I do not know, but, bearing in mind the fact that Grunwald is a solicitor, who, after all, has learned his law, and bearing in mind that the very basis of fraudulent conversion is the fact that one uses other people's money for one's own purposes, and that it does not matter whether one thinks that one will be able to pay it back later, or whether later one thinks that mortgages might be taken out, you may find it rather difficult to believe that a man of Grunwald's ability honestly believed that he was entitled to take no less than three-and-a-quarter million pounds from the State Building Society's money to buy shares for himself, for Murray and the whole of the group, so that, when that transaction was over at the moment of purchase, they would have the shares and the State Building Society would have nothing whatsoever for its three-and-a-quarter million pounds. It is utterly immaterial that a man should say, " Ah, well, I shall use this money for purposes for which I have no right to use it, but in the end, no doubt, it will all come out because the horse will win " or " the shares will go up " or " the take-over will be successful." It is a fraudulent conversion whether the horse wins or loses, whether the shares go up or down, and whether the take-over is or is not successful. You may have great difficulty in believing in those circumstances that Grunwald honestly believed that he could use what was, in effect, about a quarter of the whole of the resources of the State Building Society in order, temporarily, to give it away to get shares for himself and for the other members of the group.

If you take that view and if you feel that that is the conclusion to which you are bound to come, then two things follow. Not only does the whole of the defence of Grunwald on counts 2 and 6 fall to the ground, but it is also the end of his defence on this count. If you think that the buying of the shares was not honest and that Grunwald, as a solicitor and as one who is grounded in the very basis of the law, must have known it, not only may you think that it would be right to convict him under counts 2 and 6, but, as no man has the right to take into consideration moneys which he knows that he has no right to use, the whole basis on which he says " This promise was not reckless because I was going to have these resources " falls to the ground.

That is the way in which I would suggest to you that you look at this matter. As the prosecution has said, you are entitled to say, " Well, even if the State Building Society money could be used, he still did not have promises sufficient to have raised the eight-and-a-half million pounds ". I would, however, advise you to exercise your common sense. Let the basis of your decision on this matter be: Did he know that he had no right to use that money? Did he know that he had no right to buy shares for himself and for others with the three-and-a-quarter million pounds? If he did, he had no basis for that statement at all, because what he was doing was to say, in effect, " I am going to commit a crime and I am going to use the moneys of that crime to pay the shareholders." That no man can do. Therefore this count (count 4), you may think—it is a matter for you—really depends on the decision which you give with regard to counts 2 and 6, and, if you convict him on counts 2 and 6, you may well feel that there is no real defence to count 4. If you feel that you can acquit him on counts 2 and 6, then I would say to you, acquit him also on this count, although you are entitled, as the prosecution has said, even then to consider whether you can convict him on this count, but, as a matter of common sense, I would suggest that course to you.

[HIS LORDSHIP went on to deal with other counts of the indictment which are not material to the report. The result of the trial is stated at p. 390, letter A.

In respect of the counts referred to in this report, Grunwald and Murray were both found guilty on counts 2 and 6; Grunwald was found guilty on count 4 and not guilty on count 11. Grunwald and Murray were each sentenced to imprisonment for five years.]

Solicitors: *Director of Public Prosecutions*; *Stafford Clark & Co.* (for Grunwald); *Wontner & Sons* (for Murray); *D. J. Freeman & Fraser* (for Jasper).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CENLON FINANCE CO., LTD. *v.* ELLWOOD (INSPECTOR OF TAXES). ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO., LTD. TABLEAU HOLDINGS, LTD. *v.* WILLIAMS (INSPECTOR OF TAXES). WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS, LTD.

[CHANCERY DIVISION (Cross, J.), July 20, 21, 22, 29, 1960.]

Income Tax—Profits—Computation of profits—Dividend received, being dividend paid from capital profits of payor company not assessable to tax—Whether assessable trading receipt to be brought into charge to tax by recipient company—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 c. 10), *Sch. D, Case I*, *s.* 122, *s.* 123 (1).

Income Tax—Appeal—Finality of determination—Appeal against original assessment determined by agreement—Subsequent discovery of dividends excluded from trading receipts—Discovery not based on fresh facts and original assessments made on basis that dividends should be excluded—Whether additional assessments in respect of dividends as trading receipts could be raised notwithstanding the determination of the appeal—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 c. 10), *s.* 41 (1), *s.* 50 (2), *s.* 510 (1).

By the sale of some of its freehold property W., Ltd. realised a capital profit of £25,000 which was not subject to tax in its hands and which in November, 1953, it distributed as a dividend to its sole shareholder, the taxpayers, C., Ltd., as an accretion of capital on the footing that the taxpayers had become entitled to it as capital. In November, 1954, the taxpayers were assessed to income tax under Case I of Sch. D to the Income Tax Act, 1952, in estimated amounts of £500 for 1953-54 and of £1,000 for 1954-55. The taxpayers appealed against the assessments on the ground that they had not yet prepared the relevant accounts. They subsequently submitted the accounts showing a profit of £634 from 1953-55 on the basis that dividends from W., Ltd. and another company were excluded. On a specific request by the inspector the taxpayers gave particulars of dividends excluded from the computation of profits as paid out of capital reserve or profit not subject to tax, including the dividend of £25,000. In 1955 the taxpayers received a letter from the inspector of taxes agreeing the computation, notices of assessment for the two years amended to agree with the company's figures, and a notice of assessment of £107 for 1955-56 also in accordance with those figures. In 1956 a new inspector of taxes was appointed for the area. On reading the correspondence he came to the conclusion that the £25,000 should have been included as a trading receipt in the computation of the taxpayers' profits, and additional assessments were made on the company for 1953-56 and also a first assessment for 1956-57 giving effect to this view. On appeal,

Held: (i) payments of tax by a company franked its dividends from tax in the hands of the recipient, whether the dividends were paid out of income or capital (see p. 394, letter I, post) and this general exemption, implied from the provisions of the income tax legislation concerning deduction of tax from dividends, applied to dividends paid by a company, whether tax had

or had not been deducted from them, and justified the exclusion of dividends paid by W., Ltd. to the taxpayers (C., Ltd.) from the trading receipts of the taxpayers; accordingly the additional assessments and the 1956-57 assessment must be discharged (see p. 395, letter I, to p. 396, letter A, post).

Hughes v. *Bank of New Zealand* ([1938] 1 All E.R. 778) applied.

(ii) if, however, contrary to the decision at (i) above, dividends from W., Ltd. ought to be brought into charge to tax as trading receipts of the taxpayers, nevertheless the additional assessments for the years 1953-54 and 1954-55 could not stand for the following reasons—

(a) the determination of the previous assessments for 1953-54 and 1954-55, being a determination by what was admittedly an agreement within s. 510 (1) of the Income Tax Act, 1952, after appeal by the taxpayers, was final by virtue of s. 50 (2) in regard to the particular subject-matter of appeal (*Inland Revenue Comrs.* v. *Brooks*, [1915] A.C. 478, applied; see p. 397, letter B, post), and

(b) the finality of this determination precluded additional assessments being raised for the years 1953-54 and 1954-55 because, although these additional assessments were raised on what was admittedly a "discovery" (within s. 41 (1) of the Income Tax Act, 1952) of the omission of the dividends from the taxpayers' trading receipts, no fresh facts had been before the inspector when the "discovery" was made by him and the subject-matter remained that which had been finally determined in 1955 (see p. 397, letters E to H, post).

Appeals allowed.

[As to miscellaneous receipts constituting trade receipts within Case I of Sch. D. to the Income Tax Act, 1952, see 20 HALSBURY'S LAWS (3rd Edn.) 153, 154, para. 268; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, *78-173*.

For the Income Tax Act, 1952, s. 41 (1) s. 50 (2), and s. 510 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 49, 56, 476.]

Cases referred to:

Commercial Structures, Ltd. v. *Briggs*, [1948] 2 All E.R. 1041; 30 Tax Cas. 487; 28 Digest (Repl.) 387, *1693*.

Cull v. *Inland Revenue Comrs.*, [1939] 3 All E.R. 761; [1940] A.C. 51; 108 L.J.K.B. 879; 161 L.T. 173; sub nom. *Inland Revenue Comrs.* v. *Cull*, 22 Tax Cas. 603; 28 Digest (Repl.) 340, *1509*.

Hughes v. *Bank of New Zealand*, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; 28 Digest (Repl.) 264, *1174*.

Inland Revenue Comrs. v. *Blott*, *Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest (Repl.) 345, *1525*.

Inland Revenue Comrs. v. *Brooks*, [1915] A.C. 478; 84 L.J.K.B. 404; 112 L.T. 523; sub nom. *Brooks* v. *Inland Revenue Comrs.*, 7 Tax Cas. 236; 28 Digest (Repl.) 331, *1463*.

Inland Revenue Comrs. v. *Reid's Trustees*, [1949] 1 All E.R. 354; [1949] L.J.R. 701; 30 Tax Cas. 431; 28 Digest (Repl.) 211, *892*.

Neumann v. *Inland Revenue Comrs.*, [1934] All E.R. Rep. 398; [1934] A.C. 215; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332; 28 Digest (Repl.) 338, *1501*.

Cases Stated.

The taxpayers, Cenlon Finance Co., Ltd., appealed to the Special Commissioners of Income Tax against assessments made on them under Case I of Sch. D to the Income Tax Act, 1952, for the years 1953-54, 1954-55, 1955-56 and 1956-57 in the sums of £10,452, £22,134, £22,134 and £22,241 respectively. The assessments for 1953-54 to 1955-56 were additional assessments. The questions for determination were: (i) as regards the years 1953-54 to 1955-56, whether there

had been a discovery within the meaning of s. 41 (1) of the Act of 1952 (raised only formally in view of the authorities); (ii) as regards the years 1953-54 and 1954-55, (a) whether there had been an agreement on certain matters within the meaning of s. 510 (1) of the Act, and (b) if so, whether additional assessments for those years were competent; (iii) as regards all years whether a dividend received by the taxpayers, from which tax had not been deducted, was a receipt of the taxpayers' trade which should be included in computing their Case I liability. The taxpayers contended: (i) (formally) that as regards the years 1953-54, 1954-55 and 1955-56 that there had been no discovery within the meaning of s. 41 (1) of the Income Tax Act, 1952, and therefore that the additional assessments for those years were not competent; (ii) that as regards the years 1953-54 and 1954-55 the proper officer of the Crown and the taxpayers had come to an agreement within the meaning of s. 510 (1) of the Act of 1952 on the specific point that the dividend of £25,000 received from Henry White (Sutherland House), Ltd., should not be included in the computation of the taxpayers' Case I profits, the agreement having the like consequences as if an appeal had been determined by the commissioners and therefore being final under s. 50 (2) of the Act, so that an additional assessment could not be raised under s. 41 (1); and (iii) that a dividend paid to a company resident in the United Kingdom was not taxable in the hands of the recipient whether tax had been deducted from it or not and that it could not therefore be included in a computation of Case I profits. The Crown contended: (i) that there had been a discovery within the meaning of s. 41 (1) of the Act of 1952, that the taxpayers had been undercharged in respect of the years 1953-54, 1954-55 and 1955-56 and that the additional assessments were therefore validly made; (ii) that the additional assessments for 1953-54 and 1954-55 were not barred by reason of the settling of appeals against the first assessments under s. 510 (1) of the Act nor by reason of s. 50 (2) nor by reason of the issue having already been determined, since (a) neither s. 510 nor s. 50 (2) had any bearing on the meaning of " discovery " in s. 41 (1), (b) s. 50 (2) applied only to the particular assessment determined on an appeal and not to the additional assessments, and (c) neither s. 50 (2) nor s. 510 (1) operated by way of an estoppel to prevent the raising of an additional assessment under s. 41 (1), the doctrine of res judicata having no application to decisions of income tax commissioners; and (iii) the dividend of £25,000 received by the taxpayers was a receipt of their trade and as such had to be taken into account in computing the profits or gains of that trade for the purpose of assessment to income tax under Case I of Sch. D. The commissioners held: (i) that there had been a discovery within s. 41 (1) of the Act of 1952 for the years 1953-54, 1954-55 and 1955-56; (ii) that the specific matter of the taxability of the £25,000 dividend had been raised and considered by the inspector of taxes and that an agreement had been come to within s. 510 (1) that it was not to be included in computing the taxpayers' Case I liability with the same effect as the determination of an appeal thereon, and s. 50 (2) therefore operated to prevent the raising of additional assessments to include the dividend for the two years under s. 41 (1); and (iii) that the dividend was a receipt of the taxpayers' Case I trade and was not itself a receipt chargeable to income tax but should be included in the computation of the taxpayers' Case I liability as a receipt of its Case I trade. The taxpayers and the Crown appealed by way of Case Stated to the High Court.

The facts in the case of Tableau Holdings, Ltd., were not materially different.

P. Shelbourne for the taxpayers.

R. E. Borneman, Q.C., and *A. S. Orr* for the Crown.

Cur. adv. vult.

July 29. **CROSS, J.**, read the following judgment: The taxpayers, Cenlon Finance Co., Ltd., were registered on Oct. 12, 1953, and started to trade as dealers in stocks and shares on Oct. 16, 1953. On Oct. 20, 1953, they bought for £72,000 the whole of the issued share capital, i.e., twenty thousand £1 shares,

of another company, Henry White (Sutherland House), Ltd. Henry White, a company carrying on business as ladies' outfitters, had sold some of its freehold property in Newcastle-under-Lyme, and realised thereby a capital profit which was not subject to tax in its hands. On Nov. 2, 1953, Henry White paid to the taxpayers, who were then its sole shareholders, £25,000 out of this capital profit pursuant to a special resolution passed on Oct. 23, 1953, in the following terms:

> "That the sum of £25,000 surplus moneys in the hands of the company representing part of the capital profit arising from the sale of the company's properties at High Street and Ironmarket and being an accretion to capital be distributed amongst the present holders of the shares in the capital of the company pari passu and in proportion to the number of such shares respectively held by them and on the footing that they become entitled thereto as capital and the directors are hereby authorised and directed to distribute the same accordingly."

On Dec. 4, 1953, the taxpayers sold their holding of shares in Henry White for £27,500. On Nov. 19, 1954, Sch. D assessments were made on the taxpayers for the year 1953-54 in an estimated amount of £500 and for the year 1954-55 in the estimated amount of £1,000. Formal notices of appeal against both these assessments were given on the taxpayers' behalf on Nov. 22, 1954, the ground stated being that they had not yet prepared accounts relevant to the years of assessment. On July 1, 1955, the taxpayers submitted accounts for the period Oct. 16, 1953, to Apr. 15, 1955, together with a computation of their profits as adjusted for the purposes of Case I of Sch. D, which showed a trading profit of £634 and in which the sum of £33,231 in respect of dividends from United Kingdom companies (including the Henry White dividend of £25,000) was deducted and excluded from the profits.

On July 21, 1955, the inspector of taxes for the St. Martin's District, in which the income tax affairs of the taxpayers are dealt with, wrote to the taxpayers' accountants, inter alia, as follows:

> "3. Profit on trading, £634. A copy of the account is required to show how this profit is made up.
>
> "5. I shall be glad to have particulars of the dividends paid out of profits not charged to income tax of £33,200."

On July 27, 1955, the accountants replied, inter alia:

> "3. Profit on trading, £634:—commission received, £22,519; profit on debt bought, £1,930; profits on dealings in stocks and shares . . . £31,623; [total], £56,072. Losses on dealings in stocks and shares . . . £55,438; Balance, £634.
>
> "5. Dividends paid out of profits not charged to income tax, £33,200: Henry White (Sutherland House), Ltd.: Distribution out of capital reserve created from the surplus arising from the sale of certain of the company's fixed assets—£1 5s. per share, £25,000. Abraville Securities, Ltd.: Distribution out of profits not subject to income tax £164 per share, £8,200; [total] £33,200."

On Aug. 8, 1955, the inspector wrote to the accountants agreeing their computation, and wrote again on Aug. 15, enclosing notices of assessment for the years 1953-54 and 1954-55 amended so as to agree with the accountants' figures. On Nov. 24 the inspector issued a notice of assessment for income tax under Sch. D on the taxpayers for the year 1955-56 in the amount of £107, which was in accordance with the figures agreed as aforesaid. In May, 1956, a new inspector succeeded to the charge of the St. Martin's Tax District, and in June, 1956, having received a memorandum from the chief inspector of taxes, he read the correspondence and other documents to which I have referred and reached the conclusion that the dividends of £25,000 and £8,200 received by the taxpayers from Henry White (Sutherland), Ltd. and Abraville Securities, Ltd., should have been

included as trading receipts in the computation of their profits for the purposes of Case I of Sch. D, and that the first assessments for the years 1953-54 to 1955-56 inclusive should have been made accordingly. He did not have any facts in relation to the taxpayers' affairs before him beyond those which were before his predecessor in 1955. On June 18, 1956, the new inspector wrote to the taxpayers' accountants as follows:

> " With reference to the accounts for the year ended on Apr. 15, 1955, I consider that the two items amounting to £33,200 (viz., £25,000 from Henry White (Sutherland House), Ltd., and £8,200 from Abraville Securities, Ltd.) are of an income nature and should be brought into the Case I liabilities of the company."

Subsequently, additional assessments were made on the taxpayers on this footing for the years 1953-54 to 1955-56 in the sums of £10,452, £22,134 and £22,134 respectively, and a first assessment for the year 1956-57 in the sum of £22,241. Appeals by the taxpayers against these assessments were heard by the Special Commissioners on Dec. 8, 1958, and Mar. 23, 1959. After the assessments had been made, the profits of Abraville Securities, Ltd., out of which the dividends of £8,200 had been paid, were assessed to tax. In view of this fact, the inspector dropped his claim in respect of the dividend received by the taxpayers from that company.

The Special Commissioners decided: (i) That the dividend paid to the taxpayers by Henry White (Sutherland), Ltd. should have been included in the computation of the taxpayers' tax liability under Case I of Sch. D; (ii) that as regards the years 1953-54, 1954-55 and 1955-56 the new inspector had made a " discovery " within the meaning of s. 41 of the Income Tax Act, 1952, but, (iii) that as regards the years 1953-54 and 1954-55, s. 510 (1) of the Income Tax Act, 1952, prevented the raising of additional assessments under s. 41. The commissioners therefore upheld the additional assessment for the year 1955-56 and the first assessment for the year 1956-57 as amended by excluding from them the dividend received from Abraville Securities, Ltd., but they discharged the additional assessments for 1953-54 and 1954-55. Neither party was satisfied with this decision, and I have before me an appeal by the taxpayers and a cross-appeal by the inspector of taxes.

I will deal first with the taxpayers' appeal. A company, which is in law a separate entity from its shareholders, pays tax on the revenue profits which it earns. It is under no legal obligation to divide any, let alone all, of its profits among its shareholders. If and when it decides to pay a dividend, whether out of revenue profits which have borne tax or out of capital profits which have not borne tax, the sums paid to the shareholders are received by them as income. Logically, it might appear to follow that such sums should themselves be liable to tax in the hands of the recipients; but, though there is no express exemption, the provisions which have always appeared in the Income Tax Acts in one form or another enabling companies to deduct tax from dividends paid to their shareholders have been construed as impliedly exempting dividends from tax in the hands of the shareholders.

At one time, it was suggested that this was because the tax paid by the company was paid by it as agent for its shareholders. This idea is now discredited. The true view is that, though the tax which the company pays is its own tax and not tax which it pays as agent for its shareholders, payment of tax by the company franks the dividends which it distributes from further tax in the hands of the shareholders. In effect, when one comes to consider the tax liability of the shareholders, the company is treated as though it was a partnership in which the shareholders were partners, and the profits made by the company are treated as though they had been made by the shareholders. The general position, as I have stated it, has been explained by the House of Lords in many cases, stretching

from *Inland Revenue Comrs.* v. *Blott* (1), to *Inland Revenue Comrs.* v. *Reid's Trustees* (2) decided in 1949.

The question at issue here is whether the recipient of a dividend is not only freed from liability to be assessed to tax on the dividends themselves, but is also entitled to have the dividends excluded for tax purposes from the receipt side of an account, the balance of profit on which is subject to tax under Case I of Sch. D. I do not see how the answer to this question can depend in any way on whether the dividend has been paid out of capital profits or out of revenue profits. To include dividends paid out of revenue profits in an assessment under Case I of Sch. D, though it might seem unfair, would not involve any double taxation, and it is clear that dividends are not exempted from tax because it would be unfair to tax them. If that was the reason for their exemption, dividends paid out of capital profits on which the company has paid no tax would be liable to be taxed directly as income in the hands of the recipient. The exemption which is implied from the deduction provisions in the Act applies to all dividends alike, and the extent of the exemption must, I should have thought, be the same for all alike.

If, therefore, the inspector is right with regard to the Henry White (Sutherland), Ltd. dividend, I do not see how he was justified in dropping his claim with regard to the Abraville Securities, Ltd.'s dividend. But why should the exemption of a dividend from tax be confined to a charge to tax on the dividend itself and not extend to a charge under Case I of Sch. D? Counsel for the Crown relied strongly on the fact that several of the Law Lords in the cases to which I have referred stated that tax was not payable on dividends " as such " (see, e.g., Lord Tomlin's words in *Neumann* v. *Inland Revenue Comrs.* (3)). He asked me to infer that the speakers had in mind the possibility that tax might be payable on dividends as items in a receipt and payment account. I doubt whether the speakers had this possibility in mind at all. It seems to me more likely that they used the qualifying words " as such " because tax is payable on the revenue profits of the company out of which dividends are normally paid; and, in any case, it is to be observed that other Law Lords have not used the qualifying words " as such " at all (see, e.g., Lord Atkin's statement in *Cull* v. *Inland Revenue Comrs.* (4)).

On the other hand, I think that the decision in *Hughes* v. *Bank of New Zealand* (5) tells strongly against the contention of the Revenue. In that case, the bank, which was not resident in the United Kingdom, was assessable to income tax under Case I of Sch. D on the profits arising from the trade carried on at its London branch office. Among the assets held by the London branch were certain holdings of five per cent. war loan, and it was held that the exemption conferred by s. 46 (1) of the Income Tax Act, 1918, in respect of war loan interest where the war loan was in the beneficial ownership of a non-resident was unlimited, with the result that the interest was not only exempted from tax as interest, but could not be taxed indirectly by inclusion in the bank's trading receipts for the purpose of assessment under Case I of Sch. D.

As appears from the judgment of Romer, L.J., it was argued by the Revenue in that case that the charge in Case I of Sch. D was not a charge of the interest as such to tax, but simply a charge to tax of the balance of profits and gains of a trade, and that the exemption did not apply. The courts rejected this argument, dissected the trading receipts, discovered among them the items of war loan interest, and held that there was no reason why the general exemption of such interest from tax should not apply to an assessment under Case I of Sch. D. In my judgment, the exemption of dividends from income tax which is implied in the deduction provisions of the Income Tax Act is a general exemption analogous

(1) 8 Tax Cas. 101. (2) [1949] 1 All E.R. 354; 30 Tax Cas. 431.
(3) [1934] All E.R. Rep. at p. 406; 18 Tax Cas. at p. 362.
(4) [1939] 3 All E.R. at p. 764; 22 Tax Cas. at p. 636.
(5) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

to the express exemption of war loan interest in the beneficial ownership of a non-resident. A

In the result, therefore, in my judgment, the dividend in question here was properly left out of the computation of the taxpayers' liability to tax under Case I of Sch. D. In view of this conclusion, it is not strictly necessary for me to consider the other points in the case, but as the matter may go further, I propose to deal with them. B

The relevant provisions of the Income Tax Act, 1952, are stated briefly as follows: Section 41 (1)—If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments, then where the tax is chargeable under Sch. D the additional commissioners shall make an assessment on the person chargeable in an additional first assessment in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal. C Section 47 (1)—Subject to the provisions of this section, and to any provision of this Act allowing a longer period in any particular class of case, an additional first assessment may be made at any time not later than six years after the end of the year to which the assessment relates, provided that, where any form of fraud or wilful default has been committed by or on behalf of any person in connexion with or in relation to income tax, additional D assessments may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made at any time. Section 50 (1)—Save where expressly authorised by the Act, the General Commissioners shall not alter any assessment before the time for hearing and determining appeals, and then only in cases of assessments appealed against, and in accordance with their determination. Subsection (2)—An appeal once determined by the commissioners E shall be final, and neither the determination of the commissioners nor the assessment made thereon shall be altered except by order of the court when a case has been required as provided by this Act. Section 510 (1)—Subject to the provisions of this section, where a person gives notice of appeal to the General Commissioners against an assessment to income tax and, before the appeal is determined by the commissioners, the surveyor or other proper officer of the Crown and the appellant F come to an agreement, whether in writing or otherwise, that the assessment shall be treated as upheld without variation or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if at the time that the agreement was come to the commissioners or board had determined the appeal and had upheld the assessment without variation, had varied it in that manner or had discharged or cancelled G it as the case may be.

The issue between the parties has been narrowed by admissions made on each side. In the first place, the Crown admits that the correspondence between the inspector of taxes and the taxpayers' accountants in July and August, 1955, constituted an agreement in writing within the meaning of s. 510 (1) for the variation of the estimated assessment in accordance with the figures put forward H by the taxpayers. Secondly, the taxpayers admit that, having regard to the decision of the Court of Appeal in *Commercial Structures, Ltd.* v. *Briggs* (6), I must hold that, when the new inspector, acting on instructions from the chief inspector of taxes, took the view that the dividend in question was wrongly excluded from the taxpayers' accounts which had been submitted to his predecessor in July, 1955, he made a " discovery " within the meaning of s. 41 (1). I The question at issue between the parties is therefore how far, if at all, is s. 41 controlled by s. 50 (2)? Section 41 (1) does not itself place any limit on the time within which a " discovery " may be made. Section 47 (1) expressly cuts down the period in which additional assessments may be made to six years in cases where there has been no fraud or wilful default. Is the right to make additional assessments consequent on a " discovery " further cut down by s. 50 (2)?

(6) [1948] 2 All E.R. 1041; 30 Tax Cas. 487.

Counsel for the taxpayers argued that what was made final by s. 50 (2) was the determination by the commissioners of the amount of the taxable income of the taxpayers for the year to which the appeal related, and that once an appeal had been heard in no circumstances could any further additional assessment be made in respect of that year's income. If this were right, then it would follow that, if an appeal was brought against an assessment on some point of law, the Revenue authorities could not make an additional assessment after the hearing of that appeal, even if they found that the taxpayer had fraudulently concealed the true amount of his receipts for that year. I see no reason for construing s. 50 (2) in a way which would lead to so extravagant a result. I think that the section means no more than that the determination of the appeal by the commissioners is to be final with regard to the particular matter which was the subject of the appeal. This was the view taken by LORD ATKINSON of s. 57 (10) of the Taxes Management Act, 1880, which is in very similar terms to s. 50 (2) of the Income Tax Act, 1952 (see *Brooks* v. *Inland Revenue Comrs.* (7)).

Even on this construction, however, s. 50 (2) may still conflict with s. 41 (1) in cases in which the inspector changes his mind without having any fresh facts before him. Suppose that an appeal is brought on a point of law and decided by the Special Commissioners against the Revenue; that the inspector, being satisfied that the commissioners were right, does not ask for a Case to be stated; but that subsequently the courts decide in another case that the view of the law taken by the Special Commissioners was wrong. In such a case, the inspector, on hearing of the court's decision in the other case, would have discovered that the first assessment was wrong within the meaning given to the word " discovery " by the Court of Appeal in *Commercial Structures, Ltd.* v. *Briggs* (8). Nevertheless, I think that he would be precluded by s. 50 (2) from raising an additional assessment.

Further, I think that the same result would ensue if, instead of contesting the appeal and losing it, the inspector agreed to its being allowed by the commissioners; or, to take the matter a stage further back, if he came to an agreement with the appellant within the meaning of s. 510 on the point at issue.

It is true that in this case the taxpayers' notice of appeal did not raise the question whether or not the Henry White (Sutherland), Ltd. dividend should be included in the computation of its profits. It was simply a notice of appeal against estimated assessments; but the question whether the dividend should be included was raised by the inspector when he saw the accounts, and he agreed to the estimated assessments being reduced on the footing that the dividend ought not to be included. The agreement which he made was, therefore, in substance, equivalent to the allowing of an appeal by the taxpayers against the inclusion of the dividend.

It follows, in my judgment, that, if, contrary to the view which I have expressed, the dividend should have been included in the original assessments, the Special Commissioners were right in holding that no additional assessments could be made for the years 1953-54 and 1954-55.

The second case before me, Tableau Holdings, Ltd., raises the same points as those on which I have given judgment in the Cenlon case. The only material difference in the facts is that the notice of appeal by the taxpayers was against the inclusion of the capital profit dividend in the computation of their profits for the purposes of Case I of Sch. D. It is therefore to that extent, an a fortiori case.

It follows, therefore, that, in my judgment, both the appeals of the taxpayers should be allowed.

Appeals allowed.

Solicitors: *Manches & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

---

(7) 7 Tax Cas. 236.

(8) [1948] 2 All E.R. 1041; 30 Tax Cas. 487.

POOLE *v.* REGINAM.

[PRIVY COUNCIL (Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest), July 25, 26, 27, 28, October 5, 1960.]

Privy Council—Eastern Africa—Criminal law—Nolle prosequi—Second information for same offence on same facts signed before nolle prosequi entered—No fresh committal—Validity of second information—Kenya Criminal Procedure Code (Laws of Kenya, 1948, c. 27), s. 82 (1).

Criminal Law—Indictment—Second indictment or information not inherently bad by reason of the pendency of an earlier one for the same offence.

A second indictment or information is not inherently bad by reason of the pendency of an earlier one for the same offence against the same person on the same facts (see p. 407, letter A, post).

R. v. *Stratton* ((1779), 1 Doug. K.B. 239) and dictum of BLACKBURNE, C.J., in *R.* v. *Mitchel* ((1848), 3 Cox, C.C. at p. 119) applied.

Dictum of CROMPTON, J., in *R.* v. *Allen* ((1862), 1 B. & S. at p. 856) explained.

The appellant was arraigned in Kenya on an information charging him with murder; but before the first witness for the Crown was called, one of the jurors stated that he had a conscientious objection on religious grounds to giving a verdict of guilty in the case. The court adjourned and, during the adjournment, a fresh information was signed charging the appellant with murder in the same terms as the first information. On the resumption of the court after the adjournment, counsel for the Crown entered a nolle prosequi, at the same time handing in the fresh information. The trial judge discharged the appellant on the first information, but he was served with the second information on which he was duly tried and convicted. By s. 82 (1)* of the Kenya Criminal Procedure Code, the Attorney-General may, at any stage before verdict or judgment in a criminal case, enter a nolle prosequi and thereupon the accused is to be at once discharged in respect of the charge for which the nolle prosequi is entered, but such discharge is not to operate as a bar to any subsequent proceedings against him on account of the same facts. The appellant contended that the trial on the second information was a nullity (i) by reason of the fact that the Attorney-General had entered a nolle prosequi in respect of a previous information charging the same offence as that on which the appellant was subsequently convicted without a fresh committal after investigation by a subordinate court, or (ii) because two separate informations against the same man for the same offence could not be in existence at the same time.

Held: the trial was not a nullity since, on the proper construction of s. 82 (1), the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the first information and, if the second information took effect from the date of signature, it was not rendered invalid by the existence at that moment of the former information, while if the second information only took effect when filed, it was valid from that moment and unaffected by the entry of the nolle prosequi in respect of the first information.

Appeal dismissed.

[As to the effect of nolle prosequi, see 10 HALSBURY'S LAWS (3rd Edn.) 399, para. 721; and for cases on the subject, see 14 DIGEST (Repl.) 272, 273, *2383-2410.*]

Cases referred to:

R. v. *Allen*, (1862), 1 B. & S. 850; 31 L.J.M.C. 129; 5 L.T. 636; 26 J.P. 341; 121 E.R. 929; 14 Digest (Repl.) 272, *2385.*

* The terms of s. 82 (1) are set out at p. 401, letter B, post.

A *R.* v. *Dunn*, (1843), 1 Car. & Kir. 730; 174 E.R. 1009; 14 Digest (Repl.) 272, *2394*.
R. v. *Mitchel*, (1848), 3 Cox, C.C. 93.
R. v. *Noormahomed Kanji*, (1937), 4 E.A.C.A. 34.
R. v. *Stratton*, (1779), 1 Doug. K.B. 239; 21 State Tr. 1045; 99 E.R. 156; 14 Digest (Repl.) 282, *2539*.
B *R.* v. *Swan & Jefferys*, (1751), Fost. 104; 168 E.R. 52.
R. v. *Wylie, Howe & McGuire*, (1919), 83 J.P. 295; 14 Digest (Repl.) 273, *2410*.
Sey v. *R.*, (1950), 13 W.A.C.A. 128.

Appeal.

Appeal by special leave by Peter Harold Richard Poole from a judgment of the Court of Appeal for Eastern Africa (O'CONNOR, P., FORBES, V.-P., GOULD C and WINDHAM, JJ.A., and FARRELL, J.), dated Mar. 21, 1960, dismissing the appellant's appeal from his conviction in the Supreme Court of Kenya (SINCLAIR, C.J., sitting with a jury) on Dec. 10, 1959, of the murder of Kamawe s/o Musunge, for which he was sentenced to death. The facts are stated in the judgment of the Board at p. 403, letter E, et seq., post.

D *F. H. Lawton*, *Q.C.*, and *H. F. Cassel* for the appellant.
L. G. Scarman, *Q.C.*, *J. G. Le Quesne* and *K. C. Brookes* (Crown Counsel, Kenya) for the Crown.

LORD TUCKER: On Dec. 10, 1959, the appellant was convicted of murder after a trial before SINCLAIR, C.J., and a jury in the Supreme Court of Kenya. His appeal to the Court of Appeal for Eastern Africa was dismissed on Mar. 21, 1960. E From this decision he appealed to Her Majesty in Council by special leave and the appeal was heard by the Board on July 25, 26 and 27, 1960. On July 28 their Lordships announced that they would humbly advise Her Majesty that the appeal be dismissed. They now give their reasons.

Except for one incident in the course of the trial (which will be dealt with at once), no complaint was made before the Board on behalf of the appellant with F regard to the evidence, the summing-up or the conduct of the trial. The exception was the following incident. At the conclusion of the evidence of a witness for the prosecution named Titoro, who had said that he saw the appellant shoot the deceased man named Kamawe, the chief justice asked the witness to indicate certain positions and distances which he had described, but this could not conveniently be done in the court room as it was too small. He accordingly G proceeded with the witness and counsel for the prosecution and defence to the steps outside the judges' entrance where the witness indicated the positions and distances of which he had spoken. The distances indicated were all agreed with counsel, sometimes after having been paced out. On returning to court, counsel for the prosecution stated that he did not know whether the appellant had been present at the demonstration. It was ascertained that he had not been present. H The court was then adjourned to the same place and the demonstration repeated in the presence of the appellant. The second demonstration took about half the time occupied by the first which had taken from fifteen to twenty minutes. There was no material variation in the positions or distances indicated on each occasion. Section 193 of the Criminal Procedure Code of Kenya provides:

I > "Except as otherwise expressly provided, all evidence taken in any inquiry or trial under this code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."

It was contended on behalf of the appellant that, this being a felony, the whole trial must take place in the presence of the prisoner and that no action taken by the trial judge could cure the irregularity which had occurred and which vitiated the whole trial. It will be observed that s. 193 draws no distinction between felonies and misdemeanours. Moreover, s. 381 of the code provides:

" Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code; or . . . (c) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

" Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The Court of Appeal for Eastern Africa, after considering certain English authorities and some Indian decisions under s. 537 of the Indian Code of Criminal Procedure, which is in similar terms to s. 381 of the Kenya Code set out above, were of opinion that, although an irregularity had occurred and it could not be said that the accused's presence had been dispensed with, his presence throughout the trial was not an absolute requirement necessarily going to the root of a conviction, and that, in the circumstances of this case, the appellant had been in no way prejudiced by the incident which was curable under s. 381. Their Lordships are in agreement with this reasoning and would only observe that the decision in such cases must always be a matter of degree. The consequences of accepting to the full the submission of counsel for the appellant would result (to take an extreme case) in vitiating a trial because a formal witness had given his name and address in the witness-box after an adjournment and it had not been noticed that the prisoner had not yet been brought up from the cells. On the other hand it is not difficult to envisage many instances in which his absence would be fatal. Their Lordships should, perhaps, add that, whatever be the proper interpretation of the relevant provisions of the Kenya Code, the circumstances of the present irregularity are not of such a nature as would bring the case within the principles on which the Board intervenes in the exercise of its criminal jurisdiction.

Their Lordships accordingly pass to the important ground of appeal on which special leave was granted and which was the reason for the appeal before the Court of Appeal for Eastern Africa having been heard by a full court of five judges (O'CONNOR, P., FORBES, V.-P., GOULD and WINDHAM, JJ.A. and FARRELL, J.) viz., that the trial was a nullity by reason of the fact that the Attorney-General had entered a nolle prosequi in respect of a previous information charging the same offence as that on which the appellant was subsequently convicted without a fresh committal after investigation by a subordinate court.

Before recounting the circumstances in which the nolle prosequi was entered, it will be convenient at this stage to set out the relevant sections of the Criminal Procedure Code of Kenya (Laws of Kenya, 1948, c. 27).

" 3.—(1) All offences under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

" (3) Provided, however, and notwithstanding anything in this code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in the colony, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before His Majesty's High Court of Justice in England at the date of the coming into operation of this code.

" 66. Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within the colony, or which according to law may be

dealt with as if it had been committed within the colony, and to deal with the accused person according to its jurisdiction.

" 69. The Supreme Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings: Provided that except under s. 84, no criminal case shall be brought under the cognisance of the Supreme Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court.

" 82.—(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

" (2) If the accused shall not be before the court when such nolle prosequi is entered the registrar or clerk of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which such accused may be detained, and also, if the accused person has been committed for trial, to the subordinate court by which he was so committed, and such subordinate court shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties (if any) and also to the accused and his sureties in case he shall have been admitted to bail.

" 83. The Attorney-General may order in writing that all or any of the powers vested in him by the two last preceding sections and by Part 8 of this code be vested for the time being in the Solicitor-General or a Crown counsel, and the exercise of these powers by the Solicitor-General or a Crown counsel shall then operate as if they had been exercised by the Attorney-General: Provided that the Attorney-General may in writing revoke any order made by him under this section.

" 89.—(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

" (4) The magistrate, upon receiving any such complaint or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of the next succeeding subsection, draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless such a charge shall be signed and presented by a police officer.

" 138. A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.

" 226. Any magistrate empowered to hold a subordinate court of the first, second or third class may commit any person for trial to the Supreme Court: Provided that it shall not be competent for a magistrate empowered to hold a subordinate court of the third class to commit a European for trial to the Supreme Court.

" 227. Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the subordinate court is of opinion that it is not suitable to be disposed of upon summary trial, a preliminary inquiry shall be held according to the provisions hereinafter contained by a subordinate court, locally and otherwise competent.

" 228. A magistrate conducting a preliminary inquiry shall, at the

commencement of such inquiry, read over and explain to the accused person the charge in respect of which the inquiry is being held, but the accused person shall not be required to make any statement in reply thereto. A

" 233.—(1) If, after examination of the witnesses called on behalf of the prosecution, the court considers that on the evidence as it stands there are sufficient grounds for committing the accused for trial, the magistrate shall frame a charge under his hand declaring with what offence or offences the accused is charged and shall read the charge to the accused person . . . B

" 246. In the event of a committal for trial the written charge (if any), the depositions, the statement of the accused person, the recognisances of the complainant and of the witnesses, the recognisances of bail (if any), and any documents or things which have been put in evidence, shall be transmitted without delay by the committing court to the registrar of the Supreme Court, and an authenticated copy of the depositions and statement aforesaid shall be also transmitted to the Attorney-General. C

" 249. If, prior to the trial before the Supreme Court, the Attorney-General is of opinion, upon the record of the committal proceedings received by him, that the case is one which may suitably be tried by a subordinate court, he may cause the depositions to be returned to the court which committed the accused, and thereupon the case shall be reopened, tried and determined in the same manner as if such person had not been committed for trial: Provided that in every such case the accused shall be entitled to have recalled for cross-examination or further cross-examination all or any of the witnesses for the prosecution. D

" 250.—(1) If, after the receipt of the authenticated copy of the depositions as aforesaid, the Attorney-General shall be of the opinion that the case is one which should be tried upon information before the Supreme Court, an information shall be drawn up in accordance with the provisions of this code, and when signed by the Attorney-General shall be filed in the registry of the Supreme Court. E

" (2) In any such information the Attorney-General may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial. F

" 251. The registrar or his deputy shall indorse on or annex to every information filed as aforesaid, and to every copy thereof delivered to the officer of the court or police officer for service thereof, a notice of trial, which notice shall specify the particular sessions of the Supreme Court at which the accused person is to be tried on the said information, and shall be in the following form, or as near thereto as may be:— G

> ' A.B.
>
> ' Take notice that you will be tried on the information whereof this is a true copy at the sessions of the Supreme Court to be held at on the day of 19 .' H

" 255. All informations drawn up in pursuance of s. 250 of this code shall be in the name of and (subject to the provisions of s. 83) signed by the Attorney-General, and when so signed shall be as valid and effectual in all respects as an indictment in England which has been signed by the proper officer of the court in accordance with the Administration of Justice (Miscellaneous Provisions) Act, 1933. I

" 257. The practice of the Supreme Court in its criminal jurisdiction shall be assimilated as nearly as circumstances will admit to the practice of His Majesty's High Court of Justice in its criminal jurisdiction and of Courts of Oyer and Terminer and General Gaol Delivery in England.

" 272. If any information does not state, and cannot by any amendment authorised by the last preceding section be made to state, any offence of

which the accused has had notice, it shall be quashed either on a motion made before the accused pleads or on a motion made in arrest of judgment. A written statement of every such motion shall be delivered to the registrar or other officer of the court by or on behalf of the accused and shall be entered upon the record.

" 275. Any accused person against whom an information is filed may plead—(a) that he has been previously convicted or acquitted, as the case may be, of the same offence, or (b) that he has obtained the King's pardon for his offence. If either of such pleas are pleaded in any case and denied to be true in fact, the court shall try whether such plea is true in fact or not. If the court holds that the facts alleged by the accused do not prove the plea, or if it finds that it is false in fact, the accused shall be required to plead to the information."

On Nov. 11, 1959, the Resident Magistrate at Nairobi, having heard the witnesses adduced on behalf of the prosecution whose evidence was recorded in the form of depositions, directed that a charge should be drawn up against the appellant of the murder of Kamawe on Oct. 12, 1959, contrary to s. 199 of the Penal Code (1) and that he be committed to the Supreme Court for trial. On Nov. 18, 1959, an information was signed by the Deputy Public Prosecutor for the Attorney-General which recited as follows:

" At the sessions holden at Nairobi on Nov. 30, 1959, the court is informed by the Attorney-General on behalf of Our Lady the Queen that Peter Harold Richard Poole is charged with the following offence:— "

then followed the charge of murder of Kamawe on Oct. 12, 1959.

On this information the appellant was arraigned on Nov. 30, 1959, and pleaded not guilty. He was given in charge of the jury and the case for the Crown was opened by Crown counsel. Before the first witness was called, one of the jury stated that he had a conscientious objection on religious grounds to giving a verdict of guilty in this case. After a short adjournment, counsel for the appellant submitted that the juror's statement did not incapacitate him from sitting, but that, if the court held otherwise, the case should proceed with eleven jurors. It being then 11.20 a.m., Crown counsel asked for an adjournment and the court adjourned until 2.15 p.m. It appears that, during the adjournment, the acting senior Crown counsel on behalf of the Attorney-General signed a fresh information dated Nov. 30 charging the appellant with the offence of murder in the same terms as the first information dated Nov. 18. On the resumption of the court after the adjournment, Crown counsel submitted there was no power to discharge the juror as he was not incapable. He said that the court might have inherent power to discharge the jury, but he thought it safer to enter a nolle prosequi which he then did and at the same time handed in the fresh information dated Nov. 30. Counsel for the appellant contended that there was no inherent power to discharge the jury in the circumstances and that it was not a case in which a nolle prosequi could be entered. The learned chief justice thereupon ruled as follows:

" In view of the entry of a nolle prosequi the accused is discharged in respect of the charge for which the nolle prosequi is entered."

After the appellant had been discharged and left the dock, he was asked by the deputy registrar to accompany him to the ante-room of the court where he served him with the new information of that date and executed a warrant as authority for the prison officers to detain him pending his trial on the new information. It was not contested that the acting senior Crown counsel was duly authorised under s. 83 to enter a nolle prosequi and sign an information. Thereafter the appellant was duly tried on the new information at the December

(1) Section 199 reads: " Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

Sessions of the Supreme Court holden at Nairobi and convicted on Dec. 10. It was contended by counsel for the appellant that, on the true construction of s. 82 of the code, the entry of the nolle prosequi brought the prosecution to an end, subject always to the right of the Crown to start another prosecution against the accused de novo by re-arresting him and taking him again before a subordinate court with a view to a fresh committal for trial. He submitted that the words the " proceedings shall not continue " in s. 82 (1) referred to the " proceedings " which had been instituted under s. 89 (1), and that the words " discharged in respect of the charge " referred to the charge drawn up and signed under s. 89 (4), and that the words " subsequent proceedings " at the end of s. 82 (1) similarly implied proceedings which could only be initiated in accordance with s. 89 (1). He sought to reinforce his submission on the ground of certain procedural difficulties which he suggested would necessarily follow from the construction relied on by the Crown.

Their Lordships will return later to the procedural consequences and will for the present content themselves with the construction of the language of s. 82 in the context in which they appear in relation to a nolle prosequi entered at the stage at which it was entered in this case. Unlike the procedure with regard to nolle prosequi in England, where it cannot be used until an indictment has been found (see the observations of DARLING, J., in *R.* v. *Wylie, Howe & McGuire* (2)) the words " In any criminal case and at any stage thereof before verdict or judgment " in sub-s. (1) and the provisions of sub-s. (2) make it clear that, in Kenya, a nolle prosequi may be entered at different stages and before an information has been signed. It follows from this that the words " the charge " must necessarily have a different meaning according to the stage at which it is entered. If entered before committal, it must necessarily refer to the charge drawn up and signed under s. 89 (4), and if entered after committal and before an information has been signed it will have reference to the charge drawn up under s. 233. Where an information has been duly signed under s. 250 and the accused has been arraigned and pleaded to it, it contains the only effective charge and that is the charge and the only charge in respect of which the accused is discharged and it is the proceedings on that information which shall not continue.

Reverting to the consequences said to follow from the construction contended for by the Crown, it is said that a person may remain committed for trial for an indefinite period and it is asked what is to happen to the exhibits which have been remitted to the registrar of the Supreme Court under s. 246; similarly, it is asked what is to happen to the recognisances of the witnesses bound over to give evidence at the trial having regard to the provisions of s. 82 (2). Finally it is said that grave injustice may be done to an accused under the provisions of s. 299 of the code which provides for the circumstances in which the depositions of a witness may be read at the trial when he is absent from the colony.

Their Lordships do not consider these consequences necessarily follow. The exhibits are in the custody of the court and the court on application made and notice given would clearly have jurisdiction to make such order as seemed proper with regard to the exhibits. As to the recognisances of the witnesses, it appears that they are merely bound over to attend and give evidence in the Supreme Court and subsequently they receive notice of the time and place of trial. There is nothing in s. 82 (2), as pointed out in the judgment of the Court of Appeal, which operates to discharge the witnesses from attendance at any subsequent trial of which they may receive notice. With regard to the reading of the depositions of absent witnesses, it is not to be assumed that the court will not be alert to ensure that the provisions of that section shall not be allowed to operate so as to cause injustice to an accused person as a consequence of the use of the nolle prosequi procedure by the Crown. It must also be remembered that all prosecutions in Kenya are in the hands of the Attorney-General. There are no

(2) (1919), 83 J.P. 295.

private prosecutions. The provisions of the code should not be interpreted on the assumption that the wide powers vested in the Attorney-General may be abused by the indefinite postponement of trials by means of the use of the nolle prosequi procedure for which he would be answerable as a Minister of the Crown. In any event there is, in their Lordships' opinion, nothing in the difficulties envisaged above sufficient to compel a construction of s. 82 different to that which it would otherwise seem to bear. It should, perhaps, be noted that a further difficulty was much relied on on the hearing before the Court of Appeal, viz., as to the procedural difficulty of bringing an accused person before the Supreme Court again after he had been released on entry of a nolle prosequi. This objection was disposed of in the judgment of the Court of Appeal by reference to s. 66 of the code which had not been cited in argument and was not relied on in the present appeal.

Their Lordships have so far confined their observations to the proper construction of s. 82 of the code without reference to previous authority or, except for passing references, to the careful and detailed reasoning of the judgment of the Court of Appeal for Eastern Africa delivered by the vice-president. The interpretation now placed on the section is, however, in accord with the previous decision of the Court of Appeal for Eastern Africa in *R.* v. *Noormahomed Kanji* (3) decided on a similar provision in the Criminal Procedure Code of Uganda, and of the West African Court of Appeal in *Sey* v. *R.* (4) on the corresponding provisions of the Criminal Procedure Code of the Gold Coast as it then was. In the present case, the Court of Appeal for Eastern Africa have followed their previous judgment in *R.* v. *Noormahomed Kanji* (3) for substantially the reasons which their Lordships have endeavoured to express.

It is necessary, however, to deal with a further and independent submission of counsel for the appellant to the effect that, whatever be the proper construction of s. 82, there were in the present case two separate informations in existence at the same time for the same offence against the same person, which he contended was a situation which the law would not recognise as legally possible. He agreed that there could be two or more separate informations for different offences based on the same facts in existence at the same time and that a nolle prosequi entered in respect of one such information would not preclude a trial or trials on the others, but he submitted that there could not be in existence at the same time two informations against the same man for the same offence on the same facts. There is nothing in the Criminal Procedure Code which expressly prohibits or authorises such a course, but s. 275 provides for pleas of autrefois acquit and convict and no such plea as autrefois arraign is recognised. Furthermore, there is no limit to the number of informations which the Attorney-General may sign.

It was, however, argued that the situation was so alien to the practice at common law that it must be regarded as inherently bad in the absence of express statutory authorisation. The researches of counsel for the Crown, however, reveal that, so far from being inherently bad, there is ancient authority to the contrary effect though the court will not allow an accused to be tried on both indictments. In *R.* v. *Swan & Jefferys* (5) in 1751, the prisoners were indicted for murder. They pleaded not guilty at Chelmsford summer assizes and their trial was postponed to the next assizes. In the meantime, the Attorney-General preferred another bill against them charging Swan with petty treason and Jefferys with murder, and at the next assize a true bill was found and the prisoners arraigned on it. The prisoners pleaded in abatement ore tenus that another indictment was depending for the same offence and pleaded over to the treason and felony. Counsel for the prisoners contended they should not have been arraigned on the new bill pending the former indictment on which issue had been joined. They asked that the trial on the first indictment should proceed

(3) (1937), 4 E.A.C.A. 34. (4) (1950), 13 W.A.C.A. 128. (5) (1751), Fost. 104.

before the prisoners were called on to plead to the second. The court (WRIGHT, J., with whom FOSTER, J., was sitting at the request of the former) was of opinion that the charge in the bill last found must be answered notwithstanding the pendency of the former, for autrefois arraign was no plea in the case, but that the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact. The court proposed that the first indictment should be quashed by consent, to which counsel agreed, and the trial on the second indictment proceeded.

In *R.* v. *Stratton* (6), the Solicitor-General, in support of a motion to quash an information filed ex officio by the Attorney-General to which the defendants had pleaded in order that another which stated the offence more particularly might be filed, stated that the defendants could suffer no injury by quashing the indictment because the Crown might go to trial and judgment on the new one, notwithstanding the pendency of the other; for that, on indictments or informations for crimes, the pendency of another prosecution for the same offence cannot be pleaded as it might to informations for penalties. LORD MANSFIELD, C.J., observed (7) that, if it was proper to stop the information, he did not see why the Attorney-General might not do it by entering a nolle prosequi without the interference of the court. BULLER, J., said (7) that what the Solicitor-General had stated, viz., that the pendency of the first information would be no plea to the second, was decisive against the motion. The court accordingly refused to quash the information.

In *R.* v. *Dunn* (8) a true bill for perjury was found by the grand jury against the defendant at Durham spring assizes in 1843, and the case remitted to the next summer assizes. Before the summer assizes it was discovered that there were defects in the indictment and, accordingly, a fresh bill was prepared and found by the grand jury in July, 1843. Counsel for the prisoner submitted he was entitled to be tried on the first indictment before the second. WIGHTMAN, J., held the defendant was entitled to have the first indictment disposed of before he could be tried on the second. Mr. Archbold for the Crown then proposed to enter a nolle prosequi on the first indictment, but WIGHTMAN, J., held that this could only be done with the authority of the Attorney-General. Mr. Archbold then moved to quash the first indictment on the ground of defects apparent on its face, which application was granted on terms as to costs.

R. v. *Mitchel* (9) was a decision of the Court of Queen's Bench in Ireland in 1848. BLACKBURNE, C.J., posed the question (10):—Is the plea of an indictment pending a bar to this information for the same matter? And proceeded as follows:

> "In support of the affirmative, that it is, there is neither precedent, the authority of any case, the dictum of any judge, or even the opinion of any text writer: but, on the other hand, there are authorities that such a plea is utterly invalid."

He went on to examine the authorities, some of which have been referred to above and to quote from HALE'S PLEAS OF THE CROWN, Vol. 2, pp. 221 and 222 and HAWKINS ON PLEAS IN ABATEMENT, ch. 34. He said (11):

> "I have only further to add on this part of the case, that even if the plea of a former prosecution depending could be pleaded, the entering of the nolle prosequi would be an answer to it, and this appears to have been plainly decided by *R.* v. *Stratton* (6)."

In ROSCOE'S CRIMINAL EVIDENCE (16th Edn.), at p. 233, it is stated:

> "Where there are two indictments (sic) for the same act (e.g., by coroner's inquisition and the justices), defendant ought to be tried on both at once."

---

(6) (1779), 1 Doug. K.B. 239.
(7) (1779), 1 Doug. K.B. at p. 240.
(8) (1843), 1 Car. & Kir. 730.
(9) (1848), 3 Cox, C.C. 93.
(10) (1848), 3 Cox, C.C. at p. 118.
(11) (1848), 3 Cox, C.C. at p. 119.

A In the light of the authorities cited above, the statement by CROMPTON, J., in *R.* v. *Allen* (12) to the effect that there cannot be two prosecutions against a man for the same offence at the same time cannot have been intended to mean that there cannot be two indictments in existence for the same offence against the same person on the same facts. Their Lordships are, therefore, satisfied that a second indictment or information is not inherently bad by reason of the B pendency of an earlier one for the same offence against the same person on the same facts.

In the present case, whether or not there were at any moment of time two such informations in existence depends on the proper construction of s. 250 and s. 255 of the Criminal Procedure Code. Section 255 provides that the indictment

C "... when so signed shall be as valid and effectual in all respects as an indictment in England which has been signed by the proper officer of the court in accordance with the Administration of Justice (Miscellaneous Provisions) Act, 1933."

Is the word "when" used temporarily, or is it equivalent to "if" with the result that the information takes effect on being filed in accordance with s. 250? D Counsel for the appellant contended that it took effect at the moment of signature, and this was the view of the Court of Appeal. On the other hand, counsel for the Crown before the Board submitted that, on a proper construction of the two sections read together, the word "when" should not be given a temporal meaning. Their Lordships' decision in the present case does not depend on the preference of one interpretation to the other as, in their view, on the proper E construction of s. 82 of the Criminal Procedure Code, the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the information in respect of which it was entered and that, if the second information took effect from the date of signature, it was not rendered invalid by the existence at that moment of the former information. If, on the other hand, the second information only took effect when filed, it was valid from F that moment and unaffected by the entry of the nolle prosequi in respect of the first information. This being the position, their Lordships do not consider it necessary in this case to determine whether, under s. 250 and s. 255 an information signed by the Attorney-General becomes valid and effectual on signature before being filed or on filing after signature.

For the reasons set out above, their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Merriman, White & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(12) (1862), 1 B. & S. at p. 856.

BUXTON AND OTHERS *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT.

[QUEEN'S BENCH DIVISION (Salmon, J.), July 20, 21, 28, 1960.]

Town and Country Planning—Validity of Minister's action—Application to High Court to challenge validity—"Person aggrieved"—Refusal by local planning authority of permission to develop land by digging chalk—Appeal to Minister against refusal under s. 16 of Town and Country Planning Act, 1947—Local inquiry held at which objections made and evidence given by four adjoining landowners—Inspector's recommendation to Minister that appeal be dismissed on ground of detriment to adjoining landowners—Appeal allowed by Minister—Whether landowners persons aggrieved by Minister's action—Town and Country Planning Act, 1959 (7 & 8 Eliz. 2 c. 53), s. 31 (1) (b).

In December, 1957, H. Ltd. applied to the local planning authority for permission to develop land which they owned and occupied by excavating and processing chalk. Planning permission was refused and H. Ltd. then appealed against this refusal, under s. 16 of the Town and Country Planning Act, 1947, to the Minister of Housing and Local Government who caused a local inquiry to be held by his inspector into the planning authority's refusal to grant permission. The inquiry was held in November, 1958, and among those who appeared at the inquiry, called evidence and were heard were four substantial landowners whose land was adjacent to that of H. Ltd. and was being used by the landowners for agricultural and residential purposes. In his report on the inquiry to the Minister, the inspector recommended that H. Ltd.'s appeal be dismissed on the principal grounds that there was serious risk of chalk dust being deposited on the land of the four adjoining landowners in quantities detrimental to the user of their land, and that there was no present shortage of chalk in the locality. The Minister, however, decided to allow the appeal. The four landowners now applied to the High Court under s. 31 of the Town and Country Planning Act, 1959, to quash the Minister's decision. On the question whether the four landowners were persons aggrieved within the meaning of s. 31,

Held: the landowners were not persons "aggrieved" within the meaning of s. 31 of the Town and Country Planning Act, 1959, because the Minister's action in allowing the appeal did not infringe any legal right of theirs, for their common law rights were not infringed and as individuals they had no statutory right under the Town and Country Planning Acts, 1947 to 1959, to have their representations considered by the Minister.

Dictum of JAMES, L.J., in *Re Sidebotham, Ex p. Sidebotham* ((1880), 14 Ch.D. at p. 465) applied.

Per CURIAM: the applicants for planning permission, the local planning authority* and any owner who has made a representation to the Minister under s. 37† of the Town and Country Planning Act, 1959, are persons to whom s. 31 of the Act of 1959 applies‡ (see p. 412, letter H, post).

[For the Town and Country Planning Act, 1959, s. 31 (1), see 39 HALSBURY'S STATUTES (2nd Edn.) 1203.]

Cases referred to:

Ealing Borough Council v. *Jones*, [1959] 1 All E.R. 286; [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194; 3rd Digest Supp.

R. v. *Surrey JJ.*, (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest 422, *2822*.

* The judgment at p. 412, post, reads "local authority", but in the present case the local planning authority had delegated its functions.

† For the terms of s. 37 (4), (5), of the Town and Country Planning Act, 1959, see p. 412, letters D to G, post.

‡ I.e., have the rights conferred by s. 31 (1) on persons aggrieved; see p. 410, letter G, post.

A *R.* v. *Taunton St. Mary* (*Inhabitants*), (1815), 3 M. & S. 465; 105 E.R. 685; 16 Digest 424, *2839*.

Sevenoaks Urban District Council v. *Twynam*, [1929] 2 K.B. 440; 98 L.J.K.B. 537; 141 L.T. 566; 93 J.P. 189; Digest Supp.

Sidebotham, Re, Ex p. Sidebotham, (1880), 14 Ch.D. 458; 49 L.J.Bcy. 41; 42 L.T. 783; 4 Digest (Repl.) 250, *2267*.

B

Originating motion.

By notice of motion dated Oct. 26, 1959, made pursuant to s. 31 of the Town and Country Planning Act, 1959*, the applicants, Aubrey Leland Oakes Buxton, Samuel Ranulph Allsopp, Ernest William Dalrymple Tennant and Paul Braeckman, gave notice to the respondent, the Minister of Housing and Local Government (hereafter referred to as "the Minister") that within fourteen days of service of the notice on the Minister, or so soon thereafter as counsel for the applicants could be heard, application would be made to the High Court of Justice for an order suspending, until the determination of the proceedings, the operation of the Minister's action under s. 16 of the Town and Country Planning Act, 1947, in allowing the appeal of D. Heath & Sons, Ltd. against the refusal of planning permission to excavate and process chalk at land owned by that company; for an order quashing the Minister's action in allowing the appeal; and for an order that the costs of the application be paid by the Minister or such other order as the court thought fit. The grounds of the application were that (i) The Minister had not complied with the relevant requirements in allowing the appeal, and the applicants' interests were thereby substantially prejudiced, in that he granted the appeal in disregard of the evidence given at a local inquiry into the appeal and in disregard of the recommendation of the inspector holding the inquiry that planning permission to develop the land by digging chalk be refused; and that, after the local inquiry was closed, the Minister consulted the Minister of Agriculture, Fisheries and Food on the subject-matter of the appeal without giving an opportunity to the applicants or other parties represented at the local inquiry to comment on or correct the representations of fact or opinion made by the Minister of Agriculture, Fisheries and Food to the respondent Minister, and the respondent Minister permitted the Minister of Agriculture, Fisheries and Food to make the relevant decision. (ii) The Minister's action by reason of the foregoing matters was outside the powers of the Town and Country Planning Acts, 1947 to 1959. (iii) Alternatively, those Acts impliedly required that the objections of the applicants, which were fully represented at the local inquiry, should be fairly and properly considered by the Minister who should fairly and properly give effect to his consideration of those objections and neither requirement was complied with by the Minister.

C D E F G

At the hearing of the motion by SALMON, J., it was agreed by consent of counsel for the applicants and counsel for the Minister that, before the merits of the motion were considered, the judge should determine a preliminary issue, namely, whether the applicants were persons "aggrieved" within the meaning of s. 31 of the Town and Country Planning Act, 1959, since, if they were not, the applicants had no right of appeal under that section against the Minister's action. The case is accordingly reported on this issue alone. The relevant facts and the relevant provisions of s. 31 of the Act of 1959 are set out in the judgment of SALMON, J., post.

H I

F. H. B. W. Layfield for the applicants.

J. R. Cumming-Bruce for the Minister of Housing and Local Government, the respondent.

C. H. Beaumont watched the proceedings for D. Heath & Sons, Ltd.

Cur. adv. vult.

* This Act came into force one month after it had, on July 16, 1959, received the royal assent.

July 28. **SALMON, J.,** read the following judgment: D. Heath & Sons, Ltd., whom I will call " the operators ", are the owners and occupiers of certain land in Cambridge Road, Stansted Mount Fitchett, in the County of Essex. On Dec. 10, 1957, the operators applied under s. 14 of the Town and Country Planning Act, 1947, to Saffron Walden Rural District Council for permission to develop their land by digging chalk. The rural district council is the local authority to whom the local planning authority (1) has delegated its powers in accordance with Part 3 of the Act of 1947.

On Apr. 1, 1958, the local authority (2) refused this application. Thereafter the operators appealed against this refusal to the Minister of Housing and Local Government pursuant to s. 16 of the Act of 1947. The Minister caused a local inquiry to be held by an inspector appointed by him under s. 15 and s. 16 of the Act into the refusal of permission by the local authority. Amongst those who appeared at this inquiry and called evidence and were heard were the operators, the local authority, and four substantial landowners, the present applicants, whose land is adjacent to that of the operators and is being used for agricultural and residential purposes.

The inquiry was held on Nov. 13, 1958, and on Dec. 1, 1958, the inspector presented a detailed report to the Minister in which he recommended that the operators' appeal should be dismissed. The inspector's recommendation was based principally on his findings that there is a serious risk of chalk dust being deposited on the land of the applicants in quantities which would be detrimental to the user of the land; and that there is no present shortage of chalk in the locality, although chalk produced from the operators' land could be sold profitably. The Minister, however, rejected his inspector's report and decided to allow the appeal. In pursuance of the duty cast on him by s. 12 of the Tribunals and Inquiries Act, 1958, the Minister gave the reasons for his decision, which appear in his letter of Sept. 17, 1959. It appears from this letter that the Minister disagreed with the findings of his inspector to which I have referred.

The local authority, whose contentions at the inquiry were substantially the same as those of the applicants, do not challenge the Minister's decision. The applicants, however, seek to do so under s. 31 of the Town and Country Planning Act, 1959. The material words of this section are as follows:

> "(1) If any person . . . (b) is aggrieved by any action on the part of the Minister to which this section applies and desires to question the validity of that action, on the grounds that the action is not within the powers of the Act of 1947, of the Act of 1954, or of this Act, as the case may be, or that any of the relevant requirements have not been complied with in relation to that action, he may, within six weeks from the date on which the . . . action is taken . . . make an application to the High Court under this section."

Then sub-s. (4) of s. 31 provides:

> " This section [that is to say, s. 31] applies to action on the part of the Minister, taken after the commencement of this Act, of any of the following descriptions, that is to say . . . (b) any decision of the Minister on an appeal under s. 16 of that Act . . . ",

that is, of the Act of 1947. Then s. 31 (5) provides:

> " On any application under this section the High Court . . . (b) if satisfied that the order or action in question is not within the powers of the Act of 1947, of the Act of 1954, or of this Act, as the case may be, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation thereto, may quash that order or action."

(1) Viz., Essex County Council.
(2) Viz., Saffron Walden Rural District Council acting under powers delegated to them by Essex County Council.

The principal points on which the applicants rely are (i) that it appears from the Minister's letter of Sept. 17, 1959, that in rejecting his inspector's findings of fact he relied on certain subsequent advice and information given to him by the Minister of Agriculture, Fisheries and Food without affording the local authority or the applicants any opportunity of correcting or commenting on this advice and information; (ii) that the Minister's decision is inconsistent with another decision given by him in similar circumstances in relation to land situated close to the land in question. I express no opinion on either of these points, which have not been fully argued, for counsel on behalf of the Minister has taken a preliminary objection. He argues that the applicants are not persons " aggrieved " within the meaning of s. 31 of the Act of 1959.

This case raises, therefore, the perennial question what the legislature means when it uses the words " aggrieved person ". This, however, is the first occasion on which these words have had to be construed under the Town and Country Planning Act, 1959. I would respectfully repeat and adopt what was said by LORD PARKER, C.J., in *Ealing Borough Council* v. *Jones* (3):

> ". . . I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament. As long ago as 1929, LORD HEWART, the Lord Chief Justice (4), referred to the fact that these words were so often used and that if one looked at the cases one could find some cases going one way and some cases going another. Notwithstanding that, the words continued to creep in after 1929 and continue to do so today. This is another case where Parliament has failed to make clear what was really intended by those words."

Superficially there is much to be said for the view that the applicants are aggrieved by the Minister's action. For example, Mr. Buxton, one of the applicants, as the inspector's report shows, has an estate of about 250 acres adjoining the operators' land. He is interested in landscape gardening and ornithology and has spent large sums of money for these purposes on his land. Moreover, he has a herd of pedigree pigs and some breeding mares very close indeed to the site from which the chalk is to be won. I can well understand his annoyance at the Minister's decision to reject recommendations which the Minister's inspector has made after a thorough inspection of the site and the careful investigation of a considerable body of evidence.

If I could approach this problem free from authority, without regard to the scheme of the town and country planning legislation and its historical background, the arguments in favour of the applicants on the preliminary point would be most persuasive, if not compelling. Before the town and country planning legislation any landowner was free to develop his land as he liked, provided he did not infringe the common law. No adjoining owner had any right which he could enforce in the courts in respect of such development unless he could show that it constituted a nuisance or trespass or the like. The scheme of the town and country planning legislation, in my judgment, is to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development.

The legislature made the local planning authority, under the general supervision of the Minister, custodians of the public's rights. It is plain from s. 16 of the Act of 1947 that if the local planning authority grants permission for development, there can be no appeal to the Minister of any kind. It is only if the local planning authority refuse permission or grant it on unacceptable terms that the applicant for planning permission may appeal to the Minister. The Act of 1959 has left this position unchanged. It would be strange indeed if the present applicants, who would have had no right of appeal to the Minister from the local

(3) [1959] 1 All E.R. at p. 287; [1959] 1 Q.B. at p. 390.
(4) In *Sevenoaks Urban District Council* v. *Twynam*, [1929] 2 K.B. 440 at p. 443.

authority's grant of planning permission, nevertheless have the right to apply to the courts from the Minister's grant of planning permission. I doubt whether the present applicants had any legal right to appear at the inquiry. Sections 15 and 16 of the Act of 1947 provide that the Minister shall afford the applicant for planning permission and the local planning authority an opportunity of appearing before and being heard by the inspector. The local planning authority is offered the opportunity, in my view, as custodians of the public right, and the applicant for obvious reasons, but the Act makes no provision for individual members of the public being heard. No doubt it was the practice of inspectors appointed under s. 15 very sensibly to hear any member of the public who desired to be heard.

Under s. 14 of the Act of 1947 anyone could apply for planning permission in respect of a piece of land notwithstanding that he had no interest in this land. It not infrequently occurred that someone intending to make an offer for land would apply for and obtain planning permission and then buy it without the owners having any idea that permission had been granted or even asked for. It was to meet this situation that the legislature enacted s. 37 of the Town and Country Planning Act, 1959. This section makes provision that no application for planning permission by a non-owner shall be entertained unless the owner has been given notice of the application. The section also provides by sub-s. (4) as follows:

> "Where an application for planning permission is accompanied by such a certificate as is mentioned in para. (b), para. (c) or para. (d) of sub-s. (1) of this section, or by a certificate containing a statement in accordance with para. (b) of the last preceding subsection . . . (b) the local planning authority, in determining the application, shall take into account any representations relating thereto which are made to them, before the end of the period specified in the preceding paragraph, by any person who satisfies them that he is an owner of any of the land to which the application relates or that he is the tenant of an agricultural holding any part of which is comprised in that land."

Then s. 37 (5) provides:

> "The preceding provisions of this section shall apply, with the necessary modifications, . . . (b) in relation to an appeal to the Minister under s. 16 of [the Act of 1947] from a decision of the local planning authority, as they apply in relation to an application for planning permission which falls to be determined by the local planning authority."

In my judgment, anyone given a statutory right to have his representations considered by the Minister impliedly has the right that the Minister, in considering those representations, shall act within the powers conferred on him by the statute and should comply with the relevant requirements of the statute. If these rights are infringed, then any such person is an aggrieved person within the meaning of s. 31 of the Town and Country Planning Act, 1959. In my view, the applicants for planning permission, the local authority and any owner who has made a representation to the Minister under s. 37 of the Act of 1959, are persons to whom s. 31 applies. Subsection (2) (b) of s. 31 expressly confers power on the local planning authority. In my view this subsection was enacted in case it should be held that the local planning authority is excluded from the ambit of aggrieved persons by previous decisions under other Acts.

In my judgment, the Minister's action which these applicants seek to challenge infringed none of their common law rights. They have no rights as individuals under the statutes. Accordingly, in my judgment, none of their legal rights has been infringed, and in these circumstances it could not, in my view, have been the intention of the legislature to enable them to challenge the Minister's decision in the courts. Ever since the judgment of JAMES, L.J., in the well-known case

Re Sidebotham, Ex p. Sidebotham (5), it has been generally accepted that the words " person aggrieved " in a statute connote the person with a legal grievance, that is to say, someone whose legal rights have been infringed. JAMES, L.J., said (6):

> ". . . the words ' person aggrieved ' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A ' person aggrieved ' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

On the other hand, there is a line of authority dealing with the prerogative order of certiorari which suggests that in some cases the words " person aggrieved " may have a very wide connotation. See, for example, *R.* v. *Surrey JJ.* (7) and *R.* v. *Taunton St. Mary* (*Inhabitants*) (8). This line of authority has not, however, been cited by counsel for the applicants and I have heard no argument in relation to it. It may be that the words " person aggrieved " for the purposes of certiorari do not necessarily mean the same as " person aggrieved " within the meaning of s. 31 of the Act of 1959.

As was pointed out by LORD HEWART, C.J., in *Sevenoaks Urban District Council* v. *Twynam* (9), to which I have referred:

> ". . . as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes . . . The problem with which we are concerned is not, what is the meaning of the expression ' aggrieved ' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

As LORD PARKER, C.J., points out in *Ealing Borough Council* v. *Jones* (10), one may look at the authorities only to see what the general principles are that can be extracted from them as a guide to the courts in approaching the question as to what the words " aggrieved person " mean in any particular statute.

I think that the guiding principle is that laid down by JAMES, L.J. (11), to which I have already referred, and which, as far as I know, has never been challenged: the words " person aggrieved " in a statute connote some person with a legal grievance.

Apart from authority and the scheme of the town and country planning legislation, there is, as I have already indicated, much to be said for the view that in ordinary parlance the applicants whose amenities may be spoilt and the value of whose land may be diminished by the proposed development are persons aggrieved by the Minister's decision. I, however, must apply the principle to which I have referred and I must have regard to the general scheme of the legislation. The relevant statutes, in my judgment, confer no right on the applicants as individuals. Accordingly, none of their legal rights has been infringed and no legal obligation has been imposed on them by the Minister's action.

I have, accordingly, come to the conclusion that I must decide this preliminary point against the applicants.

[HIS LORDSHIP awarded the Minister costs against the applicants but declined, as against them, to grant D. Heath & Sons, Ltd., on whom the notice of motion

---

(5) (1880), 14 Ch.D. 458. (6) (1880), 14 Ch.D. at p. 465.
(7) (1870), L.R. 5 Q.B. 466. (8) (1815), 3 M. & S. 465. (9) [1929] 2 K.B. at p. 443.
(10) [1959] 1 All E.R. at p. 288; [1959] 1 Q.B. at p. 390.
(11) In *Re Sidebotham, Ex p. Sidebotham*, (1880), 14 Ch.D. at p. 465.

was served by the applicants as a matter of courtesy, their costs of attending the hearing by counsel.]

Motion dismissed.

Solicitors: *Barlow, Lyde & Gilbert*, agents for *H. Stanley Tee*, Bishop's Stortford (for the applicants); *Solicitor, Ministry of Housing and Local Government* (for the Minister of Housing and Local Government, the respondent); *Daybell, Watts-Jones & Co.* (for D. Heath & Sons, Ltd.).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Costs—Taxation—Review by court—Procedure in Probate, Divorce and Admiralty Division—Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2, r. 35.

The President has given the following directions:

1. Every application in the Probate, Divorce and Admiralty Division under r. 35 of the Supreme Court Costs Rules, 1959*, to review a registrar's decision in respect of the taxation of a bill of costs shall be made to a judge nominated by the President.

2. Every application shall be made by summons to be served within three days after issue, and returnable on a day to be appointed by the judge.

3. Every summons must contain full particulars of the item or items or the amount allowed in respect of which the application to review is made.

4. Each party shall within four days after service of the summons lodge with the chief clerk of the Contentious Department all documents produced in evidence by that party at the hearing before the registrar relating to the item or items or the amount allowed; and the chief clerk shall then deliver these documents and the summons, objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the registrar to the judge.

5. When appointing a day for the hearing of the summons the judge may decide to exercise his power to appoint two or more assessors to sit with him at the hearing, and if the judge does so decide, the chief clerk of the Contentious Department shall give notice of the decision to each of the parties and will, in any case, give to each of them notice of the day appointed by the judge for the hearing of the summons.

6. If the judge decides to appoint assessors the party applying shall within four days after the receipt of notice thereof lodge with the chief clerk of the Contentious Department two or more copies, as the case may be, of the summons, objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the registrar for the use of the assessors.

7. When each of the assessors has signified his acceptance of his appointment the chief clerk of the Contentious Department shall send to each of them the notice of his appointment including the day appointed for the hearing of the summons, and a copy of the documents mentioned in para. 6.

B. LONG,
Senior Registrar.

Oct. 12, 1960.

---

* The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

A

PRACTICE DIRECTION.

CHANCERY DIVISION.

Practice—Order—Drawing up procedural orders made in chambers—Chancery Division.

B With effect from Monday, Nov. 7, 1960, the following procedural orders made in chambers will, unless otherwise directed at the time of making the order, be drawn up by the solicitor entitled to the carriage of the order, passed in the chambers of the master by whom the order was made, and entered by the entry clerk in Room 136:—

Order adding defendant (5s.)
C Order consolidating actions (5s.)
Order 30 directions (5s.)
Order for examination of judgment debtors (10s.)
Order for examination of witnesses (10s.)
Order giving leave to defend (10s.)
Order to deliver interrogatories (5s.)
D Order for particulars (5s.)
Order for substituted service (5s.)
Order for transfer of action to county court or district registry (5s.)
Order for appointment of guardian ad litem (5s.)
Order for appointment of new next friend (5s.)
Order to set aside writ or originating summons (10s.)
E Order for the withdrawal of a solicitor (10s.)
Order for third-party directions (5s.)
Order for time (5s.)
Order to discharge or vary order on application by third party (5s.)
Order to dismiss for want of prosecution (10s.)
Order for further discovery (5s.)
F Order directing production of documents and inspection (5s.)
Order giving leave to serve out of the jurisdiction (5s.)
Order for issue of letter of request to take evidence abroad (10s.)
Order for appointment of special examiner to take evidence abroad (where no convention) (10s.)
Order for issue between judgment creditor and garnishee (10s.)
G Order dismissing summons generally (10s.)

(NOTE:—Where any of the above orders marked with a 5s. fee are made on a summons bearing a 10s. stamp, no fee will be payable on the order.)

When a procedural order is made by a master, the solicitor entitled to the carriage of the order will prepare and lodge with the master's summons clerk two engrossments (original and duplicate) of the order as proposed to be
H passed and entered together with the summons and the evidence on which the order was made. The engrossments must be typed on foolscap paper or on printed copies of Form 2 of Appendix K of the ANNUAL PRACTICE. The summons clerk will give the solicitor an appointment to attend before the master's principal clerk to pass the order.

I If on the appointment before him the principal clerk is satisfied that the proposed order gives effect to that made by the master he will direct the solicitor having the carriage of the order to stamp one of the engrossments (if a fee is payable on the order). The principal clerk will then add his initials to both copies.

The summons on which the order was made will be numbered serially by the summons clerk and filed in chambers. The serial number of the summons will be inserted in the left-hand margin of the original and duplicate order by the

summons clerk. The summons clerk will then enter details of the order in an order book which he will maintain, setting out the following details:—

(a) Title of cause or matter
(b) Reference number of proceedings
(c) Date of order
(d) Date of initialling by principal clerk
(e) Serial number of summons
(f) Fee paid (if any).

The necessary statistical entries will also be recorded in the statistical register by the summons clerk.

The summons clerk will transmit any original affidavits lodged in support of the application on which the order was made to the Filing and Record Department of the Central Office.

The order will then be transmitted by the summons clerk to the entry clerk who will enter the order in the same way as orders drawn up in the Registrars' Office.

The sealed duplicate order will normally be ready for collection from the Entry Seat on the day following the appointment before the principal clerk at which the order was passed.

Any party who desires to amend the order as entered shall, within four days after service on him of the order, take an appointment before the principal clerk for this purpose, and shall serve notice of such appointment on the other parties. Without prejudice to the right of a party to adjourn to the master, the principal clerk may, if he thinks proper so to do, refer the question to the master for his decision.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

Oct. 17, 1960.

PRACTICE DIRECTION.

CHANCERY DIVISION.

Practice—Order—Minutes of order drawn by counsel—Consent orders—Chancery Division.

The following directions have been given by the judges of the Chancery Division.

1. Where minutes of order have been settled by counsel the registrar should not interfere in any way with the minutes unless it appears to him that they do not carry out the intention of the judge or are defective in form. If the registrar is not satisfied he should refer the minutes back to counsel through the solicitors with his proposed amendments. Should the registrar and counsel be unable to agree the minutes, the matter should be mentioned to the judge.

2. In the case of terms scheduled to a consent order these terms represent an arrangement between the parties, and the registrar is not concerned to approve them, although he may properly offer suggestions on them if it appears to him that they may cause some difficulty.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

Oct. 17, 1960.

DIXON *v.* CEMENTATION CO., LTD.

[Court of Appeal (Lord Evershed, M.R., Ormerod and Devlin, L.JJ.), May 20, 1960.]

Safe System of Work—Permitting unsafe system to be in operation—Whether workman required to plead and prove alternative system of work which would have been safe.

The plaintiff, in the course of his employment, was holding a piece of wood in position so that a fellow workman could hammer a nail into it. Owing to the nature of the work, the other workman had to lean over, above the piece of wood, holding the nail, and the plaintiff's face was about a foot or so from the nail. The other workman struck the nail with a hard blow but did not strike it directly, and the nail flew out, hitting the plaintiff in the eye. As a result of the accident the plaintiff lost the eye. The system of work used on this occasion had been used by the employers' workmen for some twenty years, and there had been some previous occasions when some facial injuries had been caused to workmen. In an action against the employers for damages for personal injuries, the plaintiff, in his statement of claim, alleged that a safe system of work would have avoided the accident. Judgment was given for the plaintiff. On appeal, it was contended by the defendants that, where failure to provide a safe system was pleaded, it was essential for the plaintiff to set out what the proper system of work was.

Held: in a case such as the present case, it was not essential for the plaintiff to plead, and prove, what the safe system would be; and, in the circumstances, the appeal would be dismissed.

Dictum of Viscount Simon, L.C., in *Colfar* v. *Coggins & Griffith (Liverpool), Ltd.* ([1945] 1 All E.R. at p. 328) explained.

Appeal dismissed.

[Editorial Note. The dictum of Viscount Simon, L.C., in *Colfar* v. *Coggins & Griffith (Liverpool), Ltd.* ([1945] 1 All E.R. at p. 328), which was relied on by the defendants in the present case, was considered by Lord Oaksey in *General Cleaning Contractors, Ltd.* v. *Christmas* ([1952] 2 All E.R. at p. 1115), who expressed the view that a plaintiff could succeed in an action for breach of duty by not adopting a safe system of work without proving what system would be safe; c.f., however, per Lord Tucker at pp. 1117, 1120.

As to a master's duty to provide a safe system of working, see 25 Halsbury's Laws (3rd Edn.) 512, para. 979; and for cases on the subject, see 34 Digest 194, 195, *1583-1596*.]

Case referred to:

Colfar v. *Coggins & Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 326; [1945] A.C. 197; 114 L.J.K.B. 148; 172 L.T. 205; 2nd Digest Supp.

Appeal.

This was an appeal by the defendants from a judgment of Diplock, J., dated July 13, 1959, in an action for damages for personal injuries sustained by the plaintiff in an accident in the course of his employment with the defendants. The statement of claim contained three allegations of negligence on the part of the defendants, followed by the statement: "A safe system of work would have avoided the matters hereinbefore set out."

The facts are stated in the judgment of Devlin, L.J.

Marven Everett, Q.C., and *A. G. Sharp* for the defendants.

Geoffrey Veale, Q.C., and *H. G. Bennett* for the plaintiff.

DEVLIN, L.J., delivering the first judgment at the request of LORD EVERSHED, M.R., said: This is an appeal from a judgment of DIPLOCK, J., given at Leeds Assizes on July 13, 1959, by which he awarded the plaintiff the sum of £2,580 damages against his employers, the defendants, for the loss of an eye. The plaintiff, in the course of his work, had to work with another man, a fellow workman, in an unusual position. The plaintiff was holding a piece of wood in position and the other workman was holding a nail and was banging it in, and was doing so from on top of his work and leaning over. They were working in a tunnel and that was why they had to work in this position. I do not think that it is really necessary to describe the nature of the work more than that. The essential matter which emerges from it is the odd position that had to be assumed. The fellow workman, Mr. Beevers, struck the nail which he was holding twice and, thinking that he had got it sufficiently in position so as to drive it in, struck it a hard blow. Unfortunately, he did not strike it directly and the nail flew out and flew into the eye of the plaintiff, who was below holding the wood in position. Some suggestion was made that there was contributory negligence on the part of the plaintiff in that he had been told—obviously a wise precaution—to keep his head down while the hammering was going on, but he looked up. He said that he looked up because he thought that the pause by Mr. Beevers meant that the job had been finished. The allegation of contributory negligence has not been pursued and there is really nothing in it. No allegation of negligence has been made against Mr. Beevers. Therefore, the case against the defendants must be that they permitted an unsafe system of work to be in operation.

An unsafe system of work is rather a grandiose expression, although it is a traditional one, to use for a case of this type. It might be simpler to say—and I think that it would be equally correct—that the defendants allowed an unsafe practice to be adopted, one which they knew or ought to have known to be unsafe, and one which they could have altered. That is the case and the only case against them. The essence of the unsafety is the position in which the two men were and the fact that the plaintiff's face or head had to be a distance of about a foot or so from the nail which was being hammered in position, so that, if he did look up in the way in which he did, then there was danger if the nail flew off. Most unfortunately, it hit the plaintiff in the eye: but there was at least a danger that it would fly off and do some facial injury to him—a danger which, it is said on behalf of the plaintiff, the defendants ought to have foreseen and guarded against.

Counsel for the defendants has based himself on the dictum of VISCOUNT SIMON, L.C., in *Colfar* v. *Coggins & Griffith (Liverpool), Ltd.* (1) that, in a plea of this sort (that is, a lack of a safe system), it is essential for the plaintiff to set out what the proper system of work is and in what respect it has not been observed. VISCOUNT SIMON, L.C., said this with regard to the plea of failure to provide and maintain a proper system of work:

> " To raise this issue, the statement of claim ought to set out, so far as relevant, what the proper system of work was, and in what relevant respects it is alleged that it was not observed. Instead of this, there is merely an allegation that the bag of salt fell on the plaintiff ' owing to the negligence of the defendants ' followed by particulars many of which cannot be regarded as alleging defects of ' system ' at all."

It is clear that in the case with which VISCOUNT SIMON, L.C., was dealing, there was no proper particularisation of the allegation of negligence that the bag of salt fell. It is in relation to facts of that sort that VISCOUNT SIMON'S dictum must be considered. I do not think that it means that, in every case where an unsafe system of working is alleged, it is necessary for the plaintiff to undertake

(1) [1945] 1 All E.R. at p. 328; [1945] A.C. at p. 203.

A the burden of pleading, and proving, an alternative system of work which could have been adopted and which would have been safe. That is for the employer to provide. There may be cases in which the plaintiff will not get very far with an allegation of unsafe system of work unless he can show some practicable alternative, but there are also cases—and I think that this is one of them—in which a plaintiff can fairly say: "If this is dangerous, then there must be some other B way, that can be found by a prudent employer, of doing it, and it is not for me to devise that way or to say what it is."

On behalf of the defendants it is said that this is a practice which has gone on for twenty years and no reasonable employer could be expected to have thought that there was anything dangerous about it. On behalf of the plaintiff there is a reply to that, namely, that the evidence shows that there had been cases C where some facial injury had been caused; the fact that the plaintiff's face had to come into such close proximity to the nail meant that some precautionary measures ought to be taken. It may be that Mr. Beevers, who was only a general labourer, should not have been employed, and that the precaution of employing a skilled workman to do the job, one who would be very much less likely to make a bosh shot, would have been sufficient. As against that, it is said that hammering D a nail is a very ordinary thing and it is difficult to draw the line between the professional and the amateur in such a matter. This is a case in which there are considerations to be borne in mind on both sides. They have been put effectively on the one side by counsel for the defendants, and, on the other side, by counsel for the plaintiff. I have indicated some of them and I need not summarise them further. For my part, having considered them, and finding this to be a nicely E balanced case, I am not disposed to disturb the finding on this point of the learned judge at the trial, and, therefore, I would dismiss the appeal.

ORMEROD, L.J.: I agree and I would also dismiss this appeal for the same reasons.

LORD EVERSHED, M.R.: I am also of the same opinion. The arguments F presented to us, as DEVLIN, L.J., has pointed out, have been factual and forceful, but I agree with my brethren that, on the whole, it would not be right to disturb the learned judge's view.

Appeal dismissed.

Solicitors: *L. Bingham & Co.*, agents for *James Chapman & Co.*, Manchester (for the defendants); *Goldingham, Wellington & Co.*, agents for *Morrish & Co.*, Leeds (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

LEE *v.* LEE'S AIR FARMING, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest), July 6, 7, October 11, 1960.]

Company—Director—Governing director—Contract of service—Dual capacities as director and servant—Governing director killed while piloting company's aircraft under alleged contract of service—Workman's compensation claim—Whether sole governing director and principal shareholder could also be working as servant of company under contract of service negotiated by him with company.

Privy Council—New Zealand—Workman's compensation—Workman—Governing director of company exercising full and unrestricted control of company's affairs but also working for company as pilot and being paid wages—Death of governing director while acting as pilot on company's business—Whether contract of service with company—New Zealand Workers' Compensation Act, 1922 (1922, *No.* 39), *as amended, s.* 2.

In 1954 the appellant's husband, L., formed the respondent company for the purpose of carrying on the business of aerial top-dressing. Of the three thousand £1 shares forming the nominal share capital of the company, L. was allotted 2,999 shares. He was appointed governing director of the respondent company and pursuant to art. 33 of the articles of association was employed as chief pilot of the company at a salary arranged by him. Article 33 provided that in respect of such employment the rules of law applicable to the relationship of master and servant should apply between the company and him. In his capacity as governing director and controlling shareholder, L. exercised full and unrestricted control of the affairs of the respondent company and made all decisions relating to contracts for aerial top-dressings. Different forms of insurance cover for the benefit of the respondent company and its employees were arranged by the company secretary, and certain personal accident policies were taken out in favour of L., the premiums in respect of which were paid by the respondent company and debited to L.'s personal account in the books of the company. The respondent company owned an aircraft equipped for top-dressing and L. was a duly qualified pilot. In March, 1956, L. was killed while piloting the aircraft during the course of aerial top-dressing and the appellant claimed compensation under the New Zealand Workers' Compensation Act, 1922, s. 3 (1)*, under which, if personal injury by accident arising out of and in the course of any employment to which the Act applied was caused to a worker, the employer was liable to pay compensation. By s. 2 of that Act, " worker " was defined as " any person who has entered into or works under a contract of service . . . with an employer, whether by way of manual labour, clerical work, or otherwise, and whether remunerated by wages, salary, or otherwise ".

B C D E F G H

Held: L. was a " worker " within the meaning of s. 2 and the appellant was entitled to compensation under the Act, since L.'s special position as governing director and principal shareholder did not preclude him from making on the company's behalf a contract of employment with himself, nor preclude him from entering into, or working in the capacity of servant under, a contract of service with the company.

I

Salomon v. *Salomon & Co.* ([1897] A.C. 22) applied.

Appeal allowed.

[Editorial Note. The decision in *Re Beeton & Co., Ltd.* ([1913] 2 Ch. 279) illustrates in English law the employment of a director under contract in a dual capacity, and the judgment of SIMONDS, J., in *Re T. N. Farrer, Ltd.* ([1937]

* The terms of s. 3 (1) are printed at p. 422, letter A, post.

2 All E.R. at p. 508), citing *Re Anglo-Austrian Printing & Publishing Union, Isaacs' Case* ([1892] 2 Ch. 158), exemplifies the ascertainment of the terms of a contract of service from articles of association.

As to a director being a servant of a company in another capacity, see 6 HALSBURY'S LAWS (3rd Edn.) 666, para. 1315; and for cases on the subject, see 9 DIGEST (Repl.) 563, *3718-3720.*

As to a company being a separate entity, see 6 HALSBURY'S LAWS (3rd Edn.) 11, para. 1; and for cases on the subject, see 9 DIGEST (Repl.) 30, 31, *11-18.*]

Cases referred to:

Booth v. *Helliwell,* [1914] 3 K.B. 252; 83 L.J.K.B. 1548; 111 L.T. 542; 78 J.P. 223; 9 Digest (Repl.) 532, *3502.*

Brown v. *Okiwi Farms, Ltd.,* [1957] N.Z.L.R. 1073; 3rd Digest Supp.

Fowler v. *Commercial Timber Co., Ltd.,* [1930] All E.R. Rep. 224; [1930] 2 K.B. 1; 99 L.J.K.B. 529; 143 L.T. 391; 9 Digest (Repl.) 557, *3687.*

Inland Revenue Comrs. v. *Sansom,* [1921] 2 K.B. 492; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20; 28 Digest (Repl.) 396, *1746.*

Salomon v. *Salomon & Co., Salomon & Co.* v. *Salomon,* [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 9 Digest (Repl.) 30, *11.*

Short v. *Henderson* (*J. & W.*), *Ltd.,* 1946 S.C. (H.L.) 24; 2nd Digest Supp.

Simmons v. *Heath Laundry Co.,* [1910] 1 K.B. 543; 79 L.J.K.B. 395; 102 L.T. 210; 3 B.W.C.C. 200; 34 Digest 21, *15.*

Appeal.

Appeal by Catherine Lee from a judgment of the Court of Appeal of New Zealand (GRESSON, P., NORTH and CLEARY, JJ.), dated Dec. 18, 1958, on a Case Stated by the Compensation Court of New Zealand (ARCHER, J.) pursuant to r. 5 of c. 8 of the New Zealand Workers' Compensation Rules, 1939, in an action brought by the appellant under the New Zealand Workers' Compensation Act, 1922, as amended, claiming compensation of £2,430 against the respondent company in respect of the death of her husband, Geoffrey Woodhouse Lee, which she alleged arose out of and in the course of his employment by the respondent company. She also claimed a sum of £50 for funeral expenses. The facts are set out in the judgment of the Board.

A. C. Perry (of the New Zealand Bar) and *J. G. Le Quesne* for the appellant.
Martin Jukes, Q.C., and *J. H. C. Goldie* for the respondent company.

LORD MORRIS OF BORTH-Y-GEST: The judgment of the Court of Appeal of New Zealand, from which this appeal is brought, was given as their opinion on a Case Stated by the judge of the Compensation Court. It is provided by r. 5 of c. 8 of the Workers' Compensation Rules, 1939 that:

> "In any action or other proceeding the court or a judge thereof may state a Case for the opinion of the Court of Appeal on any point of law arising in the action or proceeding."

This procedure was adopted by the judge of the Compensation Court in the action which was brought by the appellant in respect of the death of her husband. She claimed £2,430 compensation on behalf of herself and her four infant children and she also claimed a sum for funeral expenses. The claim was made in reliance on the provisions of the Workers' Compensation Act, 1922, as amended by later statutes. The appellant's late husband died in an aircraft accident in Canterbury, New Zealand, on Mar. 5, 1956, while engaged in the capacity of an aircraft pilot in aerial top-dressing operations. The claim of the appellant rested on her allegation that at the time of his death her husband was a "worker", in that he was employed by the respondent company. The respondent company denied that the deceased was a "worker" within the meaning of the Workers' Compensation Act, 1922, and its amendments. It is provided, by s. 3 (1) of the Act, as follows:

A

" If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall be liable to pay compensation in accordance with provisions of this Act."

Under the relevant part of the statutory definition, the term " worker " means

B

" any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether remunerated by wages, salary, or otherwise."

The denial of the respondent company that the deceased was a " worker " was based on the fact that the deceased was, at the time of the accident, the controlling shareholder and governing director of the respondent company. In 1954 the deceased had instructed a firm of public accountants in Christchurch to form a company for the purpose of conducting an aerial top-dressing business. On Aug. 5, 1954, " Lee's Air Farming, Ltd.", the respondent company, was incorporated. The nominal capital of the respondent company was £3,000 divided into three thousand shares of £1 each. The deceased was allotted 2,999 shares; the remaining share, according to the memorandum of association, was to be taken by a solicitor. The articles of association included the following:

C

D

" 32. Subject as hereinafter provided Geoffrey Woodhouse Lee shall be and he is hereby appointed governing director and subject to the provisions of cl. 34 hereof shall hold that office for life and the full government and control of the company shall be vested in him and he may exercise all the powers and authorities and discretions vested in the directors generally and that notwithstanding he is the sole director holding office and he may exercise all the powers of the company which are not by statute required to be exercised by the company in general meeting and any minute entered in the minute book of the company's proceedings signed by the governing director shall, in any matter not expressly required by statute to be done by the company in general meeting have the effect of a resolution of the company.

E

F

" 33. The company shall employ the said Geoffrey Woodhouse Lee as the chief pilot of the company at a salary of £1,500 per annum from the date of incorporation of the company and in respect of such employment the rules of law applicable to the relationship of master and servant shall apply as between the company and the said Geoffrey Woodhouse Lee.

G

" 34. The governing director may retire from office upon giving one month's notice in writing of his intention so to do, and the office of governing director shall be vacated if the governing director (a) ceases to be a director by virtue of s. 148 of the [Companies] Act [, 1933]; or (b) becomes bankrupt or enters into a composition with his creditors; or (c) becomes prohibited from being a director by reason of any order made under s. 216 or s. 268 of the Act; or (d) becomes of unsound mind or becomes a protected person under the Aged and Infirm Persons Protection Act, 1912; or (e) becomes incapable of carrying out the duties of a director.

H

" 35. The governing director may at any time convene a general meeting of the company.

" 36. The governing director shall not be disqualified by his office from holding any office or place of profit in the company or from contracting with the company whether as vendor, purchaser or otherwise, nor shall any such contract or arrangement or any contract or arrangement entered into by or on behalf of the company in which the governing director shall be interested be avoided nor shall the governing director be liable to account for any profit realised by any such contract or arrangement by reason of the governing director holding such office or of the fiduciary relations thereby established.

I

DIRECTORS

" 37. If and whenever there shall cease to be a governing director the number of directors of the company shall not be more than four or less than two who shall forthwith be appointed or elected by the company in general meeting.

" 38. A director need not hold any share qualification in the capital of the company.

" 43. No director shall be disqualified by his office from holding any office or place of profit under the company or under any company in which this company shall be a shareholder or otherwise interested or from contracting with the company either as vendor purchaser or otherwise nor shall any such contract or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be avoided nor shall any director be liable to account to the company for any profit arising from any such office or place of profit or realised by any such contract or arrangement by reason only of such director holding that office or of the fiduciary relations thereby established but it is declared that the nature of his interest must be disclosed by him as provided by s. 155 of the Companies Act, 1933."

The deceased was appointed governing director of the respondent company and the secretary was Mr. Sugden, a public accountant, and a member of the firm of public accountants who had been instructed by the deceased to form the respondent company. On Aug. 16, 1954, art. 33 was amended by deleting the words " a salary of £1,500 per annum from the date of incorporation of the company " and inserting the words " a salary to be arranged by the governing director ". That resolution was effected by a minute signed by the deceased.

The Case Stated recorded that one of the assets of the respondent company was an " Auster " aircraft equipped for top-dressing, and that the deceased was a duly qualified pilot. The Case further recorded that, while the respondent company was in the course of being incorporated, Mr. Sugden negotiated and obtained different forms of insurance cover for the benefit of the respondent company and its employees. Mr. Sugden supplied to the insurance brokers an employers' statement of wages relative to employers' liability insurance pursuant to s. 8 of the Workers' Compensation Amendment Act, 1950, and duly received an assessment of premium. Certain personal accident policies were taken out in favour of the deceased; the premiums in respect of these were paid by the respondent company and were debited to the personal account of the deceased in the books of the respondent company. Under the provisions of the Workers' Compensation Amendment Act, 1950, every employer of a worker in any employment to which the Act of 1922 applied was (subject to certain exceptions) under obligation to insure with an authorised insurer against his liability to pay compensation and was required to deliver a statement of wages to such authorised insurer.

Certain other findings recorded in the Case Stated were as follows:

" 10. Following its incorporation the [respondent] company started operating its aerial top-dressing business and the deceased worked for the [respondent] company as its pilot continuously thereafter until his death on Mar. 5, 1956.

" 11. On July 8, 1955, the said Clyde Leslie Sugden forwarded to the said brokers an employers' statement of wages for the year ended Mar. 31, 1955, and on the same date wrote a letter to the said brokers discussing the apportionment of the salary of the deceased. A copy of the said letter is annexed hereto. The relevance of the said letter was that a higher premium was payable on that part of the salary of the deceased attributable to his work as a pilot.

" 14. In his capacity as governing director and controlling shareholder of the [respondent] company the deceased exercised full and unrestricted control of the affairs of the [respondent] company and he expressly or impliedly authorised the acts and conduct of any other employee or officer of the [respondent] company including the said Clyde Leslie Sugden.

" 15. In his capacity as aforesaid the deceased made all decisions relating to contracts for aerial top-dressing, contract prices, the manner in which the [respondent] company's aircraft was to be employed and the methods to be employed in carrying out the work of the [respondent] company, and in general he exercised complete and unfettered control over all the operations of the [respondent] company at all material times.

" 16. On Mar. 5, 1956, while the deceased was piloting the said Auster aircraft during the course of aerial top-dressing operations in Canterbury the said aircraft stalled and crashed to the ground and burst into flames and was destroyed and the said deceased was killed as a result of the crash.

" 17. The [appellant] and her said four infant children were totally dependent on the deceased and the salary payable to the deceased up to the time of his death was such that if the [respondent] company is liable in this action it must pay the said sums of £2,430 and £50 claimed by the [appellant] in the action."

The question which was raised for the opinion of the Court of Appeal was whether at the time of his accident the deceased was employed by the respondent company as a " worker " within the meaning of the Workers' Compensation Act, 1922, and its amendments. The Case Stated came on for hearing in the Court of Appeal of New Zealand (GRESSON, P., NORTH and CLEARY, JJ.) on Nov. 27, 1958, and the reasons for judgment were delivered by NORTH, J., on Dec. 18, 1958. In the course of his judgment, the learned judge said (1):

" We interpret the question to mean whether on the admitted facts of this case the deceased could hold the office of governing director of the company and also be a servant of the company."

Their Honours answered " the question in its amended form " in the negative. The formal judgment records the judgment in these words:

" This court doth answer in the negative the question raised in the Case Stated and as amended by this court namely whether on the admitted facts of the case the deceased could hold the office of governing director of the company and also be a servant of the company."

The Court of Appeal recognised that a director of a company may properly enter into a service agreement with his company, but they considered that, in the present case, inasmuch as the deceased was the governing director in whom was vested the full government and control of the respondent company he could not also be a servant of the respondent company. After referring in his judgment to the delegation to the deceased of substantially all the powers of the company, NORTH, J., said (2):

" These powers were moreover delegated to him for life and there remained with the company no power of management whatsoever. One of his first acts was to appoint himself the only pilot of the company, for although art. 33 foreshadowed this appointment, yet a contract could only spring into existence after the company had been incorporated. Therefore, he became in effect both employer and worker. True, the contract of employment was between himself and the company: see *Booth* v. *Helliwell* (3), but on him lay the duty both of giving orders and obeying them. In our view, the two offices are clearly incompatible. There could exist

(1) [1959] N.Z.L.R. at p. 397. (2) [1959] N.Z.L.R. at p. 399.
(3) [1914] 3 K.B. 252.

no power of control and therefore the relationship of master-servant was not created."

The substantial question which arises is, as their Lordships think, whether the deceased was a " worker " within the meaning of the Workers' Compensation Act, 1922, and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the respondent company. On this view, it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged to the respondent company and when he was carrying out the operation of top-dressing farm lands from the air. He was paid wages for so doing. The respondent company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the respondent company alone. It cannot be suggested that, when engaged in the activities above referred to, the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the respondent company. That relationship came about because the deceased, as one legal person, was willing to work for and to make a contract with the respondent company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor, in their Lordships' view, could it reasonably have been suggested) that the respondent company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity, their Lordships see no reason to challenge the validity of any contractual obligations which were created between the respondent company and the deceased. In this connexion, reference may be made to a passage in the speech of LORD HALSBURY, L.C., in *Salomon* v. *Salomon & Co.* (4):

> " My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered."

A similar approach was evidenced in the speech of LORD MACNAGHTEN when he said (5):

> " It has become the fashion to call companies of this class ' one man companies '. That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the [Companies] Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors."

Nor, in their Lordships' view, were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the respondent company. Always assuming that the respondent company was not a sham, then the capacity of

(4) [1897] A.C. at p. 33. (5) [1897] A.C. at p. 53.

the respondent company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the respondent company in its negotiation. The deceased might have made a firm contract to serve the respondent company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his contract would not have been affected. The circumstance that, in his capacity as a shareholder, he could control the course of events would not in itself affect the validity of his contractual relationship with the respondent company. When, therefore, it is said that " one of his first acts was to appoint himself the only pilot of the company " it must be recognised that the appointment was made by the respondent company and that it was none the less a valid appointment because it was the deceased himself who acted as the agent of the respondent company in arranging it. In their Lordships' view, it is a logical consequence of the decision in *Salomon* v. *Salomon & Co.* (6) that one person may function in dual capacities. There is no reason, therefore, to deny the possibility of a contractual relationship being created as between the deceased and the respondent company. If this stage is reached, then their Lordships see no reason why the range of possible contractual relationships should not include a contract for services and if the deceased, as agent for the respondent company, could negotiate a contract for services as between the respondent company and himself there is no reason why a contract of service could not also be negotiated. It is said that therein lies the difficulty, because it is said that the deceased could not both be under the duty of giving orders and also be under the duty of obeying them. But this approach does not give effect to the circumstance that it would be the respondent company and not the deceased that would be giving the orders. Control would remain with the respondent company, whoever might be its agent to exercise the control. The fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the respondent company to give the orders does not alter the fact that the respondent company and the deceased were two separate and distinct legal persons. If the deceased had a contract of service with the respondent company, then the respondent company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the respondent company is recognised. Just as the respondent company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the respondent company to give an order to the deceased.

An illustration of the validity of transactions entered into between a company comparable to the respondent company and its sole governing director is found in *Inland Revenue Comrs.* v. *Sansom* (7). Sansom sold his business as a going concern to a private company, John Sansom, Ltd. He became the sole governing director of the company and the whole direction, control and management of the business and affairs of the company were in his hands. The company made large profits but no dividends were ever declared. He was the only director. The capital of the company was £25,000 divided into 2,500 shares of £10 each. Sansom held 2,499 shares and had given one share to someone who had previously been employed by him. By its memorandum, the company had power to lend money to such persons and on such terms as it should think fit. The company made what were described in the balance sheets as " loans or advances " to Sansom. They were made without interest and without any security. Sansom was assessed to supertax on the loans; he was so assessed on the basis that the amounts received by him were in fact not " loans or advances " but constituted an income received by him from the

(6) [1897] A.C. 22. (7) [1921] 2 K.B. 492.

company. Sansom appealed to the commissioners. They found that the company was a properly constituted legal entity; that it had power to make loans to such persons and on such terms as it should think fit; that it did make such loans to Sansom; and that such loans did not form part of Sansom's income for the purposes of supertax. On appeal by the Crown on a Case Stated, the judge (ROWLATT, J.) made an order remitting the case to the commissioners to find whether, in point of truth and in fact, the company did carry on the business or whether Sansom really carried it on to the exclusion of the company; whether, if the company did carry on the business, it carried it on as agent for Sansom who was to be regarded as a principal standing outside the company; whether the company carried on the business on its own behalf and for the benefit of the corporators. On appeal to the Court of Appeal, it was held that the findings of the commissioners being on questions of fact were conclusive and involved the negativing of the questions which the judge had directed to be put to them; accordingly, the order remitting the case to the commissioners was discharged. In his judgment, YOUNGER, L.J., said (8):

> "It is conceded that the entire property in this business was bought and paid for by the company, that it passed to the company nearly ten years ago, that every transaction thereafter was carried out by and in the company's name, and has now been carried to completion in a liquidation regularly constituted. In those circumstances unless the company's legal status is to be denied to it—and this is expressly disclaimed by the learned judge—there appears to me to be no room on this case as stated for directing any such inquiry."

He further said (8):

> "In my judgment so long as such a company as this was is recognised by the legislature there can be no reason why the contracts and the engagements made in its name or entered into on its behalf, and themselves ex facie regular, should not everywhere until the contrary is alleged and proved be regarded as the company's . . ."

An illustration of circumstances in which a person may possess dual roles is seen in *Fowler* v. *Commercial Timber Co., Ltd.* (9). In that case, the plaintiff was appointed managing director of the defendant company (which was not a so-called "one man company") for a period of years. The company did not prosper, and the time came when it became clear that, if it were not voluntarily wound-up, it would be compulsorily wound-up. The directors, including the plaintiff, resolved that it was desirable to wind-up the company voluntarily. An extraordinary general meeting was called at which the plaintiff was present, and it was unanimously resolved to wind-up the company voluntarily. The liquidators gave the plaintiff notice that his agreement was terminated and that his services were no longer required. He claimed damages for wrongful dismissal, and it was held that there was no implied term in his agreement that he should lose his right to recover damages for breach of his agreement if the company went into voluntary liquidation with his assent or approval. SCRUTTON, L.J., said (10):

> "Such a complicated term cannot be implied for this reason: the two positions of the plaintiff (1) as managing director, who claims damages for breach of the contract of employment, and (2) as a director and shareholder of the company who thinks that in its own interests the company ought to stop business are quite consistent."

In the present case, their Lordships see no reason to doubt that a valid contractual relationship could be created between the respondent company and

(8) [1921] 2 K.B. at p. 516. (9) [1930] All E.R. Rep. 224; [1930] 2 K.B. 1.
(10) [1930] 2 K.B. at p. 6; [1930] All E.R. Rep. at p. 226.

the deceased, even though the deceased would act as the agent of that company in its creation. If such a relationship could be established, their Lordships see no reason why it should not take the form of a master and servant relationship. The facts of the present case lend no support for the contention that, if a contract existed, it was a contract for services. Article 33 shows that what was designed and contemplated was that, after its incorporation, the respondent company would, as a master, employ the deceased, as a servant, in the capacity of chief pilot of that company. All the facts and all the evidence as to what was actually done point to the conclusion that what purported to be a contract of service was entered into and was operated. Unless this was an impossibility in law, then the deceased was a worker within the statutory definition as referred to above. It is said that the deceased could not both give orders and obey them and that no power of control over the deceased was in existence. It is true that an inquiry whether a person is or is not employed on the terms that he will, within the scope of his employment, obey his master's orders may constitute an important inquiry if it is being tested in a particular case whether there is a contract of service as opposed to a contract for services (see *Simmons* v. *Heath Laundry Co.* (11) and *Short* v. *J. & W. Henderson, Ltd.* (12)). But in the present case their Lordships can find nothing to support the contention that there was, or may have been, a contract for services but not a contract of service.

Ex facie there was a contract of service. Their Lordships conclude, therefore, that the real issue in the case is whether the position of the deceased as sole governing director made it impossible for him to be the servant of the respondent company in the capacity of chief pilot of that company. In their Lordships' view, for the reasons which have been indicated, there was no such impossibility. There appears to be no greater difficulty in holding that a man acting in one capacity can give orders to himself in another capacity than there is in holding that a man acting in one capacity can make a contract with himself in another capacity. The respondent company and the deceased were separate legal entities. The respondent company had the right to decide what contracts for aerial top-dressing it would enter into. The deceased was the agent of the respondent company in making the necessary decisions. Any profits earned would belong to the respondent company and not to the deceased. If the respondent company entered into a contract with a farmer then it lay within its right and power to direct its chief pilot to perform certain operations. The right to control existed even though it would be for the deceased, in his capacity as agent for the respondent company, to decide what orders to give. The right to control existed in the respondent company and an application of the principles of *Salomon* v. *Salomon & Co.* (13) demonstrates that the respondent company was distinct from the deceased. As pointed out above, there might have come a time when the deceased would remain bound contractually to serve the respondent company as chief pilot though he had retired from the office of sole governing director. Their Lordships consider, therefore, that the deceased was a worker and that the question posed in the Case Stated should be answered in the affirmative.

Their Lordships find it unnecessary, as did the Court of Appeal, to review the judgment of the Compensation Court in *Brown* v. *Okiwi Farms, Ltd.* (14), though they agree with the Court of Appeal that the phrase "incorporated partnership" is not a happy one. That case must be regarded as turning on its own facts.

Their Lordships were referred to and have considered certain reported decisions of cases in the Workers' Compensation Commission of New South Wales in which, under comparable legislative provisions, questions have arisen and with varying results have been decided whether persons were employed

(11) [1910] 1 K.B. 543.
(12) 1946 S.C. (H.L.) 24.
(13) [1897] A.C. 22.
(14) [1957] N.Z.L.R. 1073.

under contracts of service. As these cases have not been under review and as they so largely depend on a consideration of their own particular facts and circumstances, their Lordships do not include an analysis of them in this judgment.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the question in the Case Stated should be answered in the affirmative. The respondent company must pay the costs before their Lordships' Board and in the Court of Appeal and the Compensation Court.

Appeal allowed.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the appellant); *Goldingham, Wellington & Co.* (for the respondent company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRICE *v.* ROMILLY.

[QUEEN'S BENCH DIVISION (Diplock, J.), July 11, 12, 1960.]

Agriculture—Agricultural holding—Notice to quit—Consent of tribunal—Failure to comply with notice to remedy breaches of terms of tenancy—Several works required to be done by tenant—Failure of tenant to carry out one of the specified works by date of notice to quit—Whether partial failure in compliance sufficient to render tribunal's consent unnecessary under Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 24 (2) (*d*).

By a notice in writing, dated Apr. 21, 1959, the landlord of an agricultural holding requested the tenant to remedy breaches of his tenancy agreement by Oct. 31, 1959, by carrying out certain works as specified in seven paragraphs of the notice. On Dec. 16, 1959, the landlord served on the tenant a notice to quit which purported to be pursuant to s. 24 (2) (d)* of the Agricultural Holdings Act, 1948. The matter having been referred to arbitration under the Act, the arbitrator, by his award, determined that the notice to quit was properly given because the tenant had failed to comply with a part of the notice of Apr. 21, 1959, in that he had failed to remedy a breach of the terms of his tenancy not inconsistent with the fulfilment of his responsibility to farm in accordance with the rules of good husbandry by carrying out the work specified in para. 1 of the notice. The award did not deal with two of the minor works required by the notice, but, dealing with the other matters, the arbitrator found (a) that two of the breaches referred to had been remedied before the date of the notice to quit, (b) that one breach could not be remedied within the time stated, and (c) that, in regard to certain other requests, the tenant was not in breach of the terms

---

* The Agricultural Holdings Act, 1948, s. 24 (1), as amended by the Agriculture Act, 1958, s. 8 (1) and Sch. 1, para. 8, provides: "Where notice to quit an agricultural holding . . . is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Agricultural Land Tribunal consents to the operation thereof."

Section 24 (2) then provides: "The foregoing subsection shall not apply where . . . (d) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him . . . within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid."

of his tenancy. On a motion by the tenant to set aside the award for an error in law on the face of the award, namely, that a partial failure to comply with a notice to remedy breaches of the terms of a tenancy was insufficient for the purposes of s. 24 (2) (d) of the Act of 1948,

Held: failure by a tenant to comply with one of the requirements of a notice to remedy breaches of terms of a tenancy, if the unfulfilled requirement were not de minimis and were in respect of a term of the tenancy whose performance was not inconsistent with the fulfilment of the tenant's responsibilities to farm in accordance with the rules of good husbandry, constituted sufficient failure in compliance for the purposes of s. 24 (2) (d) of the Agricultural Holdings Act, 1948; accordingly the notice to quit was properly given and the award should stand.

[As to the operation of a notice to quit an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 282-285, paras. 599-601.

As to an error in law on the face of an award, see 2 HALSBURY'S LAWS (3rd Edn.) 60, para. 127.

For the Agricultural Holdings Act, 1948, s. 24 (2) (d), see 28 HALSBURY'S STATUTES (2nd Edn.) 46, 47.]

Motion to set aside award.

This was a motion by the tenant of an agricultural holding to set aside the award of an arbitrator, in an arbitration under the Agricultural Holdings Act, 1948 (as amended by the Agriculture Act, 1958), on the ground that there was an error in law on the face of the award.

By a notice in writing, dated Apr. 21, 1959, and served on the tenant by the landlord's agents, the tenant was requested to remedy alleged breaches of his tenancy agreement by Oct. 31, 1959. The works required to be done were set out in the notice in seven items, item 1 being " Clean out the ditch between ordnance survey Nos. 885 and 918 ". On Dec. 16, 1959, the landlord's agents served on the tenant a notice to quit the holding on Mar. 25, 1961, or at the expiration of the year of his tenancy which should expire next after the end of twelve months from the date of service of the notice. The notice stated that it was given pursuant to the appropriate paragraph of s. 24 (2)* of the Agricultural Holdings Act, 1948, for the reason that the tenant had failed to comply with the notice, dated Apr. 21, 1959, requiring him within a reasonable time, or within such reasonable time as was specified in the notice, to remedy all the breaches by him that were capable of being remedied of the terms and conditions of the tenancy not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry as set out in the notice. The tenant duly served a notice in writing requiring the matter to be determined by arbitration†. The matter having been submitted to arbitration under s. 26 of the Act of 1948 (as substituted by the Agriculture Act, 1958), the arbitrator made his award in these terms:

" 1. I award and determine that the notice to quit the said holding dated Dec. 16, 1959 . . . was properly given.

" 2. I award and determine that at the date of the giving of the said notice to quit the . . . tenant had failed to comply with a part of the notice in writing dated Apr. 21, 1959, requiring him to remedy the breach of the terms of his tenancy not inconsistent with the fulfilment of his responsibility to farm in accordance with the rules of good husbandry by cleaning out the ditch between ordnance survey Nos. 885 and 918 [item 1]."

The award went on to deal with all the other items in the notice of Apr. 21, 1959, except two minor items, namely, item 5 (renewing a short length of fence) and

* Paragraph (d) of s. 24 (2).

† This notice was served pursuant to art. 6 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959 No. 81).

item 7 (re-hanging a number of gates) with which the arbitrator did not deal. By para. 3 of the award the arbitrator found that at the date of the notice to quit the tenant had complied with the requirements of item 2 and part of item 4. In para. 4 he held that the breach referred to in item 3 was not capable of being remedied in the time stated in the notice. He further found, in para. 5 of the award, that one of the requests in item 4 was not in accordance with any term of the tenancy, and, in para. 6, that the request contained in item 6 had been varied by a later agreement and that the tenant had not failed to remedy that breach.

It was contended on behalf of the tenant that a partial failure to remedy breaches of covenant set out in the notice of Apr. 21, 1959, was not sufficient for the purposes of s. 24 (2) (d) of the Act of 1948, and that, as the consent of the Agricultural Land Tribunal had not been obtained, the notice to quit was not valid.

Brian T. Neill for the tenant.
Anthony Cripps, Q.C., and *P. G. Langdon-Davies* for the landlord.

DIPLOCK, J., stated the facts and, after reading the relevant terms of s. 24 (2) of the Agricultural Holdings Act, 1948, the notices of Apr. 21, 1959, and Dec. 16, 1959, and the terms of the arbitrator's award, continued: Counsel for the tenant put his case most strongly on the contention that a partial failure to fulfil or to comply with the requirements of a notice to remedy breaches of covenant was insufficient under s. 24 (2) (d) of the Agricultural Holdings Act, 1948, and that, indeed, is the ground set out in the notice of motion. The point is a very short one and is not susceptible of any great elaboration. I have to ask myself whether a tenant, who has done part of the work set out in a notice but has failed to do another part of it, has

> ". . . failed to comply with a notice in writing . . . requiring him . . . within such reasonable period as was specified in the notice to remedy any breach by the tenant . . . of any term or condition of his tenancy . . ."

It seems to me that, if he has not remedied it and remedied it completely, he has failed to comply with the notice. Counsel for the tenant contended that it was sufficient if there was a " substantial compliance " with the terms of the notice. Those words are not in the Act, and I see no reason for reading them into the Act. No doubt, of course, the de minimis rule would apply, but the Act seems to me to be plain in its terms, and, if a tenant fails to comply fully with the requirements set out in the notice, being requirements for remedying breaches of terms or conditions of his tenancy which are not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, the provisions of s. 24 (2) (d) of the Act are fulfilled. The really substantial argument which has been put forward is that " substantial compliance " with the notice suffices; that argument fails.

Counsel for the tenant made other verbal criticisms of the award. It is not perhaps as elegantly phrased as it might be, but it seems to me that its meaning is perfectly plain, and there is nothing to suggest in it that the arbitrator has gone wrong in law. Counsel points out, and it is a fair verbal criticism, that in para. 2 of the award the arbitrator refers to " a part of the notice in writing ", whereas in subsequent paragraphs, where he is dealing with other items, he does not use the words " part of "; it is lacking in elegance, but nothing more, and it is perfectly plain what the arbitrator means. Counsel also contended that an arbitrator ought to set out all the facts and make a specific finding as to each of the relevant facts. It does not seem to me that there is any statutory requirement that an award should be thus set out, and it seems to me that there are sufficient findings of fact in the award and nothing, indeed, to indicate that the arbitrator has not applied his mind to all the matters to which he should.

Another point made by counsel for the tenant is that on the true construction of s. 24 (2) (d) of the Act of 1948 the tenant has a locus poenitentiae and that, if, as in this case, the notice sets out a reasonable period in which the work should be done and the tenant does not do the work in that period but does it in between the end of that period and the service of the notice to quit, the requirements of s. 24 (2) (d) are not fulfilled. There seem to me to be two difficulties in that argument in its application to this case. First, on the construction of s. 24 (2) (d), I think that the construction submitted by counsel for the tenant is plainly a wrong construction in law; but there is the additional difficulty for counsel in the way in which this case comes before me, in that there is no indication in the award of what view the arbitrator has formed on that point of construction, and, therefore, it is impossible to say that, on the face of the award, he has formed a wrong view.

I think that I have dealt with the main points put before me by counsel for the tenant. I should perhaps add an additional point which was made, namely, that it was not apparent whether the arbitrator had considered whether or not the notice gave a reasonable time for doing the work. That point could not be raised in these proceedings if it were not apparent whether the arbitrator had considered the matter, because these are proceedings to set aside the award for an error on its face; but, in fact, it does appear from the terms of the award that the arbitrator has considered that matter, because, in para. 4 of the award, he expressly finds that one of the matters was not capable of being remedied in the time stated in the notice. I only mention that because it seems to be right, when the arbitrator's award has received such detailed criticism, to draw attention to the fact that he appears, in his award, to have considered all those matters which he ought to have considered in an arbitration which is obviously one of considerable importance to the tenant and, indeed, to the landlord. In the result, despite the most careful arguments of counsel for the tenant, I am unable to find that the award shows any error on its face, and, accordingly, this motion must be dismissed.

Application dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *Scobie & Beaumont*, Hereford (for the tenant); *Robbins, Olivey & Lake*, agents for *Burges, Salmon & Co.*, Bristol (for the landlord).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

FISCHLER *v.* ADMINISTRATOR OF ROUMANIAN PROPERTY.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Cohen and Lord Denning), May 23, 24, 25, 26, June 23, 1960.]

Currency Control—Debts clearing office—Beneficial title to money—Price of goods imported in 1939 *into United Kingdom—Money paid to Anglo-Roumanian Clearing Office—Clearing scheme brought to an end—Outbreak of war—Money transferred to Custodian of Enemy Property—Peace treaty—Transfer to Administrator of Roumanian Property—Debts Clearing Offices and Import Restrictions Act,* 1934 (24 *&* 25 *Geo.* 5 *c.* 31), *s.* 1—*Clearing Office* (*Roumania*) *Order,* 1936 (*S.R. & O.* 1936 *No.* 427), *as amended by Clearing Office* (*Roumania*) *Amendment Order,* 1939 (*S.R. & O.* 1939 *No.* 750)—*Treaty of Peace* (*Roumania*) *Order,* 1948 (*S.I.* 1948 *No.* 118), *art.* 1 (5) (*g*).

In 1939 a sum of £2,193, being the proceeds of a sale by a Roumanian national of goods exported to a buyer in England, was paid, under the Debts Clearing Offices and Import Restrictions Act, 1934, and subordinate legislation (S.R. & O. 1936 No. 427, as amended by S.R. & O. 1939 No. 750)* to the Anglo-Roumanian Clearing Office, viz., to the Bank of England where the sum was allocated to a " compensation transactions account " of the clearing office. In that account the sum had to be recorded, and was recorded, in accordance with agreement between the Roumanian and United Kingdom governments, in a sub-account nominated at the time of payment of the sum to the Bank of England in the name of a person or bank in Roumania as " beneficiary in respect of the corresponding payment " made to the Bank of England. By Roumanian law the seller was bound to nominate one of several Roumanian banks, and the Commercial Bank was nominated. Roumanian law did not recognise trusts, as known to English law, but did bind the Commercial Bank to make to the clearing office any request for payment which the Roumanian seller might require to be made and forbade the bank from making such a request without the seller's authority; by that law also any loss in relation to the £2,193 would fall on the seller, not on the bank. Thus the Commercial Bank was by Roumanian law in the position of a watch-dog. In or before 1940 the Roumanian seller assigned the sum of £2,193 in the sub-account to the appellant. The clearing scheme in respect of Roumanian goods was brought to an end as regards goods imported after June 17, 1940, by S.R. & O. 1940 No. 963, and was abolished by the Debts Clearing Offices Act, 1948, s. 1, existing rights and liabilities of the office becoming rights and liabilities of the Crown.

In 1941 war was declared between the United Kingdom and Roumania. Under s. 8 (1) (b) of the Trading with the Enemy Act, 1939, and S.R. & O. 1939 No. 1198, the £2,193 was paid to the Custodian of Enemy Property. Under art. 1 (5) of the Treaty of Peace (Roumania) Order, 1948† (S.I. 1948 No. 118), consequent on the conclusion of a treaty of peace with Roumania signed on Feb. 10, 1947, the £2,193 became vested in the respondent, the Administrator of Roumanian Property, and became subject to a charge for amounts due to British nationals from Roumanian nationals. This charge was subsequently released as regards the appellant's rights, if any, in the £2,193, and, under art. 1 (5) (g) of the Order of 1948, " the owner " of the £2,193 became entitled to recover that sum from the respondent. On the question whether the appellant was " the owner " within art. 1 (5) (g),

---

* The relevant terms of the agreement on which this legislation was founded are summarised at p. 440, post.

† Made under the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947; 4 HALSBURY'S STATUTES (2nd Edn.) 638.

Held: the appellant was the beneficial owner of the £2,193 and was entitled under art. 1 (5) (g) to recover it from the respondent for the following reasons—

(i) (per VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE and LORD COHEN) the clearing office legislation did not create any new beneficial owner of, or beneficial right to, the £2,193, but merely created certain rights of control over that sum; and, the clearing scheme having been brought to an end, the original beneficial title of the appellant revived in the new situation produced by the treaty of peace with Roumania and the Treaty of Peace (Roumania) Order, 1948, and

(ii) (per LORD DENNING) the £2,193 was money had and received to the use of the appellant, since the moneys received by the Anglo-Roumanian Clearing Office and standing in the sub-account of the Commercial Bank were moneys of the Roumanian creditors, not of the Commercial Bank, as the bank could not do what it liked with the money but had to apply it on the instructions of the creditors.

Appeal allowed.

[As to the debts clearing offices, see 27 HALSBURY'S LAWS (3rd Edn.) 108, para. 182.

For the Debts Clearing Offices Act, 1948, see 21 HALSBURY'S STATUTES (2nd Edn.) 1397.

As to peace treaties, see the instruments listed in 5 HALSBURY'S STATUTORY INSTRUMENTS 88.]

Cases referred to:

Bank Voor Handel en Scheepvaart, N.V. v. *Administrator of Hungarian Property*, [1954] 1 All E.R. 969; [1954] A.C. 584; [1954] 2 W.L.R. 867; 2 Digest (Repl.) 269, *614*.

Rahimtoola v. *H.E.H. The Nizam of Hyderabad*, [1957] 3 All E.R. 441; [1958] A.C. 379; [1957] 3 W.L.R. 884; 3rd Digest Supp.

Appeal.

Appeal by Israel Fischler from an order of the Court of Appeal (LORD EVERSHED, M.R., SELLERS and PEARCE, L.JJ.), dated Nov. 18, 1958, allowing an appeal by the respondent, the Administrator of Roumanian Property, from an order of GLYN-JONES, J., dated Dec. 20, 1957, whereby judgment was entered for the appellant for £2,193 6s. 8d., and directing that the order of Dec. 20, 1957, be set aside and that judgment be entered for the respondent. The facts are set out in the opinion of LORD RADCLIFFE, p. 440, letter I, post.

J. G. Foster, Q.C., and *Mark Littman* for the appellant.

Eustace Roskill, Q.C., and *J. R. Cumming-Bruce* for the respondent.

Their Lordships took time for consideration.

June 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the privilege of reading the opinion of my noble and learned friend, LORD RADCLIFFE, which will shortly be read. I agree with him so fully in his reasoning and conclusion that I do not think it necessary to add anything. In due course, I shall move that the appeal be allowed and the judgment of the learned trial judge restored.

My noble and learned friend, **LORD COHEN**, who is unable to be here, desires me to say that he also agrees with the opinion of LORD RADCLIFFE.

LORD REID: My Lords, in 1939, a Roumanian firm, Granimex, exported peas to a buyer in this country. By reason of legislation, which I shall deal with later, the buyer was required to pay the price to the Anglo-Roumanian Clearing Office (A.R.C.O.) and did so. Granimex could then spend the price in buying certain classes of goods for export to Roumania. In fact, Granimex assigned £2,193 of the price to the appellant, and it is not now disputed that this

A was lawful. As a result of directions given by the appellant, this sum was paid by A.R.C.O. to a British company from which the appellant had bought rubber for export to Roumania, but this sale fell through and the money was repaid to A.R.C.O. Nothing more was done about the money before the outbreak of war between Britain and Roumania in 1941. Then, under the Trading with the Enemy Act, 1939, this money was paid to the Custodian of Enemy B Property. Then, under legislation following on the peace treaty with Roumania, the money was paid to the respondent who now holds it, and the appellant seeks in this action to recover it. Money in the hands of the respondent is normally subject to a charge which makes it available to meet the claims of British creditors of Roumanians and the original Roumanian owners cannot recover it. But in 1951, the appellant was able to go to Israel and he is now a citizen C of that country. In consequence of this and of the fact that he suffered persecution in Roumania, the Board of Trade, acting under statutory authority, have released the charge on property belonging to him, and the question in this case is whether he is the owner of this sum of £2,193. If he is, this appeal must succeed.

The respondent contends that the appellant is not the owner, and it is for D him to prove that he is. The first matter to be considered is the legal position when the price of the peas was paid to A.R.C.O. This payment was made by reason of the provisions of s. 1 of the Debts Clearing Offices and Import Restrictions Act, 1934 (1). Certain countries had adopted forms of exchange control which made it difficult or impossible for British creditors to recover their money and for British exports to those countries to continue unless some way was found E to enable the exporters to be paid. The scheme of the Act was to require the price of goods imported from such countries to be paid to a clearing office; it authorised the clearing office to sue and to give a good discharge to a person who paid to the office a debt due to a foreign creditor. The Act did not provide how money received by the clearing office was to be dealt with but left that to be determined by orders to be made under sub-s. (6). It was argued that the effect F of these provisions was to deprive the foreign creditor of all right or interest in money paid to a clearing office and to vest in the clearing office not only the legal title but the whole beneficial right in the money. Certainly the legal title was vested in the clearing office, but I am unable to agree that these provisions vested any beneficial right in the office or the Crown. I can see no sign of any intention to confer a financial benefit on the Crown. I think that the effect G was merely to impound the money, leaving it to orders to be made under the Act to determine whether or to what extent the foreign creditor's rights were taken away or limited. The respondent's argument appeared to be that it is impossible for a person to retain any property or beneficial right in money if his right to obtain payment of it is taken away. But statutory restrictions on the way in which a person can use his property are a commonplace, and the only H effective way of preventing a person from using his money in forbidden ways is to prevent him from getting possession of it; preventing a person from obtaining immediate payment of his money does not cause it to cease to be his money.

So I turn to the relevant orders to see whether they deprived Granimex of its beneficial right or interest in the price of the peas. The first order which I I need consider is the Clearing Office (Roumania) Amendment Order, 1939 (S.R. & O. 1939 No. 750). This order incorporated an agreement between the British and Roumanian governments, and it provided what was to be done with money of Roumanian creditors paid to A.R.C.O. In some cases, deductions were to be made but that did not apply in this case. In fact, Granimex could use the whole price of the peas in one or other of two ways but in no other way. Granimex could either direct it to be paid to a British

(1) This Act expired on Apr. 1, 1949, and was repealed by S.L.R. Act, 1953.

exporter as the price of goods of certain kinds to be exported to Roumania or direct it to be transferred to the National Bank of Roumania so that Granimex would receive in Roumania the equivalent in Roumanian currency at the official rate of exchange. But it seems that the latter was the less profitable way of using the money.

I have stated the substance of the matter, but it is said that we must not look at that because of the terms of the order. The greater part of the order is concerned with matters which do not arise in this case and there is no need to consider any of its provisions except those of art. 11. Article 3 (ii) required the price of the peas to be

> " transferred to a non-interest-bearing account at the Bank of England, in the name of the Controller of the Clearing Office (hereinafter referred to as the Compensation Transactions Account) for distribution in accordance with art. 11 of this agreement."

The relevant parts of art. 11 are:

> " (1) All amounts credited to the Compensation Transactions Account in accordance with art. 3 (ii) shall be recorded in the books of the clearing office in separate sub-accounts in the names of the persons or banks in Roumania respectively nominated at the time of payment as the beneficiaries in respect of the corresponding payments made to the Bank of England. Subject to the provisions of para. (2) of this article, payment shall be made from the Compensation Transactions Account at the sole request of such persons or banks in Roumania or of their nominees to the extent of the amounts standing to the credit of their respective sub-accounts.
>
> " (2) Of the amounts credited to each sub-account in accordance with para. (1) of this article, thirty per cent. shall be available for payments to persons in the United Kingdom in respect of goods grown, produced or manufactured in the United Kingdom and exported to Roumania, and seventy per cent. shall be available for payments to persons in the United Kingdom in respect of any goods imported into Roumania, provided that the debt in respect of which any such payment is made is due to a person in the United Kingdom. The amount of sterling available for payments in respect of any goods if not used for the purchase of United Kingdom goods shall be utilised so far as possible for payments in respect of goods grown, produced or manufactured in a British overseas territory, colony or territory under British protection or mandated territory in respect of which a mandate is exercised by the Government of the United Kingdom of Great Britain and Northern Ireland.
>
> " (3) Any sum standing to the credit of a sub-account of the Compensation Transactions Account may, at the request of the person or bank in whose name such sum is recorded in accordance with para. (1) of this article be surrendered to the Special Account."

To comply with art. 11 (1), Granimex nominated the Commercial Bank of Roumania as their " nominated beneficiary ", and the price of the peas was credited by A.R.C.O. to the sub-account of that bank. The documents which had to be sent to A.R.C.O. disclosed that Granimex was the seller of the peas and there was nothing in art. 11 to prevent Granimex nominating itself. Indeed, it appears that, in some cases, Roumanian traders were permitted to nominate themselves. But it appears that Roumanian law required Granimex to nominate a Roumanian bank, in order that the bank should be responsible for seeing that Roumanian regulations were observed. The bank had no financial interest in the money; it was there as a " watch-dog ". The relationship between the bank and Granimex was governed by Roumanian law, and it is clear from the evidence (first) that the bank was bound to make to A.R.C.O. any request for payment which Granimex might require the bank to make provided that such

request was lawful; (secondly) that it would have been illegal for the bank to make any request to A.R.C.O. for payment of this money without the consent of Granimex; and (thirdly) that if, for any reason, the money was not forthcoming from A.R.C.O. the loss would have fallen on Granimex and not on the bank. The bank was not a " beneficiary " in any ordinary sense of that word.

It was not argued that the use of the word " beneficiaries " in art. 11 meant or implied a requirement that only persons with a beneficial interest in money received by A.R.C.O. could lawfully be nominated. Such money was the proceeds of trading, and it was to be paid out to pay for exports. Roumanian banks were mentioned as beneficiaries, and it could not have been supposed that these banks were going to export peas or import rubber or other permitted goods. Moreover, A.R.C.O. was aware from the documents in this case and presumably in other cases that the bank was not the trader, and A.R.C.O. had no reason to suppose that this or other banks had acquired a financial interest in these transactions. Article 11 is part of an agreement between the British and Roumanian governments, and the Roumanian government at least was aware of its own regulations under which the banks merely acted to see that the law was observed.

Nevertheless, it was argued that the only persons entitled to claim that they were owners of money in the hands of A.R.C.O. were the nominated beneficiaries, and this agreement was accepted by the Court of Appeal reversing the decision of GLYN-JONES, J. The Court of Appeal held that there was " no room for consideration of agency or trust " and said:

> " In order to succeed, the [appellant] must establish some right, some proprietary or other interest, by virtue of which the [respondent] is accountable to the [appellant] for the sum of money by him claimed; and that he cannot do. The rights, duties and obligations of the Anglo-Roumanian Clearing Office with respect to the Compensation Transactions Sub-Account in the name of the Commercial Bank of Roumania were exclusively defined and limited by the terms of the Act of 1934 and the Clearing Office (Roumania) Amendment Order, 1939, which give no recognition to any rights in any other persons on the Roumanian side. We refer particularly to the use of the word ' shall ' in s. 1 (1) and (6) of the Act—which we have read and do not take time by re-reading. The terms of the Order of 1939 are similarly categorical. As appears from the order itself and para. 1 thereof in particular, the order was directed to giving statutory effect to the Anglo-Roumanian Payments Agreement. All the sums received by the clearing office had to be applied (' *shall* be applied ') in the manner provided by that agreement and in no other manner and for no other purpose. The language of the articles of the agreement which we have read is no less categorical. By virtue of those provisions the clearing office were by force of statute or its equivalent accountable to no person except as provided by the orders which were exclusive of any right in the [appellant]: and the [respondent] as the successor in title of the clearing office can, in our judgment, be in no different position."

It is true that A.R.C.O. was not directly accountable to Granimex, or to the appellant who now stands in its place; any requisition by Granimex for payment by A.R.C.O. had to be made through the Commercial Bank of Roumania. But the question in this case is not whether A.R.C.O. was directly accountable to the appellant. It is whether, under the Treaty of Peace (Roumania) Order, 1948 (S.I. 1948 No. 118), the appellant was " owner " of the property held by the respondent, and I can find nothing in the Order of 1939 enacting an irrebuttable presumption that the nominated beneficiary is the beneficial owner or otherwise preventing inquiry into the true facts of the case. Let me suppose that it was the nominated beneficiary who had had the charge on his property released. If direct accountability by A.R.C.O. were the sole criterion, it would

seem that the nominated beneficiary could now claim to be paid not only money which truly belonged to him, but also all other money which was in his sub-account with A.R.C.O. although the whole beneficial interest in it had always been in other persons still in Roumania. I cannot hold that we are driven to a result so completely contrary to the purposes of the Treaty of Peace Order.

Then it was said that, because the law of Roumania has nothing corresponding to our law of trust, we must regard the nominated beneficiary as the only person who can be called an " owner ". But under the law of Roumania the bank could not in any circumstances have treated this money as its own, and there was no question of any banker and customer relationship between it and the appellant. If the money were lost, the loss would fall on the appellant, and so long as it was available the bank was bound to give to A.R.C.O. such directions for its application as the appellant might require it to give and no others. There would be something far wrong with our law if we had to shut our eyes to these facts and treat the bank as beneficial owner merely because there is no doctrine of trust in Roumania.

It is clear that when the Treaty of Peace Order speaks of an owner it means beneficial owner. The order was made to give effect to provisions of the peace treaty entitling the British government to seize or retain the property of Roumanians. It charged property rights and interests belonging to or held or managed on behalf of the Roumanian government or Roumanian nationals with sums due to the British government or British nationals by the Roumanian government or Roumanian nationals; and it authorised the respondent to require such property to be transferred to him. Under this authority, the sum for which the appellant sues was transferred to the respondent in 1954. Then the Board of Trade directed the respondent to release from the charge the property rights and interests, if any, of the appellant. Article 1 (5) (g) of the Treaty of Peace Order provides that, if it is proved that property, rights or interests transferred to the respondent were not subject to the charge, " the owner thereof shall be entitled to recover the same from the administrator ". In view of the release in favour of the appellant, it is admitted that he is entitled to recover this money if he can prove that he had property right or interest in it. " Owner " must in this context mean beneficial owner because this provision only applies where the respondent has become legal owner, the title to the property having vested in him.

I have stated my reasons for holding that the beneficial interest in the price of the peas was not taken away from Granimex or from the appellant, his assignee, by the Act of 1934 or the Order of 1939. But at a late stage the respondent submitted arguments that, even if that were so, that beneficial interest was taken away either by the Clearing Office (Roumania) Amendment Order, 1940 (S.R. & O. 1940 No. 963), or by the transfer of the money to the Custodian of Enemy Property under the Trading with the Enemy Act, 1939. I shall not deal in detail with the Order of 1940 because I am satisfied that there is no substance in the point based on it. But I think it worth while to draw attention to the reference in it (2) to arrangements to be made

> " with a view to the winding-up and final distribution of the sums received by the clearing office by virtue of the principal order."

That appears to me to assume that, in 1940, the clearing office had no beneficial interest in the sums held by it and to confirm the conclusion at which I have already arrived.

The argument based on the transfer to the Custodian of Enemy Property seemed to me at first sight to have more substance. Different opinions about the legal effect of such transfer were expressed in this House in *Bank Voor Handel en Scheepvaart, N.V.* v. *Administrator of Hungarian Property* (3). LORD

(2) By art. 2.

(3) [1954] 1 All E.R. 969; [1954] A.C. 584.

ASQUITH OF BISHOPSTONE expressed (4) his view that such transfer extinguished former proprietary rights. I thought it unnecessary in that case to decide that matter and I think it equally unnecessary to do so in this case. Even if rights were extinguished the Crown was entitled to restore them. The peace treaty and consequent legislation clearly proceed on the assumption that property which had been Roumanian property before the war was still Roumanian property, and it is only on that basis that the respondent had any authority to take it. I do not think that it matters whether the property rights had been extinguished and restored or had persisted throughout. The respondent is quite entitled to submit an argument which, if right, would mean that the provisions of the peace treaty and consequent legislation were misconceived and ineffective, but I cannot find any good ground for accepting it. In my judgment, this appeal should be allowed and the judgment of GLYN-JONES, J., restored.

LORD RADCLIFFE: My Lords, I regard this as a complicated case arising out of the special situation created by the institution of the Anglo-Roumanian Clearing Office (which I will refer to as "A.R.C.O.") and its subsequent dissolution. I do not think that it can be decided exclusively according to the ordinary conceptions of property, legal or equitable, that prevail in more normal commercial transactions. It is rather that a scheme of this sort, when set up under statutory or governmental authority, generates certain rights and duties in respect of the use of property which may itself have for the time being no "owner" in the accepted sense; and the special problem with which the present case has confronted the courts is to determine where ownership resides or in what sense it arises when the scheme and its purposes are brought to an end.

The first thing that I must refer to is the clearing office system itself. I propose to do so in language as simple as possible and with a minimum of citation. The judgment of the trial judge, GLYN-JONES, J., contains a comprehensive statement of the basic facts relating to this and other aspects of the case and I think that I can make my view clear without covering them again in detail. A.R.C.O. was set up under the authority of the Debts Clearing Offices and Import Restrictions Act, 1934. The origin of this Act lay in the difficulties which exporters in the United Kingdom were experiencing at that time in getting sterling payments out of the importers in certain countries with whom they had been doing business. The function of a clearing office, when established under the Act, was to impound debts owed or owing on or after a prescribed date in respect of produce or manufactures entering the United Kingdom from the country affected and to collect the proceeds in an account at the Bank of England in the name and under the control of the clearing office itself. The sterling which thus became available in this fund was intended to be used for the purpose of "facilitating trade and payments" between the United Kingdom and the other country or, to use the accepted jargon, of unfreezing the frozen remittances and thus to make it possible for trade to continue on a viable basis. In the case of Roumania, at any rate, the means adopted was to make the sterling collected from United Kingdom importers from that country available to satisfy the debts incurred by traders in that country to United Kingdom exporters whether existing at the inauguration of the scheme or arising later. Under this system, goods could go into and go out of the country but the medium of payment itself was not capable of expatriation and the purposes for which it could be employed within the United Kingdom were controlled.

The system was regulated, as was intended, by the provisions of a payments agreement between the Government of the United Kingdom and the Government of Roumania. There were more than one of these agreements, but the only one that matters for the purpose of this appeal is the one that was entered into on July 12, 1939, and was scheduled to the Clearing Office (Roumania)

(4) [1954] 1 All E.R. at p. 991; [1954] A.C. at p. 631.

Amendment Order, 1939 (S.R. & O. 1939 No. 750). The effect of that order was to provide that any sums received by A.R.C.O. after July 17, 1939, were to be applied in accordance with the terms of this new agreement. The agreement was of considerable complexity but its relevant provisions can be summarised under the following heads:

(a) All debts due and owing on June 12, 1936, and all debts falling due after that date from persons in the United Kingdom to persons ordinarily resident or ordinarily carrying on business outside the United Kingdom in respect of the price of Roumanian goods imported into the United Kingdom were to be paid in sterling to a non-interest-bearing account at the Bank of England in the name of the controller of A.R.C.O.

(b) Any payment so made was to constitute a discharge to the debtor for the corresponding amount of the debt.

(c) The moneys coming into the A.R.C.O. account at the Bank of England were to be allocated between several different accounts specified in the agreement. Of these the one that is relevant for our purpose was to be styled the Compensation Transactions Account and (subject to a deduction for the benefit of the National Bank of Roumania of a certain percentage of the sterling received in respect of some classes of debt) this account was to have allocated to it the proceeds of all payments received by A.R.C.O. in respect of the price of Roumanian goods exported under special facilities granted in Roumania for the exportation of goods to provide foreign exchange for the settlement of outstanding trade debts or for the importation of goods into Roumania. It was under these special facilities, which were the subject of art. 10 of the agreement, that there was made the export of goods from Roumania which I shall mention later and which is the source of the appellant's claim.

(d) All amounts credited to the Compensation Transactions Account were to be recorded in the books of A.R.C.O. in separate sub-accounts which were to stand in the names of such persons or banks in Roumania as were nominated at the time when the money was paid into the Bank of England as " beneficiaries in respect of the corresponding payments made to " that bank. The source of such a nomination must, in fact, have been the Roumanian exporter; but the formal nomination was presumably made by the United Kingdom debtor acting on his instructions.

(e) The permitted use of the sterling standing to each sub-account was controlled in the sense that thirty per cent. was available for payments to persons in the United Kingdom in respect of goods grown, produced or manufactured in the United Kingdom and exported to Roumania and seventy per cent. was available for payments to persons in the United Kingdom in respect of goods of any kind imported into Roumania. Subject to this limitation, the nominated beneficiary in Roumania was to have the sole right of directing payments out of the fund at the Bank of England to the extent of the credit of his sub-account in the Compensation Transactions Account. Thus he could call money out of it so long as he enjoyed a credit with A.R.C.O. but only for the purpose of discharging sterling debts to United Kingdom creditors and according to the proportions specified.

(f) Lastly, any sum standing to the credit of a sub-account of the Compensation Transactions Account could be surrendered to the Special Account of the National Bank of Roumania if the nominated beneficiary so requested.

I now turn to the transaction with which the appellant's claim is connected. Towards the end of the year 1939 or at the beginning of the year 1940 a Roumanian national named Halpern who traded under the name " Granimex " obtained a permit from the Roumanian authorities to export to the United Kingdom a consignment of dried peas. The permit was obtained, apparently, under the special facilities régime contemplated by art. 10 of the payments

agreement and the sterling due from the United Kingdom importer passed into the Compensation Transactions Account at the Bank of England. The exact sum paid in is not known, full records not now being available, but it is not in question that it exceeded the £2,193 6s. 8d. which is the subject of the appellant's claim. The sub-account holder to the credit of whose account the money was placed was the Commercial Bank of Roumania. The evidence called at the trial of the action seems to me to establish with sufficient certainty what was Mr. Halpern's position under the Anglo-Roumanian clearing scheme. First, he lost his right to recover his debt from the United Kingdom importer. Secondly, although, so far as the scheme itself went, it was open to him to be registered with A.R.C.O. as the nominated beneficiary, the Roumanian authorities would not permit the entry in this capacity of any person's name except that of one of a select list of Roumanian banks. Therefore, any directions that he might wish to give as to the disposal of his sterling in the sub-account would have to be given through the bank whom he nominated, the Commercial Bank. On the other hand, having made this export with the approval of the Roumanian authorities, he was entitled to receive and did receive from them in due course an import licence covering a consignment of rubber from the United Kingdom in payment for which he would be able to use his " frozen " sterling. Rubber was one of the commodities specified on an agreed list, the import of which could constitute " compensation " for his export of dried peas. Mr. Halpern did not want to do business himself in rubber; but it was open to him in Roumania to sell for Roumanian currency the benefit of his import licence and the use of the accompanying sterling. That is what he did and this is where the appellant, who himself carried on business under the name of " Chimicalia ", became connected with the transaction. He paid Mr. Halpern in lei for his rights (Mr. Halpern receiving under the Roumanian regulations a preferential rate of conversion for his sterling) and thereupon became entitled as between himself and his vendor to the benefit of the latter's position. In form, however, the import transaction had to be completed in Mr. Halpern's name. In any disposition of the sterling there would thus have to be put in motion a chain of directions passing from the appellant to Mr. Halpern, from Mr. Halpern to the Commercial Bank of Roumania, from that bank to A.R.C.O. and from A.R.C.O. to the Bank of England.

Much has been made to turn in this case on the position of the Commercial Bank. That was a matter of evidence as given at the trial and I follow the learned trial judge in the conclusion to which he came. The bank was nominated as beneficiary for the purposes of the scheme simply because the Roumanian authorities would not have it otherwise. Banks so nominated were brought in to act as " watch-dogs " for the authorities. Their function, to quote from the judgment of GLYN-JONES, J., was

> " to see to it that (i) the sterling proceeds of sale were not expended otherwise than for the purchase of goods authorised to be imported in compensation, and (ii) that in default of such import the sterling was duly surrendered to the National Bank of Roumania as required by Roumanian law."

The Commercial Bank, therefore, acquired no personal interest in the sub-account by the fact of nomination. No assignment of the right to or to dispose of the sterling was involved in any sense analogous to that of a transfer of property. It could not use its rights over the sterling as part of its general assets or for the benefit of any of its customers or other persons having business with it. Its duty was to hold those rights as " mandataire " on behalf of the exporter or his assignee and to accept and implement whatever instructions might be given to it, if consistent with the requirements of Roumanian law, as to the operation of the sub-account in the furtherance of his business and to the extent of his claim on that account. The conception of trust property is not accepted

in the law of Roumania. It would be wrong, therefore, to speak of the Commercial Bank as holding its right or power in trust for Mr. Halpern or the appellant; it would not be wrong, on the other hand, to speak of it as holding such right or power as an agent or as under a duty to exercise it only on behalf of its principal.

In fact, the appellant came very near to getting his benefit out of the A.R.C.O. fund. He made a contract with a United Kingdom firm for the export of a consignment of rubber to Roumania and, on his instructions transmitted through the Commercial Bank, A.R.C.O. caused to be paid to the Midland Bank from the account at the Bank of England the sum of £2,193 6s. 8d. to cover a letter of credit in favour of the exporters. In the end shipping space could not be found for the consignment, export licences from the United Kingdom were cancelled and in January, 1941, the Midland Bank returned the amount so paid to the A.R.C.O. account and it was reinstated in the Commercial Bank's sub-account. The contemplated transaction was thus never completed and the sterling which the appellant was to use remained in the A.R.C.O. fund.

The A.R.C.O. fund came into the hands of the respondent in the following manner. I do not think that the process has any bearing on the true rights in the present appeal, so I summarise it shortly. The various sub-account balances which made up the balance of the Compensation Transactions Account were transferred from the control of the clearing office to the Custodian of Enemy Property after a state of war was established between the United Kingdom and Roumania. The authority for this transfer was (a) s. 8 of the Trading with the Enemy Act, 1939, under sub-s. (1) (b) of which clearing office funds of this kind were deemed for the purposes of the Act to be money which would but for the existence of a state of war be payable to or for the benefit of an enemy, and (b) the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O. 1939 No. 1198), made under the powers of the Act. The sub-account balance in the name of the Commercial Bank was £18,222 3s. 11d., but to my mind nothing turns on this, since the A.R.C.O. records were sufficient to identify the separate transactions, such as Mr. Halpern's export of dried peas, out of which the several credits arose and it has not been suggested that the total is anything but the sum of the individual parts.

A peace treaty was made with Roumania on Feb. 10, 1947; and the Treaty of Peace (Roumania) Order, 1948 (S.I. 1948 No. 118), made under statutory authority, set up the office of Administrator of Roumanian Property and charged with the claims of His Majesty's Government and British nationals against the Government of Roumania and Roumanian nationals all property, rights and interests within the Dominions of His Majesty (other than the Dominions themselves) belonging to or held or managed on behalf of the Roumanian government or a Roumanian national. By art. 1 (5) (g) of the order, the administrator was given power, on certificate, to call in and vest in himself any property, rights or interests as being subject to the charge; and this power he exercised on Aug. 18, 1954, by calling in from the Custodian of Enemy Property the sum of £27,921 10s. 1d. as being money derived from A.R.C.O. which, but for the existence of a state of war, would have been held for account of the Commercial Bank under the Compensation Transactions provisions and other provisions of the pre-war Anglo-Roumanian Payments Agreement. The administrator's certificate, though effective to vest the fund in him, was declared by the order to be no more than prima facie evidence of the facts which it stated and art. 1 (5) (g) concluded as follows:

> " if it is subsequently proved that the property, rights or interests were not subject to the charge the owner thereof shall be entitled to recover the same from the administrator, or, if it has been sold, the proceeds of sale, but not to any other remedy."

There has never been any dispute between the parties that, if the appellant does own a right or interest in the A.R.C.O. fund now vested in the respondent, that right or interest is free from the peace treaty charge, because, on Aug. 18, 1954, the Board of Trade, exercising a special power given to it by proviso (ii) to sub-cl. (2) of art. 1 of the order, directed the administrator to release any such right or interest that he might possess from the burden of the charge. This power was exercised in recognition of the fact that the appellant had been a victim of both Nazi and Communist persecution while in Roumania and had ultimately left that country and taken refuge in Israel. The question which became the issue in the litigation was, therefore, reduced to the short point, was he at the date of the commencement of his action the " owner " of any such property, right or interest as would entitle him to a judgment for the sterling sum of £2,193 6s. 8d.? The learned trial judge held that he was, and was consequently entitled to his judgment. In his view, the only person who could have any right, interest or property in this sum, forming part of the A.R.C.O. fund, was the appellant, since neither the clearing office nor the Commercial Bank had any beneficial right of property in it and the appellant had a right, which English law would recognise and enforce, to compel the Commercial Bank to give effect to his instructions and direct the disposition of the fund pro tanto as he should require. I am bound to say that I have found great force in his cogently expressed opinion and, though I might not at all points adopt his reasoning, I agree with the substance of the conclusion to which it led him.

The Court of Appeal did not agree that the appellant could succeed. The basis of their view was that the terms of the Debts Clearing Offices and Import Restrictions Act, 1934, and the system established by the consequent order left no room for admitting the existence of any trust or agency of the Commercial Bank on the appellant's behalf. The rights, duties and obligations of A.R.C.O. were exclusively defined and limited by the Act and order and if, under them, no recognition was permitted of any Roumanian owner except the Commercial Bank, the nominated beneficiary, the administrator, who had inherited the position of the controller of the clearing office, could not be treated as having any other or different liabilities. There is, no doubt, much to be said for this view of the case. In the end I find that, difficult as the question is, I do not share it. To put my reason for disagreeing with it in one sentence, it is this. While I think that the Court of Appeal's analysis is undoubtedly correct as a statement of the position while the clearing scheme and its attendant legislation remained in operation, that statement does not, in my opinion, conclude the question of the appellant's rights and the administrator's duties now that the scheme has come to an end and the legislation has been recalled. That circumstance, I think, produces a new situation in which it may be necessary for the purposes of justice to recognise old rights that had been placed in abeyance or to admit new rights which are the logical expression of their former existence.

It is simpler to analyse the situation without bringing in Mr. Halpern's assignment to the appellant, since it is common ground that the appellant has no better and no worse rights than Mr. Halpern would have had. One must begin with the Act of 1934 and Mr. Halpern's export of dried peas. He parted with his peas and obtained in exchange a right to be paid sterling. The clearing office scheme impounded that sterling and discharged his debtor. It impounded it, however, for the purposes of clearing and the furtherance of Anglo-Roumanian trade, not for confiscation. The use of the sterling for the purpose of acquiring goods of equivalent value in the United Kingdom was not denied to Mr. Halpern; on the contrary, on getting his import licence and giving the appropriate instructions to the Commercial Bank, he could have bought for himself with the sterling the intended consignment of rubber. He could not, of course, have claimed to take the money out of the control of A.R.C.O. and, consequently, he could not have got judgment for the £2,193 against A.R.C.O. at any time while the

scheme was in operation; but that was because the terms of the scheme both dictated the permitted uses of the clearing office fund and authorised or directed A.R.C.O. to recognise no instructions except those issued to it by the Commercial Bank.

But the clearing office scheme has now come to an end. In fact the payments agreement between the United Kingdom and Roumania was abrogated as from June 17, 1940, and by an Amendment Order (S.R. & O. 1940 No. 963) debts in respect of Roumanian goods imported after that date were to be free from clearing. So far as concerned the proceeds of debts which had reached the fund prior to that date they were left to be applied in accordance with the existing provisions of the scheme, so that Mr. Halpern could still have used his sterling if he could have secured his rubber or another permitted export; but the order also added a provision making the fund applicable in accordance with any arrangements that might be made in the future between the respective governments with a view to the winding-up and final distribution of the sums which had come into A.R.C.O. under the clearing scheme. No such arrangements ever were made. A.R.C.O.'s fund, as we know, passed through the Custodian of Enemy Property to vest in the Administrator of Roumanian Property, and in 1948 the clearing office itself was abolished by Act of Parliament (5), any outstanding debts which had not been paid into the fund were released to the creditors who owned them, and existing rights and liabilities of the office were declared to be henceforth rights and liabilities of the Crown.

The whole question is, therefore, who ought to be treated in the courts of this country as owners of the fund now that the clearing scheme has finally come to end and the debts impounded can never be used for clearing purposes. It is not unfair to say that the argument of the respondent on this, the central issue, wavered between two inconsistent positions. At one time it was said that the effect of vesting a debt under the clearing legislation was to destroy all connexion between it and its previous owner and that there was a legal and beneficial ownership of the fund in A.R.C.O., subject only to any permitted use of it under the clearing scheme by the directions of the nominated beneficiary. At another time—and this, I think, represents the respondent's main position which throughout he has been concerned to assert—it was argued that though, indeed, there were Roumanian owners of the funds, whose interests as such were charged under the peace treaty, the effect of the clearing scheme was to exclude Mr. Halpern from any rights of ownership of the proceeds of his debt and to constitute the Commercial Bank the only owner whom the law could recognise.

To take the second argument first. In my opinion, it would be quite wrong, now that the clearing scheme is at an end, to treat the Commercial Bank as owning an interest in the fund. We know from the evidence that it was not introduced as a nominated beneficiary for any such purpose; it came in merely as government watch-dog and without any right to treat its sub-account credits as if they were in any sense assets of its own. The nominated beneficiary's rights to direct applications of the fund were ministerial rights accorded for the purpose of the administration of the fund. When those purposes are no longer capable of being given effect to and the legislation which sanctioned them is recalled, the rights which the nominated beneficiary had are no longer of significance in determining the rights and duties of the holder of the fund. But has Mr. Halpern any surviving right? In my opinion, he has. I do not take the view that the clearing legislation, by impounding the proceeds of his debt, destroyed his interest in those proceeds for all purposes. By vesting them in A.R.C.O.'s fund, the legislature created no new owner of them in any beneficial sense; it merely created over them certain rights of control and disposition, out of which he would have got full value in the use of his sterling within the terms of the scheme. I regard that as the crucial point. For, if

(5) The Debts Clearing Offices Act, 1948.

A that is so, the determination of the scheme without the winding-up of the fund meant that the restrictions on the free use of the proceeds of his debt were removed, the purposes for which they had been impounded were frustrated, and his original ownership rights which had been placed in suspense during the currency of the scheme revived without any remaining impediment to their exercise except that imposed by the peace treaty charge. As that has now been released I B think that he, or rather his assignee, the appellant, emerges as the true owner of the sterling and is entitled to the judgment which he obtained on the trial of the action.

I would allow the appeal accordingly.

LORD DENNING: My Lords, the appellant is a Jew who used to live in C Roumania. He suffered persecution there during the war at the hands of the Nazis and later at the hands of the Communists. But in 1950 he succeeded in getting to Israel where he now lives. He seeks in this action to recover the sum of £2,193 6s. 8d. which he claims belonged to him before the war and is now, he says, in the hands of the Administrator of Roumanian Property.

To see the origin of the transaction, your Lordships have to carry your minds D back to the period before the war when financial transactions between England and Roumania were subject to a strict exchange control. The Roumanian government did not allow Roumanian currency to be exported from Roumania to England. So our government did not allow sterling to be exported from England to Roumania. Trade between the two countries would, therefore, have been at a standstill but for arrangements that were made for a clearing office E to be set up. These arrangements, so far as material here, were as follows: If a Roumanian exporter sold, say, dried peas to a person in England, the English importer had to pay the price in sterling to the Anglo-Roumanian Clearing Office; and he thereupon got a good discharge for the debt. The Roumanian exporter could not demand payment of this sterling in cash, but he could use it so as to buy goods in England for import into Roumania. He could use it, for instance, F to buy raw rubber. Or if he was not a rubber merchant himself, he could transfer his import licence to another Roumanian citizen who was a rubber merchant. The transferee could then use the sterling so as to buy raw rubber for import into Roumania. The Roumanian merchant was not, however, allowed to give directions himself to the clearing office. He had to do it through an authorised bank. He had to nominate the bank as the " beneficiary " in respect of the sterling. G This was done so as to enable the authorities to keep a watch on these transactions and see that the currency regulations were not evaded. When the time came for payment out of the sterling to the English seller, so as to pay for the raw rubber, the Roumanian merchant gave instructions to the authorised bank, who passed on the request to the clearing house. The clearing house had to act " at the sole request " of the authorised bank. It could not accept instructions from the H Roumanian merchant direct.

The facts in this case can be simply stated: About the end of 1939, a Mr. Halpern, who lived in Roumania and traded under the name of Granimex, exported dried peas to a merchant in England at a price of over £2,200. He nominated the Roumanian Commercial Bank as the authorised bank to act as " beneficiary " in respect of the price. The English buyer paid the sum to the I Anglo-Roumanian Clearing Office, who credited it in their books to the sub-account of the Roumanian Commercial Bank. Mr. Halpern afterwards transferred his rights in respect of this sum to the appellant, who also lived in Roumania, but traded under the name of Chimicalia. The appellant paid Mr. Halpern for these rights in Roumanian currency. Having thus got the import rights, the appellant gave an order for raw rubber to an English firm, the United Baltic Corporation, Ltd., of London. About June 1, 1940, he gave instructions to the Roumanian Commercial Bank to make the price available to the English firm. In consequence that bank cabled to the clearing office and asked them to pay

£2,193 6s. 8d. for the rubber. The clearing office did so. They paid the sum to the United Baltic Corporation. But unfortunately that company could not obtain shipping space so as to export the rubber. And on June 25, 1940, all export licences from this country were cancelled. So the United Baltic Corporation refunded the sum to the clearing office. They refunded it on Jan. 25, 1941: and on that day the clearing office credited it once again in their books to the Roumanian Commercial Bank. Three weeks later, on Feb. 15, 1941, Roumania became enemy territory. The money which was held by the clearing office became subject to the trading with the enemy legislation. An order was made under which it was paid to the Custodian of Enemy Property: see s. 8 of the Trading with the Enemy Act, 1939 (6). After the war, when a peace treaty was signed between England and Roumania, the money was not restored to its owners. It was made subject to a charge in favour of British nationals: see art. 1 (2) and (3) of the Treaty of Peace (Roumania) Order, 1948. It was transferred accordingly to the Administrator of Roumanian Property. And there it will remain and it will presumably be made available for British nationals unless the appellant can make good his claim to part of it.

As a first step in making good his claim, the appellant says that, although he was during the war a Roumanian national and, therefore, to be regarded as an enemy, the Board of Trade have released him from the charge. It has released from the charge any right or interest which he has to this £2,193 6s. 8d. He has produced a release to this effect dated Aug. 18, 1954. The Board of Trade are, no doubt, satisfied that the appellant has throughout been well disposed to the allied cause and should not suffer the loss of the money if he was the owner of it. The effect of this release is, I think, that your Lordships can disregard all the trading with the enemy legislation, and inquire simply whether this money did belong to the appellant. It may be that during the war his right to it may have been extinguished or in statutory abeyance, but on the charge being released, his right is restored just as if the war had never come to deprive him of it. The question, therefore, is simply whether this sum of £2,193 6s. 8d. belonged to the appellant on Jan. 25, 1941, when it was re-credited by the clearing office to the Roumanian Commercial Bank? Counsel on behalf of the respondent said that the appellant was not entitled to this sum of sterling at all. He had at most a very limited right, namely, a right to require the Roumanian Commercial Bank to request the clearing house to pay that sum of money to an English firm in return for goods to be exported from England to Roumania.

My Lords, I am clearly of opinion that this sum of £2,193 6s. 8d. belonged to the appellant; for the simple reason that it was money had and received to his use. It seems to me that the Anglo-Roumanian Clearing Office was nothing more than a statutory collector of moneys owing to the Roumanian creditors. It was enabled by the statute to give a good discharge to the English debtors, but the money which it received was the money of the Roumanian creditors. It held this money in a sub-account of which the nominated beneficiary in this case was the Roumanian Commercial Bank. But the Roumanian Commercial Bank was not the beneficial owner of the money. It could not do as it liked with it. It had to act on the instructions of the Roumanian creditor who had the right to say how it was to be applied. The Roumanian creditor was, of course, much circumscribed as to the use to which he could apply it. But it was, after all, only *his* use to which it could be put. It could not be applied to the use of anyone else. Hedged round with limitations as it was, nevertheless it remained money received to his use. Test it this way. Suppose that the Anglo-Roumanian Clearing Office had refused to apply the money as the Roumanian Commercial Bank requested them to do. That bank would, of course, have made its request on the directions of the Roumanian creditor. In such a case would the creditor have any remedy against the clearing office? My answer is " Yes ". He could have sued the clearing

(6) Since repealed by the S.L.R. Act, 1953.

office either in the name of the Roumanian Commercial Bank, or in his own name, joining the Roumanian Commercial Bank as a party: see *Rahimtoola* v. *H.E.H. The Nizam of Hyderabad* (7). And his remedy against the clearing office would have been for money had and received to his use. This remedy for restitution is of wide scope. Its width was well shown by those most learned pleaders Edward Bullen and Stephen Leake who in the year 1868 described it in these words:

> " This is the most comprehensive of all the common counts. It is applicable whenever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff ",

see BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.), p. 44. Those words fit this case exactly. There is only one person to whom in justice and equity this money belongs. It is not the clearing house. Nor is it the Roumanian Commercial Bank. It is the appellant. The money belongs to the appellant and should be returned to him.

I would, therefore, be in favour of allowing this appeal and restoring the order of GLYN-JONES, J.

Appeal allowed.

Solicitors: *Herbert Smith & Co.* (for the appellant); *Solicitor, Board of Trade* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

Mental Health—Jurisdiction—Management of property of patient—Settlement or gift of any property of patient for maintenance or benefit of patient's family, or for making provision for other persons—By whom statutory powers exercisable—Mental Health Act, 1959 (7 & 8 *Eliz.* 2 *c.* 72), *s.* 102 (1) (*b*), (*c*), *s.* 103 (1) (*d*).

The following direction was given by DANCKWERTS, J., on Oct. 13, 1960.

Pursuant to para. (d) of s. 103 (1)* of the Mental Health Act, 1959, I direct that the powers conferred by the said paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge unless by reason of the amount involved or the circumstances generally of the case unreasonable expense or delay would be caused.

HAROLD DANCKWERTS.

---

(7) [1957] 3 All E.R. 441 at pp. 446, 450; [1958] A.C. 379 at pp. 394, 400.

* See 39 HALSBURY'S STATUTES (2nd Edn.) 1050.

PRACTICE DIRECTION.

QUEEN'S BENCH DIVISION.

Costs—Taxation—Review of taxation—Procedure—Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2, r. 35.

The following directions for applications for the review of a taxing officer's certificate under r. 35 of the Supreme Court Costs Rules, 1959*, were given by the LORD CHIEF JUSTICE on Oct. 10, 1960.

1. Every application in the Queen's Bench Division under r. 35 of the Supreme Court Costs Rules, 1959, to review a taxing officer's decision in respect of the taxation of a bill of costs shall be made to a judge nominated by the Lord Chief Justice each term.

2. Every application shall be made by summons to be served within three days after issue and returnable on a day to be appointed by the judge.

3. Every summons must contain full particulars of the item or items or the amount allowed in respect of which the application to review is made.

4. After the issue of the summons the party applying shall forthwith give notice thereof to the taxing officer and on receipt of such notice the taxing officer shall lodge with the chief clerk of the Summons and Order Department of the Central Office the bill of costs, and the objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the taxing officer.

5. Each party shall within four days after service of the summons lodge with the chief clerk of the Summons and Order Department the documents produced in evidence by that party at the hearing before the taxing officer relating to the item or items or the amount allowed under review; and the chief clerk shall then deliver these documents and the summons, objections and answers mentioned in para. 4 to the judge.

6. When appointing a day for the hearing of the summons the judge may decide to exercise his power to appoint two or more assessors to sit with him at the hearing, and if the judge does so decide, the chief clerk of the Summons and Order Department shall give notice of the decision to each of the parties and will, in any case, give to each of them notice of the day appointed by the judge for the hearing of the summons.

7. If the judge decides to appoint assessors the party applying shall within four days after the receipt of notice thereof lodge with the chief clerk of the Summons and Order Department two or more copies, as the case may be, of the summons, objections and answers mentioned in para. 4 for the use of the assessors.

8. When each of the assessors has signified his acceptance of his appointment the chief clerk of the Summons and Order Department shall send to each of them the notice of his appointment including the day appointed for the hearing of the summons, and a copy of the documents mentioned in para. 7.

PARKER OF WADDINGTON, C.J.

---

* The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

GOLLAN AND ANOTHER v. RANDWICK MUNICIPAL COUNCIL.

[Privy Council (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest), July 12, 13, 14, 18, October 11, 1960.]

Privy Council—Australia—New South Wales—Rates—Valuation—Racecourse—Land subject to restrictive trusts, conditions and provisos materially affecting its value—Whether, in ascertaining "unimproved value" of land, valuation should take into account existence of restrictions—New South Wales Valuation of Land Act, 1916-1951, *s.* 6.

The appellants were the owners and trustees of land in New South Wales used as a racecourse. The land was the subject of two deeds of grant of 1863 and 1935, whereby it was vested by the Crown in the appellants' predecessors in fee simple, subject to a peppercorn quit rent, on the trusts and subject to the conditions, reservations and provisos mentioned in the deeds. Under the deeds of grant, the appellants were to allow the land, in their discretion, to be used (a) as a racecourse for horse-racing, (b) as a training ground for training racehorses and for the erection of appropriate buildings, (c) as a cricket ground, (d) for rifle shooting, and (e) for any other public amusement or purpose that the Governor of New South Wales might declare, and if the land or any part of it should be used for any other purpose than such as was allowed by the trusts, the land would be forfeited and revert to the Crown. The lands were and always had been in lease to the Australian Jockey Club. Section 6 of the Valuation of Land Act, 1916-1951*, enacted that the unimproved value of land was the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that any improvements thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title, had not been made. In 1954 the unimproved value was assessed and the appellants objected to the assessment on the ground that account should be taken of the restrictions in the deeds of grant.

Held: the unimproved value of the land under s. 6 of the Valuation of Land Act, 1916-1951, should be assessed on the hypothesis of an unencumbered fee simple estate subject to no condition restricting the use and enjoyment of the land; therefore, the restrictions in the deeds of grant should not be taken into consideration in assessing the unimproved value.

Royal Sydney Golf Club v. *Federal Comr. of Taxation* ((1955), 91 C.L.R. 610) approved and applied.

Reasoning of Isaacs, C.J., and Starke, J., in *Stephen* v. *Federal Comr. of Land Tax* ((1930), 45 C.L.R. 122) disapproved.

Appeal dismissed.

Cases referred to:

Armidale Racecourse Trustees v. *Armidale Municipal Council*, (1923), 6 L.G.R. 151.

Beecroft School of Arts (Trustees) v. *Valuer-General*, (1940), 14 L.G.R. 199.

Board of Fire Comrs. v. *Valuer-General*, (1953), 19 L.G.R. 115.

Corrie v. *MacDermott*, [1914] A.C. 1056; 83 L.J.P.C. 370; 111 L.T. 952; 11 Digest (Repl.) 127, *165*.

Goulston v. *Valuer-General*, (1924), 7 L.G.R. 17.

Gunnedah School of Arts (Trustees) v. *Valuer-General*, (1952), 18 L.G.R. 134.

Metropolitan Golf Proprietary, Ltd. v. *Valuer-General*, (1950), 17 L.G.R. 223.

Royal Sydney Golf Club v. *Federal Comr. of Taxation*, (1955), 91 C.L.R. 610.

Stephen v. *Federal Comr. of Land Tax*, (1930), 45 C.L.R. 122.

---

* Section 6 is set out at p. 451, letter C, post.

Sydney City Council v. *Valuer-General*, [1956] 1 L.G.R.A. 229.
Sydney Exchange Co. v. *Valuer-General*, (1953), 19 L.G.R. 111.
Toohey's, Ltd. v. *Valuer-General*, [1925] A.C. 439; 25 S.R.N.S.W. 75; 42 N.S.W.W.N. 24; 38 Digest 564, *p.*

Appeal.

Appeal by the Honourable William McCulloch Gollan and Maurice Victorian Point from an order of the Full Court of the Supreme Court of New South Wales (ROPER, C.J. in Equity, MAGUIRE and HARDIE, JJ.), dated Oct. 25, 1957, on a Case Stated under the New South Wales Land and Valuation Court Act, 1921-1955, s. 17, by the Land and Valuation Court (SUGERMAN, J.). On Sept. 23, 1954, the valuer-general, acting under the provisions of the New South Wales Valuation of Land Act, 1916, valued certain land at Randwick, near Sydney, known as the Randwick Race Course, of which the appellants were the owners and trustees, as being of the unimproved value of £385,400 and as being of the improved value of £1,250,000 and as having the assessed annual value of £62,500. The municipal rates for the year 1955, payable by the appellants to the respondent, and assessed on the unimproved value, amounted to £8,631 7s. 1d. The appellants objected to the valuation under s. 29 of the Act.

The facts are stated in the judgment of the Board.

R. O. Wilberforce, Q.C., and *B. J. F. Wright* (of the Australian Bar) for the appellants.

N. H. Bowen, Q.C., *M. H. Byers* and *P. A. Twigg* (all of the Australian Bar) for the respondent.

LORD RADCLIFFE: The appellants are the owners of some land at Randwick, near Sydney, New South Wales, which is used as a racecourse and known as Randwick Race Course. They are trustees of this property, the major portion of which was the subject of a deed of grant of June 15, 1863, whereby the land was vested by the Crown in their predecessors in fee simple, subject to a peppercorn quit rent, on the trusts and subject to the conditions, reservations and provisos mentioned in the deed. The remaining portion was granted in the year 1935 by a supplementary deed, the terms of which were for all relevant purposes the same as those of the deed of 1863.

The effect of the deed of 1863 can be summarised as follows:—(a) The trustees were to allow the land, in their discretion, to be used for a number of specified purposes, firstly as a racecourse for horse-racing, secondly as a training ground for training racehorses and for the erection of appropriate buildings, thirdly as a cricket ground, fourthly for rifle shooting, fifthly for any other public amusement or purpose that the governor of the state might declare. (b) The trustees were empowered to grant to the Australian Jockey Club or any other club or association formed for the above-mentioned recreational purposes the exclusive use and occupation of the lands for any period up to seven years. (c) There was a reservation to the Crown of the right to resume any part of the lands that might be required for public roads or ways and of the right to take stone, gravel and timber, as well as of a general right to resume any part of the land for public purposes. (d) Finally, there was a proviso that, if the land or any part of it should be used for any purpose other than such as was allowed by the foregoing trusts, the trusts should cease and the land should be forfeited and revert to the Crown.

The lands in question are now and always have been in lease to the Australian Jockey Club, the original power of leasing up to seven years having been extended to twenty-one years by the terms of an Act of 1873 entitled the " Australian Jockey Club Act ".

The appellants then are the owners of this land in fee simple subject to a number of restrictive trusts, conditions and provisos which cannot but materially affect its value. They have no power of selling their land free from any of the restrictions which bind them and it must, therefore, be taken that, if they did

A in some way manage to sell, a purchaser from them would take it subject to the same restrictions. These restrictions arise from a Crown grant which, although made in exercise of the Crown's public right or duty of granting unappropriated land, is treated as being on the same footing as a grant of land inter partes made by one citizen to another. The question at issue between the appellants and respondent is whether, in ascertaining the "unimproved value" of their land B under the New South Wales Valuation of Land Act, 1916-1951, the valuation should or should not take account of the existence of these restrictions. The Valuation of Land Act itself prescribes the principle for arriving at "unimproved value". Having declared, in s. 5 (1), that

> "The improved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable C terms and conditions as a bona fide seller would require",

it enacts, in s. 6,

> "The unimproved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that D the improvements, if any, thereon, or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made."

It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is E irrelevant that the land may be so settled or encumbered that there is no single person, or even combination of persons, who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again, the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all (see *Toohey's, Ltd.* v. *Valuer-General* (1)).

F These considerations do not, however, go far enough to supply the answer to the question on which this appeal turns and which can be expressed as follows:— Is the fee simple assumed to be sold a "pure" estate in the land without reference to the actual title under which it is held, or is it that actual title, with the consequence that there enters into the valuation notice of any restrictions on user and enjoyment by which the title is affected? Either construction would be consis- G tent with the mere words "fee simple" in the statutory formula, for grantees holding title under a conditional grant subject to forfeiture or under restrictive covenants or conditions or, a fortiori, under trusts that limit their powers are, none the less, owners in fee simple. It does not follow from this that a sale of such a fee simple would be a sale of "the" fee simple of the land within the meaning of the formula; but, even if the use of the definite article in this con- H nexion has any pregnant significance, it is better to defer dealing with that until it has been possible to give a rather fuller account of the scope and purpose of the Valuation of Land Act.

In New South Wales, unimproved value or unimproved capital value as a basis of assessment has been a conception associated primarily with rating. The valuable judgment of Sugerman, J., in *Sydney City Council* v. *Valuer-General* (2) I identifies the s. 6 formula as first appearing in s. 68 of the Land and Income Tax Assessment Act, 1895. It reappeared in the Local Government Act, 1906, which "first adopted the unimproved capital value as the general basis of rating for both shires and municipalities" (3). It is part of the somewhat confusing history of the matter that what is to all intents and purposes the same phrase was also used in the federal Land Tax Assessment Act, 1910-1950. In either case, the formula was related to the imposition of an annual rate or tax

(1) [1925] A.C. 439. (2) [1956] 1 L.G.R.A. 229. (3) [1956] 1 L.G.R.A. at p. 233.

on land and exacted, generally speaking, from the " owner " as representing all interests in the land. As was to be expected, the relevance to the statutory valuation of restrictions on use and enjoyment affecting title was soon a matter of legal controversy in rating assessments. The course followed by decisions on the issue in the courts of New South Wales falls into three separate phases. At first, a construction was adopted which accepted the idea of a " pure " fee simple and rejected any reference to restrictions imposed inter partes—see *Armidale Racecourse Trustees* v. *Armidale Municipal Council* (4) and *Goulston* v. *Valuer-General* (5). In 1930, however, *Stephen* v. *Federal Comr. of Land Tax* (6) reached the High Court of Australia, and it fell to the court to consider the meaning and effect of the corresponding words in s. 3 of the Land Tax Assessment Act, 1910-1930. Its members were equally divided in opinion, ISAACS, C.J., and STARKE, J., disagreeing with the line taken in the *Armidale* case (4), while RICH and DIXON, JJ., thought that the New South Wales decisions had taken the right approach. In the result, the questions submitted to the court, being by way of appeal, were answered in the sense favoured by the chief justice's opinion. As the High Court has since, in a later case, unanimously preferred the view of RICH and DIXON, JJ., to that which then prevailed, it is sufficient to notice with regard to the *Stephen* decision (6) that the governing reason which moved the chief justice and STARKE, J., was that the idea of the " pure " fee simple would be in itself unjust to the owner of land subject to restrictions and would be contrary to the law as laid down in the Privy Council decision in *Corrie* v. *MacDermott* (7), a case of compensation on the resumption of land. It will clear the ground if their Lordships say at this point that, in their view, the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment; and that they see no general issue of justice or injustice at stake in the selection of the answer to be returned to the question now under review.

The *Stephen* decision (6), however, changed the current of authority in rating cases in New South Wales. In 1940, trustees holding land subject to user restrictions imposed by virtue of an original grant by the Crown objected to the unimproved value of their land being arrived at on the basis of a sale of an unrestricted estate in fee simple. This objection was upheld by ROPER, J., in the Land and Valuation Court (*Trustees of Beecroft School of Arts* v. *Valuer-General* (8)), the court treating the question as concluded by *Stephen* (6) and the earlier decision in *Armidale* (4) as no longer capable of application. Two cases in 1953 (*Sydney Exchange Co.* v. *Valuer-General* (9) and *Board of Fire Comrs.* v. *Valuer-General* (10)) proceeded on the same basis; and, though there are other reported cases in which a different result was arrived at (e.g., *Metropolitan Golf Proprietary, Ltd.* v. *Valuer-General* (11), *Trustees of Gunnedah School of Arts* v. *Valuer-General* (12)), the ground of distinction is not any departure from the principle of *Stephen* (6) but the circumstance that in neither case did the restrictions relied on bind the freehold title itself.

It was a second decision of the High Court that once more changed the current of authority in New South Wales. This was *Royal Sydney Golf Club* v. *Federal Comr. of Taxation* (13), decided in 1955. The opinion of the court (DIXON, C.J., MCTIERNAN, WEBB, FULLAGAR and KITTO, JJ.), was unanimous and is contained in a single judgment. The direct issue decided was not that involved in the present appeal; on the contrary, the golf club land being for all that appears held in unrestricted fee simple, the point (among others) that arose was whether the unimproved value for the purpose of land tax assessment should take account of certain restrictions on user imposed by a county planning scheme operating under the New South Wales Local Government Amendment Act of 1951. It was

(4) (1923), 6 L.G.R. 151. (5) (1924), 7 L.G.R. 17. (6) (1930), 45 C.L.R. 122.
(7) [1914] A.C. 1056. (8) (1940), 14 L.G.R. 199. (9) (1953), 19 L.G.R. 111.
(10) (1953), 19 L.G.R. 115. (11) (1950), 17 L.G.R. 223. (12) (1952), 18 L.G.R. 134.
(13) (1955), 91 C.L.R. 610.

A held that such restrictions must be taken account of in so far as their existence would be likely to affect the sale value of the land. On the other hand, the court found it necessary to their decision to review the opinions of ISAACS, C.J., and STARKE, J., in the *Stephen* case (14), the principle of which they found to be "gravely open to question". The conclusion finally arrived at, so far as concerned s. 3 of the Land Tax Assessment Act, was expressed in the following
B words (15):

> "The interpretation of the Act which seems best to accord with the policy appearing from its provisions and also to flow from its language is that in assessing the unimproved value an estate in fee simple must be taken as the hypothesis unencumbered and subject to no condition restricting the use and enjoyment of the land."

C This conclusion is, as it says, based on two main considerations, of which one is the language, common to the Land Tax Assessment Act and the Valuation of Land Act, in which the definition of unimproved value is expressed. The other consideration arises from the structure or scheme of the Land Tax Assessment Act as a whole, from which the court deduced that (16)

D

> "the general policy of the Act was to impose the tax on the owner of the first estate of freehold in possession and to make him liable independently of the rights of any reversioner, mortgagee or holder of security in respect of the unimproved value of the land."

From this it was further deduced that the fee simple whose sale was to be assumed was an unencumbered fee simple; and the inference was drawn that, just as the
E fee simple must be taken as being free from encumbrances which operated to confer on some other person or persons an estate or interest in the land, for the reason that the scheme did not allow for the taxing of the holders of those other estates or interests, so conditions or reservations which might affect the value of the estate, even if operating only in the interests of the public, must similarly be treated as irrelevant to the valuation required.

F This decision was treated in New South Wales as restoring the interpretation of "unimproved value" under the Valuation of Land Act that prevailed before the *Stephen* case (14). In 1956, SUGERMAN, J., in the Land and Valuation Court, applied it to an area of land in Sydney held by the City Council under Crown dedication on trust to secure its use as a public park: see *Sydney City Council* v. *Valuer-General* (17). In the case now under appeal, the Supreme Court approved
G his decision and, accordingly, returned the answer "No" to the first question in the Case Stated to them,

> "Whether, in valuing the said lands under s. 5 and s. 6 of the Valuation of Land Act, 1916-1951, the trusts, restrictions, conditions and provisos contained in the said grant and in the said Act of 1873, or any of them, should be taken into consideration . . ."

H The "said Act of 1873" is a reference to the Australian Jockey Club Act, 1873, previously mentioned. Its existence and terms played a part in the arguments because the contention was raised on behalf of the appellants that, since the Act recited in its preamble the provisions of the Crown grant of 1863 and, in particular, those imposing restrictions on use and alienation, the restrictions became
I thereby part of the general statutory law of the state and, as such, as much to be taken account of in the valuation as the planning restrictions accepted by the High Court in the *Royal Sydney Golf Club* case (18) as to be admitted on the ground that the planning scheme was (19)

> "a law operating over an area of country within the state . . . chosen independently of all questions of title or ownership."

---

(14) (1930), 45 C.L.R. 122.
(15) (1955), 91 C.L.R. at p. 623.
(16) (1955), 91 C.L.R. at p. 622.
(17) [1956] 1 L.G.R.A. 229.
(18) (1955), 91 C.L.R. 610.
(19) (1955), 91 C.L.R. at p. 624.

The Supreme Court rejected this contention on two separate grounds. The Act of 1873, they said, did not create the restriction; all it did was to recognise the restriction already created. It would follow from this that the source of the obligation and conditions binding the trustee holders was not the Act of the legislature but the original Crown grant which constituted their title. Their Lordships have no doubt that this view is correct, and it is sufficient to dispose of the point. The Supreme Court also expressed the opinion that the Act of 1873, being a private Act of Parliament, could not amount to a " public law " capable of satisfying the High Court's distinction expressed by its words, " There is all the difference between a public law affecting the enjoyment of land and a restriction of title " (see *Royal Sydney Golf Club* case (20)). The appellants now say that it is a mistake to treat the Act as a private Act and that, per incuriam, the case was wrongly argued on this point by both parties in the Supreme Court. It is unnecessary to go into this, for it does not make any difference whether the Act in question ranks as public or private if the deed of grant and not the Act remains the true source of the restrictions on user.

The second question submitted to the court was:

> " Whether, in valuing the said lands as aforesaid, the restrictions arising from the said notification by the Minister of Local Government under s. 342Y of the Local Government Act should be taken into consideration . . ."

The restrictions referred to are planning restrictions operating under statutory authority. To this question the court returned the answer " Yes ", being of the opinion that such restrictions fell within the principle laid down by the High Court in the *Royal Sydney Golf Club* case (20). The respondent has not preferred any cross-appeal on this answer, and their Lordships have not, therefore, to express any view as to the validity of the distinction that has been drawn between restrictions on user imposed on title by Crown grant and restrictions on user imposed on land by the operation of a local planning scheme.

The outcome of the appeal before the Board, therefore, is to be determined by nothing more than the answer to be given to the two inter-related questions, Is the view of the High Court in the *Royal Sydney Golf Club* case (20), to be preferred to the view of ISAACS, C.J., and STARKE, J., in the *Stephen* case (21)? and, secondly, does an interpretation placed on s. 3 of the Land Tax Assessment Act, 1910-1950, hold good for the corresponding words in s. 6 of the Valuation of Land Act, 1916-1951?

The Land Tax Assessment Act was designed to impose a single annual tax on the unimproved value of all lands owned by taxpayers and not exempt from taxation. It was possible, therefore, to survey its scheme as a whole and to relate the conception of unimproved value to the general intent shown by the scheme. The Valuation of Land Act does not serve a purpose similar to this. It is, as its title declares, an Act

> " to make provision for determining values in respect of certain lands, and to provide that statutory rates, taxes, duties, and contributions based on land values shall be levied on values so determined."

In fact, the valuations made under it are required not only for the purposes of rates, but also of such diverse transactions as resumption and exchange of land, advances on mortgage and death and transfer duties. A basis of valuation that may seem reasonable and appropriate for one of these purposes is not necessarily suitable for another. It is not, therefore, to be assumed without further consideration that, though words that are effectively identical are used to define unimproved value in both these Acts, they are to have the same meaning in their respective contexts.

Yet, even with this caution taken, it would be unreal to ignore the fact that " unimproved value " as a basis of taxation is essentially a rating conception in

(20) (1955), 91 C.L.R. 610. (21) (1930), 45 C.L.R. 122.

New South Wales. The Local Government Act, 1919, which provides for the making of general, local, special and loan rates, bases them on the improved or unimproved capital value of " all ratable land " in the area. In the case of the general rate unimproved capital, value is the only permitted basis. Section 134 (1) then expressly provides that the unimproved capital value, the improved capital value and the assessed annual value of ratable land is to be the unimproved value, the improved value and the assessed annual value of the land as determined under the Valuation of Land Act, 1916-1951. Section 58 (1) and s. 59 (1) of the latter Act supply a cross-reference to this, tying in the unimproved and improved values of land as arrived at by its procedure with the Local Government Act assessments. It is apparent, therefore, that the unimproved values to be ascertained under the Valuation of Land Act are values to be employed primarily for a rating scheme. Indeed, the category of unimproved value is not required for any other of the various purposes served by the Valuation of Land Act except for the somewhat analogous imposts under the Land and Income Tax Assessment Act (see s. 58 (1) (b)) and the Fire Brigades Act, 1909 (see s. 67).

In their Lordships' opinion, the considerations that led the High Court in the *Royal Sydney Golf Club* case (22) to treat unimproved value under s. 3 of the Land Tax Assessment Act as involving the hypothesis of " a fee simple unencumbered and subject to no conditions " can be applied to unimproved value under s. 6 of the Valuation of Land Act, and they agree with the conclusion to which those considerations led them. Prima facie, it appears to their Lordships, " the fee simple of the land ", as used in s. 6, does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law. There is nothing in the rating scheme under the Valuation of Land Act and the Local Government Act which calls for any different meaning to be given to these words and, as the High Court have shown, there is more than one reason for rejecting the alternative view. That which commends itself to their Lordships as being of particular significance is the fact that the latter Act, having provided for the charging of rates on " all ratable land ", contains a long and detailed section, s. 132, which declares all land to be ratable except that comprised in a number of special categories embracing a variety of public purposes. If the conditions or restrictions affecting any particular area of land bring it within one of those categories, then it is expressly exempt by virtue of the statute, but it seems directly contrary to the intent of the Act that, though not within one of the categories, land can yet be effectively withdrawn from ratability or, at least, find its ratable assessment substantially reduced by the operation of some grant or other transaction inter partes imposing restrictions on user.

It might still be necessary to ignore all these considerations if the Valuation of Land Act were so constructed as to provide a single basis of valuation of land, whether improved or unimproved, which was to do duty for such various purposes as death duties, resumption and mortgage valuations as well as for rating. For while burdens on individual titles may naturally enough be treated as irrelevant under a general rating scheme, it would hardly be possible to expect that similar treatment was intended to be given when it came to valuing a person's individual interest for any of these other purposes. It was the appellants' argument that the Act was constructed on just this single basis, and certainly there are phrases and even sections in which it seems to be contemplated that what is provided for is a single scheme of valuation of " land ". Their Lordships are satisfied, however, that a full reading of the Act does not admit of any such construction. " Improved value " and " unimproved value " are special terms to which is allotted a particular statutory meaning. They will be resorted to only where the taxing or other Act in question requires a valuation to be made with reference to these concepts. As has been pointed out, " unimproved value " is fundamentally

(22) (1955), 91 C.L.R. 610.

a rating concept and, it seems, is resorted to for virtually no other purpose. A
" Improved value ", which is capable of raising a similar question as to the relevance of restrictions on user, does, however, find a place in s. 68, which deals with valuations for resumptions. Even that section, however, contemplates that not only will there be an " improved value " to be referred to but also separate valuations of " the respective estates and interests referred to in such valuation ".

It seems that throughout the Act it is intended that valuations of individual B
estates and interests, which will presumably allow for matters of title, will be determined and made available side by side with such special categories of valuation as the improved and unimproved value and assessed annual value of the land itself. Thus, in s. 16, which lays down the requirements for the initial valuation roll, it is provided that, apart from stating improved and unimproved values, the roll may contain a statement of " The value of the estates and interests C
of all owners ". The owner of any estate or interest is entitled to notice of, and to object to, any valuation of it, whether or not he is the owner of a freehold estate in possession (s. 29). A similar duality runs through other sections of the Act—see s. 43, s. 65, s. 68, s. 70. The scheme of the Act, therefore, does not require that the highly artificial conception of unimproved value should be imported into valuations of estates and interests required for other purposes served by the Act. D

For these reasons, their Lordships are of opinion that the answer returned by the Supreme Court of New South Wales on Question 1 of the Case Stated (23) is correct. Question 2 is not the subject of appeal. Question 3 was not argued there or here, and no answer was returned to it. Question 4 was rightly answered in the negative (24), having regard to the answer given to Question 1. The order of the Supreme Court dated Oct. 25, 1957, must be affirmed and the appeal E
dismissed. Their Lordships will humbly advise Her Majesty accordingly. The appellants must pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray* (for the appellants); *Ranken, Ford & Chester* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(23) Question 1 is set out at p. 453, letter G, ante, and was answered by the Supreme Court in the negative.

(24) Question 4 was " Whether the valuer-general was bound in law to assign to the lands only a nil or nominal value ".

R. *v.* GOLDER. R. *v.* JONES. R. *v.* PORRITT.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery, Byrne, Ashworth and Elwes, JJ.), October 3, 17, 1960.]

Criminal Law—Evidence—Previous statement by witness inconsistent with his evidence at trial—Deposition—Whether statement in deposition admissible as evidence of the truth of matters stated—Proper direction to jury.

When a witness is shown to have made previous statements inconsistent with the statements made by that witness at the trial, the jury should be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act (see p. 459, letter H, post).

R. v. *Harris* ((1927), 20 Cr. App. Rep. 144); *R.* v. *White* ((1922), 17 Cr. App. Rep. 60), and *R.* v. *Birch* ((1924), 93 L.J.K.B. 385) followed.

Appeals allowed.

[As to depositions generally and the evidential value of depositions when contradicted at trial, see 10 HALSBURY'S LAWS (3rd Edn.) 361, para. 660; 419, para. 766, especially note (s); and for cases on the subject, see 14 DIGEST (Repl.) 295-297, *2744, 2746, 2773-2775*; 301, 302, *2830-2845, 2853.*]

Cases referred to:

R. v. *Birch*, (1924), 93 L.J.K.B. 385; 88 J.P. 59; 18 Cr. App. Rep. 26; 14 Digest (Repl.) 297, *2775.*

R. v. *Frett & Rosa*, (1956), unreported.

R. v. *Harris*, (1927), 20 Cr. App. Rep. 144; 14 Digest (Repl.) 337, *3281.*

R. v. *Russell*, (1935), "The Times", May 30, 1935.

R. v. *White*, (1922), 17 Cr. App. Rep. 60; 14 Digest (Repl.) 297, *2774.*

Appeals.

The appellants, Sydney Elmer Golder, Arthur Patrick Jones and George Anthony Porritt were arraigned at West Suffolk Quarter Sessions before the learned deputy chairman (His Honour JUDGE SOUTHALL) and a jury on Jan. 6, 1960, on an indictment containing two counts. All three appellants were charged on count 1 with burglary and larceny contrary to s. 25 (1) and s. 13 (a) respectively of the Larceny Act, 1916. In count 2 Golder was charged with receiving a gold watch contrary to s. 33 (1) of the Larceny Act, 1916, being part of the property stolen and referred to in count 1. On Jan. 7, 1960, all three appellants were found guilty of the offences charged in count 1, Golder being sentenced to three years' imprisonment to run consecutively with a sentence which he was then serving, Jones to three years' imprisonment and Porritt to eighteen months' imprisonment. Leave to appeal against conviction was granted to all three appellants on July 19, 1960, by the Court of Criminal Appeal (HILBERY, CASSELS and WINN, JJ.). The appeals came before the court (HILBERY, DONOVAN and WINN, JJ.) on July 26, 1960, when the court adjourned the appeals for argument before a full court. The facts relevant to these appeals appear in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment*.

* *R.* v. *Oldroyd*, (1805), Russ. & Ry. 88; *R.* v. *Dibble*, (1908), 1 Cr. App. Rep. 155; *R.* v. *Williams*, (1913), 8 Cr. App. Rep. 133; *R.* v. *Allpress*, (July 9, 1955), unreported. In the case last cited the court (LORD GODDARD, C.J., ORMEROD and DONOVAN, JJ.) applied the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. There the sister of the accused had made a statement about a sum of money, the subject of the charge, which was found in her house. Subsequently at the trial she gave evidence entirely contrary to her previous statement, and the learned recorder in his summing-up treated this previous statement of the sister as evidence against the accused man, her evidence on oath at the trial being such as, if accepted, would have cleared him. The jury found the accused guilty. LORD GODDARD, C.J., said in conclusion: "The court has come to the conclusion that it is clearly a case in which it is their duty to apply the proviso. Although they regret that there was a misdirection on this point by the learned judge and that the learned judge should have said to the jury that they were not entitled to treat the statement made not on oath as evidence, there was evidence here quite enough to uphold the verdict . . ."

R. M. G. Simpson for the appellants.
W. M. F. Hudson for the Crown.

Cur. adv. vult.

Oct. 17. **LORD PARKER, C.J.,** read the following judgment of the court: These three appellants were tried at West Suffolk Quarter Sessions on an indictment containing two counts. In count 1 all three men were charged with burglary and larceny, and in count 2 Golder was separately charged with receiving a gold watch, part of the property referred to in count 1. All three appellants were found guilty on count 1 and leave to appeal against conviction was granted in July, 1960.

The relevant facts may be summarised as follows: In the early hours of Apr. 19, 1960, a dwelling-house in Newmarket was broken into and a quantity of property was removed, including a safe and a gold watch. At 5.35 a.m. a Standard Vanguard car driven by the appellant Porritt with three passengers, one of whom was the appellant Jones, was stopped by the police near Ely, but after investigation was allowed to proceed. About two hours later the same car was seen by other police officers at Gayherne, still driven by Porritt, but on this occasion with only one passenger, alleged to be the appellant Golder. On the evening of Apr. 19, 1960, the safe was discovered in a field near Newmarket where it had been broken open. Tyre marks were seen and careful measurements were taken by a police officer, who formed the opinion that they were made by the rear wheels of the same vehicle. When the car driven by the appellant Porritt was examined some four days later, the front tyres were seen to be of a size and type which would have left marks exactly corresponding with those found in the field, but the tyres on the rear wheels were of a different size and type. There was no evidence to show that the tyres on the rear wheels had been changed in the intervening four days. The appellants Porritt and Jones gave an explanation to the police, purporting to account for their movements on the night in question; but that explanation was, to say the least of it, unimpressive. The appellant Golder denied throughout that he was in the Newmarket area, alleging that he was in Manchester.

As counsel for the prosecution frankly admitted, the foregoing evidence was not enough to do more than create a case of grave suspicion, and accordingly he sought to rely on a witness named Mrs. Taylor. Before the committing magistrates she swore that on Apr. 20 the appellant Golder, whom she knew as "Chuck," had brought her a gold watch which was in fact part of the property stolen in Newmarket early on Apr. 19. At the trial she went back on her story and counsel for the prosecution obtained leave to treat her as an adverse witness and cross-examined her. He did not, however, succeed in extracting from her an admission that her deposition was true, still less that it was the appellant Golder who handed her the gold watch.

In the course of his summing-up the learned deputy chairman dealt with the question of the watch and the conflicting testimony of Mrs. Taylor in a way which plainly indicated to the jury that it was open to them to act on the evidence contained in her deposition notwithstanding her repudiation of it. The whole of the deposition was in fact read to them when they returned for further direction. It is only necessary to refer to two passages in the summing-up:

> "The only evidence which you have that he gave the gold watch to Mrs. Taylor is the evidence of Mrs. Taylor herself, and she, you may think, is a stranger to truth. You heard the evidence before the justices."

Later, he said:

> "If you come to the conclusion that what she said before the magistrates was accurate then of course it all starts to tie up."

In the judgment of this court the direction to the jury in regard to Mrs. Taylor's

deposition was wrong in law and, as was intimated at the end of the hearing of the appeals, all three convictions must be quashed. A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein. It is unnecessary to refer to the cases in detail; the following extract from the judgment of this court in *R.* v. *Harris* (1) is a sufficient statement of the principle:

> "... it was permissible to cross-examine this girl upon the assertions she had previously made, not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance. It is upon that matter that confusion has sometimes arisen. It has undoubtedly sometimes been thought that where a witness is cross-examined upon a previous unsworn statement and admits that the statement was made, but says that the statement was untrue, that unsworn statement may sometimes be treated as if it could be accepted by the jury in preference to the sworn statement in the witness-box ... That, of course, is all wrong, as has been pointed out on various occasions by this court, and not least in the case of *R.* v. *White* (2)."

In both *R.* v. *Harris* (1) and *R.* v. *White* (2) the previous statement was unsworn and not made in the presence of the accused. It could not, therefore, on any view be evidence against him. The principle, however, is equally applicable to earlier statements made on oath as it is to unsworn statements: cf. *R.* v. *Birch* (3).

Our attention was, however, drawn to the decision of this court in *R.* v. *Russell* (4), and it was suggested that that case had laid down a qualification to the general principle above stated to the effect that if there were other evidence before the jury tending to show that the previous statement represented the truth they were entitled to rely on it. This court can see no warrant for any such qualification, which indeed would mean that evidence which was clearly inadmissible would, on proof of the other evidence, thereupon become admissible. Indeed, as we understand it, the court in *R.* v. *Russell* (4) was not laying down any such proposition.

We were also referred to the unreported case of *R.* v. *Frett & Rosa* (5). It was a razor-slashing case in which the victim, a man called Carter, and his wife had unhesitatingly picked out their assailants at an identification parade. At the trial, however, they said that they were not sure and that the defendants merely resembled their assailants. The learned judge left it to the jury to decide whether they could safely rely on the original identification, and the jury convicted. That, however, was quite a different case from the case now under consideration. In particular, it was unnecessary to treat the Carters as adverse witnesses and they were not so treated.

In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act.

As already stated, the circumstances of the present case were such as to arouse

---

(1) (1927), 20 Cr. App. Rep. 144, see at pp. 147, 148.
(2) (1922), 17 Cr. App. Rep. 60.
(3) (1924), 18 Cr. App. Rep. 26.
(4) "The Times", May 30, 1935, but discussed in 99 J.P. Journal at p. 386 in an article entitled "Witness contradicting himself".
(5) (1956), unreported, before Donovan, J., at the Central Criminal Court.

grave suspicion but, having regard to the fact that the jury were invited to act, and in all probability did act, on material on which in law they could not act, this court is left with no alternative but to quash the convictions. A

Convictions quashed.

Solicitors: *Ludlow, Head & Walter* (for the appellant Jones); *Registrar, Court of Criminal Appeal* (for the appellants Golder and Porritt); *Moodie, Randall, Carr & Miles*, agents for *Bankes Ashton & Hayward*, Stowmarket (for the Crown). B

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

C

Re ROYAL MUTUAL BENEFIT BUILDING SOCIETY.

[CHANCERY DIVISION (Pennycuick, J.), October 10, 1960.]

Company—Winding-up—Compulsory winding-up—Non-attendance of petitioner before hearing to show compliance with rules—Petitioner not represented at hearing—Petition dismissed with costs against petitioner—Companies (Winding-up) Rules, 1949 (*S.I.* 1949 *No.* 330), *r.* 33. D

A petition was presented to the court for the compulsory winding-up of a company. The petitioner, having decided to withdraw the petition, did not comply with the requirements of r. 33 of the Companies (Winding-up) Rules, 1949, which provides: "After a petition has been presented, the petitioner, or his solicitor shall, on a day to be appointed by the registrar, attend before the registrar and satisfy him that the petition has been duly advertised . . . and that the provisions of the rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the registrar at the time appointed, and satisfied him in manner required by this rule." At the hearing of the petition the petitioner was not represented. Counsel for the company asked that the petition, instead of being struck out for non-compliance with r. 33, be dismissed with costs against the petitioner. E F

Held: the company was entitled to an order dismissing the petition with costs, because the provision in r. 33 that no order should be made in favour of a petitioner who had not complied with the requirements of the rule did not operate to protect a petitioner from an order for costs when for any reason his petition was unsuccessful. G

[As to the attendance of the petitioner before the registrar to satisfy him that the rules as to petitions have been complied with, see 6 HALSBURY'S LAWS (3rd Edn.) 546, para. 1052; as to costs where a petition for the compulsory winding-up of a company is dismissed, see ibid., p. 554, para. 1066; and for cases on the subject, see 10 DIGEST (Repl.) 898, *6059-6068*. H

For the Companies (Winding-up) Rules, 1949, r. 33, see 4 HALSBURY'S STATUTORY INSTRUMENTS 138.]

Petition. I

This was a petition presented, on July 20, 1960, by Clifford John Edwards for the winding-up by the court under the provisions of the Companies Act, 1948, of the Royal Mutual Benefit Building Society (hereinafter called "the company") on the ground that the company had ceased to carry on business or was carrying on business only for the purpose of winding-up its affairs. In a letter, dated Sept. 30, 1960, the petitioner by his solicitors gave notice to the company's solicitors that the petitioner would withdraw the petition and would not be proceeding further in the matter; that this fact had been recorded on the court

papers, and, therefore, it would not be necessary for the company's solicitors to attend court on the date fixed for the hearing of the petition, as the petitioner's solicitors did not propose to do so; and that, in the circumstances, any costs incurred by the company after Sept. 30 would be the company's responsibility. On the same date a notice in similar terms was served on the company's secretary. By letter dated Oct. 4, 1960, on behalf of the company the petitioner's solicitors were notified that counsel would be instructed on behalf of the company to make an application to the court, on the date fixed for the hearing, for the dismissal of the petition with costs. The petitioner did not attend before the registrar on an appointed day before the hearing of the petition to show compliance with the rules as to petitions, as required by r. 33 of the Companies (Winding-up) Rules, 1949, and he was not represented at the hearing of the petition. Counsel for the company asked that the petition, instead of being struck out, be dismissed with costs against the petitioner.

R. A. K. Wright for the company.

PENNYCUICK, J.: This is a petition by one Clifford John Edwards, a member of the society, for the compulsory winding-up of the society. The petitioner, for his own good reasons, has omitted to comply with the requirements of r. 33 of the Companies (Winding-up) Rules, 1949, which is in these terms:

> "After a petition has been presented, the petitioner, or his solicitor shall, on a day to be appointed by the registrar, attend before the registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the registrar at the time appointed, and satisfied him in manner required by this rule."

The ordinary practice where the petitioner fails to comply with the requirements of r. 33 is to strike out the petition. In the present case, however, the society has appeared by counsel and asks that, instead of the petition being struck out, the petition should be dismissed with costs against the petitioner. It appears to me that the society is entitled to the order for which it asks. It is quite clear that the society has the right to be represented by counsel at the hearing of a petition for the winding-up of the society. It seems to me, further, that in principle the society must have the right to an order for costs where the petition is unsuccessful, whether on the ground of non-compliance with the requirements of r. 33 or for any other reason. The petitioner was not represented, but my attention was called to the words in r. 33:

> "No order shall be made on the petition of any petitioner who has not . . . attended before the registrar . . . and satisfied him in manner required by this rule."

It seems to me that those words mean no more than that no order shall be made in favour of any petitioner who has not complied with the requirements of the rule, and do not operate to protect a petitioner from an order for costs where for any reason his petition is unsuccessful. I propose, therefore, to make the order asked for by the society, that is to say, an order dismissing the petition with costs.

Order accordingly.

Solicitors: *Lewis & Dick* (for the company).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

Re SCREMBY CORN RENTS.

[COURT OF APPEAL (Lord Morris of Borth-y-Gest, Pearce, L.J., and Pilcher, J.), October 5, 1960.]

Corn Rents—Assessment—Assessment based on price of wheat in 1799—*Periodical review of rents according to average price of wheat—*" *Price* "—*Whether price included payments under the Cereals* (*Deficiency Payments*) *Order*, 1955 (*S.I.* 1955 *No.* 962), *art.* 4 (1).

By an Act of 1801*, commissioners were required for the purpose of fixing corn rents, to assess " the average price of good marketable wheat in the County of Lincoln during the term of twenty-one years, ending at Michaelmas . . . 1799 " and the corn rents payable were to be fixed by an award accordingly. The average price so determined was $5\frac{7}{10}$s. per Winchester bushel. By the same Act, the rector, or his successors, was or were empowered to apply to quarter sessions to have commissioners appointed to assess " the average price of a Winchester bushel of good marketable wheat within the said County of Lincoln, for the twenty-one years then last past " and to report to the court of quarter sessions; and if the average price were more or less than the average price set forth in the original award by more than a certain amount, the corn rents were to be increased or diminished as declared by the court. In 1959 the successors of the rector applied to quarter sessions in accordance with the Act and the commissioners appointed reported to the court that the average price of wheat during the twenty-one years ended on Mar. 5, 1959, was 10s. 1d. exclusive of the sum (namely, 11d. per Winchester bushel) which the grower received under the Cereals Deficiency Payments Scheme (constituted by the Cereals (Deficiency Payments) Order, 1955†). Quarter sessions ordered that the corn rents be increased in the proportion that 10s. 1d. bore to $5\frac{7}{10}$s.

Held: the word " price " in the Act of 1801 meant what the grower would obtain, under his contract of sale, for his wheat when he sold it and did not include an additional benefit obtained by virtue of legislation, subsequent to the Act of 1801, from a source other than the purchaser; therefore the payments received by the grower under the deficiency payments scheme were not part of the price, and the decision of quarter sessions was correct (see p. 467, letters D and H, post).

Decision of the DIVISIONAL COURT ([1960] 2 All E.R. 650) affirmed.

[As to corn rents, see 13 HALSBURY'S LAWS (3rd Edn.) 459, 460, paras. 999-1001.]

Case referred to:

Sharp v. *Wakefield*, (1888), 22 Q.B.D. 239; 58 L.J.M.C. 57; 60 L.T. 130; 53 J.P. 20; *affd.* H.L., [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 30 Digest (Repl.) 12, *51*.

Appeal.

This was an appeal by the Church Commissioners from an order of the Divisional Court dated May 27, 1960, and reported [1960] 2 All E.R. 650. The Divisional Court dismissed an appeal by the Church Commissioners by way of a Case Stated by the County of Lincoln, Parts of Lindsey, Quarter Sessions for the opinion of the High Court regarding their decision on Sept. 15, 1959, that the Scremby corn rents payable by virtue of an award made pursuant to an Act of Parliament of 1801 should be increased in the proportion that 10s. 1d. bore to $5\frac{7}{10}$s. The question for the court was whether the decision was correct.

* A local Act entitled " An Act for dividing, allotting, and inclosing the open common fields, meadows, pastures, and other commonable lands and waste grounds, within the Parish of Scremby, in the County of Lincoln."

† The relevant provisions of the order are printed at p. 465, letters D to I, post.

A *G. D. Squibb, Q.C., E. F. Jowitt* and *J. Fennell* for the Church Commissioners. There were no respondents to the appeal.

LORD MORRIS OF BORTH-Y-GEST: This is an appeal from the judgment of the Divisional Court on a Case Stated by the General Quarter Sessions of the Peace for the County of Lincoln, Parts of Lindsey. The appeal B is brought by the Church Commissioners in circumstances which I will recount. In the Divisional Court, Lord Parker, C.J., in giving judgment, dealt with the question whether quarter sessions in a case of this kind were entitled to state a Case. He said (1):

> "... I have come to the conclusion on the whole that they were [so entitled], that Parliament by giving the duty to the court of quarter sessions C showed clearly that they were giving the decision not to an administrative tribunal, but to a court, and a court which then, as was well known, had powers of consulting the judges. Accordingly, I assume for the purposes of this judgment that quarter sessions had power to state the Case which they have done."

D The Case was stated in reference to an application made by the Church Commissioners concerning certain rents payable to the Church Commissioners as the result of an award which was made pursuant to an Act of Parliament of 1801. The question that arises for our decision is as to the meaning of the word " price " in the relevant part of the provisions of that Act. The Act relates to lands in the Parish of Scremby in the County of Lincoln. It is called:

E > " An Act for dividing, allotting, and inclosing the open common fields, meadows, pastures, and other commonable lands and waste grounds, within the Parish of Scremby . . ."

The parts of the Act with which we are concerned are those which deal with the tithes that were formerly payable. By the Act it was provided that tithes were to be abolished and certain rents called " corn rents " were to be payable instead. F Those corn rents in lieu of tithes were to be payable to the rector of Scremby. They are now payable to the Church Commissioners. Broadly stated, the Act provided that " corn rents " were to be ascertained and were then to be payable to the rector. It was provided that those corn rents could thereafter be varied, if there were variations in the price of wheat in Lincolnshire. The Act provided that the commissioners were to value lands in the parish. Further they were, G from the London Gazette or by such other ways and means as they should think proper, to inquire and ascertain what had been the average price of good marketable wheat in the County of Lincoln during the term of twenty-one years ending Michaelmas, 1799. The Act went on to provide that the commissioners by their award should ascertain and set forth what quantity of wheat was in their judgment equal in value to one-fifth part of the arable land, one-seventh H part of the meadow land, and one-ninth part of the pasture land within the parish of Scremby. Then it was further provided that there should be payable to the rector and his successors for the time being, out of the lands and estates of the several proprietors in the parish, such sum or sums of money as should be equal to the value of the quantity of wheat so to be ascertained by the commissioners. Then the " corn rents " so ascertained were to be paid and payable I by the person or persons who for the time being should be in possession or occupation of the lands. Payments had to be by four equal quarterly payments. The Case Stated records in para. 3 that there was an award and that the price of wheat was ascertained to be $5\frac{7}{10}$s. per Winchester bushel.

The Act went on to provide that the amounts of the corn rents which became payable by virtue of the first award made by the commissioners, could be varied at intervals of twenty-one years. The variations would be such as should be

(1) [1960] 2 All E.R. at p. 651.

declared by the order of the court of quarter sessions. The court of quarter sessions would have before them a report of three arbitrators or referees appointed by the court. The Act laid down the procedure for obtaining such a report. It is not known whether after the first award there was any further award before 1896: but on July 3, 1896, the average price of a Winchester bushel of good marketable wheat within the County of Lincoln for the twenty-one years then last past was found to be 4s. 3½d.

The present proceedings result from an application that was made to quarter sessions in March, 1959, for the appointment of arbitrators or referees to inquire into and ascertain the price of wheat in accordance with the provisions of the Act. The Act provides that there may be such application to quarter sessions and three persons may be named and appointed by the justices to be arbitrators or referees. Three persons were in this case appointed. The Act provides that they are to be appointed for the purpose of inquiring into and ascertaining from or by means of the London Gazette or by such other ways or means as they shall think equitable or fair the average price of a Winchester bushel of good marketable wheat within the said County of Lincoln for the twenty-one years then last past. The arbitrators or referees must make a report to quarter sessions. Then the Act goes on to provide as follows:

> ". . . and in case it shall by such report appear that such average price of a bushel of such wheat is more or less than the average price thereof set forth in the said award by the value of three pence, the said respective yearly tithe rents shall be increased or diminished, as shall be declared by the order of the said court."

The arbitrators having been appointed, they reported as follows:

> " We find: 1. The average price of a Winchester bushel of good marketable wheat in the County of Lincoln during the twenty-one years ended on Mar. 5, 1959 (excluding the payments referred to in the next succeeding paragraph) to be the sum of 10s. 1d."

That sum, therefore, was the average price of a Winchester bushel of good marketable wheat in Lincolnshire during that period of twenty-one years. The arbitrators further found:

> " 2. That in addition to the sum that the grower receives from the purchaser the grower receives deficiency payments under the Cereals Deficiency Payments Scheme, and that in the twenty-one years ended Mar. 5, 1959, these deficiency payments averaged 11d. per Winchester bushel."

The report went on to say that the three arbitrators or referees " having taken on themselves the burden of the said reference and having considered the evidence " made and published their award. It was in these terms:

> " We award and determine that the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the twenty-one years now last past the date of our appointment, namely, Thursday, Mar. 5, 1959, to be the sum of 11s."

It is not submitted by counsel for the Church Commissioners that that report was binding on the court of quarter sessions in the sense that they merely had to adopt the figure of 11s.: for the Act, as I have said, provides that if by the report it appears that the average price of a bushel of wheat was more or less than the average price set forth in the award by the value of three pence " the said respective yearly tithe rents shall be increased or diminished, as shall be declared by the order of the said court ". It was for the court to accept the facts as found, and then to do what was correct according to law.

The point that arises for our decision is whether on the report of the arbitrators there should be a variation on the basis that the price of wheat was 10s. 1d. or

on the basis that it was 11s. The effect of the variation would be to increase the corn rents payable and the corn rents would have to be increased either in the proportion that 10s. 1d. bears to $5\frac{7}{10}$s. or in the proportion that 11s. bears to $5\frac{7}{10}$s. It will be seen, therefore, that ultimately this case has to be decided by considering what is the meaning, in its context, of the word " price " in reference to the price of wheat.

The report referred to the deficiency payments under the Cereals Deficiency Payments Scheme. That was a scheme made pursuant to statute, the effect of which may be deduced by considering the Cereals (Deficiency Payments) Order, 1955 (S.I. 1955 No. 962). It is to be observed that these deficiency payments were not paid throughout the period of twenty-one years prior to Mar. 5, 1959. We have been told that the average sum of 11d. mentioned in the arbitrators' report is the average covering a period of twenty-one years taking the actual payments that have been made during the last few years during which alone there have been such payments. Under the order to which I have referred millable wheat is defined as " wheat which is sweet and in fair merchantable condition . . ." Counsel for the Church Commissioners has said that " millable wheat " can be regarded as being the same as " good merchantable wheat ", which is the phrase used in the Act. The order refers to a " registered grower ", and the registered grower

> " in relation to any cereals, means the person for the time being registered by the appropriate Minister, in such manner and subject to such conditions as that Minister may from time to time prescribe, as the grower of those cereals for the purposes of this order."

The order lays down the procedure for ascertaining standard prices and average realised prices for cereals and prescribes payments which may be made in respect of wheat or rye, and further payments which may be made in respect of oats, barley or mixed cereals. We are concerned here with wheat. Article 3 of the order provides:

> " In respect of each year and in respect of each of the following cereals, that is to say, millable wheat, millable rye, oats and barley, the Ministers shall—(a) in the light of their conclusions from a review held under s. 2 of the Agriculture Act, 1947, and with the approval of the Treasury, specify a standard price; and (b) determine, in such manner as appears to them proper in the respective circumstances, an average realised price, being in each case a price per hundredweight."

There is a proviso to which we have been referred, but I do not think it necessary to read its terms. So a standard price is specified and there is a determination of what is called the " average realised price ". Then, in regard to possible payments, the order provides by art. 4 (1):

> " If in the case of any year the average realised price of millable wheat or, as the case may be, millable rye is less than the standard price thereof, the appropriate Minister may, if he thinks fit, and subject to such conditions as he may from time to time with the approval of the Treasury prescribe, make a payment of an amount equal to the difference in respect of every hundredweight of millable wheat or, as the case may be, millable rye which is shown to his satisfaction to have been despatched or delivered during that year to, or in accordance with the instructions of, a purchaser thereof."

The payments, as art. 6 of this order provides, are to be made to the registered grower of the cereals in question or

> " if the appropriate Minister is satisfied that the interest of the registered grower in that payment has passed to some other person, to that other person."

The position, therefore, in the present case is that there was originally an

award by the commissioners as prescribed by the Act; that in 1896 there was an ascertainment of the average price of wheat in Lincolnshire; and that now, pursuant to the report of the arbitrators, it has been found, first, that the average price of a Winchester bushel of marketable wheat in the County of Lincoln during the relevant period was 10s. 1d., and further it has been found that in addition to any sum that the grower receives from the purchaser the grower receives a deficiency payment under the Cereals Deficiency Payments Scheme. The Church Commissioners, therefore, say that the corn rents should now be varied by reference to the figure of 11s. and not the figure of 10s. 1d. The corn rents should be varied, they say, to the extent of the proportion that 11s., rather than 10s. 1d., bears to the previously ascertained figure of $5\frac{7}{10}$s.

In the Case stated by the court of quarter sessions, the court declared that the Scremby corn rents should be increased in the proportion that 10s. 1d. bears to $5\frac{7}{10}$s. The question stated for the opinion of the court was whether that order and declaration was right or whether the sum of 11d. received by the grower ought to have been added to the 10s. 1d. The Divisional Court agreed with the findings of the court of quarter sessions and dismissed the appeal. Appeal is now brought to this court.

I will read again what seem to me to be the material words of the Act which we have to consider. Three persons named or appointed by the justices are arbitrators or referees

> " for inquiring into and ascertaining by, or from or by means of the London Gazette, or by such other ways or means as they shall think equitable or proper, the average price of a Winchester bushel of good marketable wheat within the said County of Lincoln, for the twenty-one years then last past . . ."

That they must report. It is to be observed that the price they must ascertain is the price of wheat within the County of Lincoln. The deficiency payments under the Cereals (Deficiency Payments) Order, 1955, are based on what the Minister specifies to be " a standard price ", which, as I understand, means a standard price for the whole country, and on what the Minister determines (also for the whole country) to be an average realised price. The scheme, therefore, seems to provide some benefit or subsidy for the grower.

Counsel for the Church Commissioners, in the course of his argument, submitted in the first place that the Act of 1801 must be construed as it would have been construed when the statute was passed, and, so far as he needed any authority for that proposition, he found it in *Sharp* v. *Wakefield* (2) where Lord Esher, M.R., said:

> " We have to construe several Acts, the first of which is the Licensing Act, 1828, under which the Case is stated. The justices stated the grounds on which they went, and the court of quarter sessions upheld their decision. The question asked is, whether the justices or the court of quarter sessions had jurisdiction in respect of either of the objections, because if they had jurisdiction as to one of them that is sufficient to support their decision. Now what is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute."

There has been no further statute, but counsel for the Church Commissioners submits that in the circumstances brought about by the provisions of recent legislation there is now an ambiguity in the meaning of the word " price ". He submits that the word " price " could now either mean the amount paid by a purchaser or could mean the amount received by the grower. He submits that the latter view should be adopted and that the amount received by the grower in this case was 11s. It has to be pointed out, however, that the subsidy given by the Order of 1955 is a subsidy based on the ascertained standard price and the

(2) (1888), 22 Q.B.D. at p. 241.

ascertained average realised price. If a particular grower has done very well himself and got more than the average realised price, he still may get the same amount of subsidy as would be received by others who have obtained less advantageous prices. Counsel for the Church Commissioners went on to submit that, in deciding between those two contentions, it should be borne in mind that the Act of 1801 was abolishing tithes, and he submitted that in the case of tithes which were personal tithes there was legislative support for the view that they were based on clear gains from personal work after all charges had been deducted.

I find myself in agreement with the Divisional Court and I am quite unable to accept the submissions so clearly put forward by counsel for the Church Commissioners. In the first place, it does not seem to me that there is any ambiguity, and I do not feel able to agree with counsel when he submits that some ambiguity has now developed. The words, as it seems to me, are quite clear. I think that what Parliament was doing was to arrange for future possible revisions of the corn rents based on alterations in the price of wheat, viz., the price of a Winchester bushel of good marketable wheat in the County of Lincoln. It seems to me that the word " price " was a word which denoted what a grower or seller would obtain for his wheat when he sold it. I cannot think that if by some later legislation he was to get from some other source than from his purchaser some additional benefit, that such benefit could properly be comprehended within the word " price ". Furthermore, there is nothing in this Act which suggests that the corn rents were to be related to net profits made by owners of land. There is no such notion introduced by the words in question.

I think, therefore, that the word " price " simply denotes what a grower of good marketable wheat would, on its sale within the County of Lincoln, realise for his wheat. There is, I think, no ambiguity, and, therefore, in agreement with the court of quarter sessions, and with the Divisional Court, I think that the figure on which to proceed should be that of 10s. 1d. and not 11s. For these reasons, I think the appeal fails.

PEARCE, L.J.: I agree. This Act was intended, as a matter of convenience, to change the payment of tithes from payment in kind to payment in money, and to tie the amount of the tithes to the market price of wheat. It is conceded that, at the time of the passing of the Act, the words " average price of good marketable wheat in the County of Lincoln " could only mean the price under a contract between buyer and seller. But it is contended that the introduction of the Cereals Deficiency Payments Scheme has produced an ambiguity since now the seller may, if he fulfils the necessary requirements, receive a subsidy (unrelated to the price of wheat in the County of Lincoln) in respect of each contract of sale, and may thereby receive something additional to the price in the contract of sale. Price, it is said, may now mean the contract price augmented by the subsidy. But in my view no such ambiguity has been introduced into the words of the Act or into their application. It is still possible to ascertain the average price of good marketable wheat. That price is independent of the subsidy. The fact that the subsidy will probably follow the sale does not alter the price at which the wheat was in fact sold or make the subsidy part of that price. Whether Parliament in 1801, had it foreseen subsidies, would have provided that the amount of the subsidy should be added to the market price is uncertain. It is always open to Parliament to do so now if it thinks fit. But it has not taken that course, and we must follow the clear words of the Act as they stand.

PILCHER, J.: I agree, for the same reasons which have been given by my Lords.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Taylor, Jelf & Co.*, agents for *Danby, Eptons & Griffith*, Lincoln (for the Church Commissioners).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SOFAER *v.* SOFAER (by her Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), July 18, 19, 20, 21, 29, 1960.]

Divorce—Cruelty—Respondent of unsound mind—Test of legal responsibility—Respondent suffering from paranoid schizophrenia—Expression of regret by respondent—Whether respondent knew that what she was doing was wrong—Meaning of "wrong" in the M'Naghten rules when applied as a defence in divorce—Cogency of evidence of medical expert who saw respondent once only.

The parties were married in 1937 and there were four children living. The marriage was unhappy owing to the wife's constant nagging, complaining and outbursts of temper. In 1942 the parties, then living in Rangoon, were evacuated to Bombay. In 1946 the wife had an abortion performed on herself. There was evidence that she had thereafter been troubled in her mind about having had the operation performed. From 1946 her conduct became worse and she assaulted the husband on a number of occasions. In 1950 the parties moved to Israel where the wife resented the living conditions. She threatened to burn down the canvas hut in which they lived. During 1953 and 1954 she used to threaten to commit suicide in order to get her own way. In 1954 a child was born to the parties and died after two and a half months. The wife accused the husband of causing the child's death by black magic. In the summer of 1954 the husband left the wife for two months as he could stand her conduct no longer. She asked him to return, promising to behave better towards him and expressing sorrow for her past behaviour. He returned to her, but she soon reverted to her former conduct. In November, 1954, she entered a mental hospital in Haifa as a voluntary patient where she remained for five weeks. In April, 1956, she entered the same mental hospital and stayed there for about ten weeks. Then the family came to England. In 1958 the wife, having been charged with larceny, was certified insane and was detained in a mental hospital where she had ever since remained. On the husband's petition for divorce on the ground of the wife's cruelty, the court found that the wife was guilty of cruelty and the question, therefore, was whether she established that she was not legally responsible for her acts by virtue of the M'Naghten rules. The medical evidence showed that the wife was suffering from paranoid schizophrenia which had developed over a long time. The medical expert opinion on whether the wife could distinguish between right and wrong in or before 1958 was partly to the effect that she could not and partly to the effect that she could. There was evidence that the wife had condemned the conduct of a relative in making illicit profits in the "black market."

Held: (i) the wife was legally responsible for her conduct since on the evidence she failed to discharge the onus of bringing herself within the second branch of the M'Naghten rules, viz., she failed to show that she did not know that what she was doing was wrong, the word "wrong" bearing for present purposes a sense which included that which was culpable or blameworthy; principal factors showing that the wife had appreciated what was wrong were—

(a) her expression of regret in August, 1954, for her conduct, since that showed realisation that there was something to regret, connoting a realisation that acts done in the past were wrong (see p. 476, letter D, post); dictum of HODSON, L.J., in *Palmer* v. *Palmer* ([1954] 3 All E.R. at p. 497) followed.

(b) her condemnation of the conduct of a relative in making illicit profits, and her threats, e.g., to commit suicide, made with a view to obtaining her own ends (see p. 477, letters B to E, post).

(ii) the wife's accusations of black magic being practised by the husband on her were prompted by delusion and did not constitute cruelty, but they

formed a small part of the whole and their exclusion did not affect the general conclusion (see p. 477, letter G, post).

Per CURIAM: if the issue were one of diagnosis or prognosis there would be considerable weight in the comment that an expert medical witness who had seen the wife only once for a short time was not in a position to dispute opinions of those who had had charge of her over some two years, but the question was about her state of mind before admission to hospital in 1958 on which no one was in a position to give a positive answer (see p. 477, letter F, post).

[Editorial Note. The meaning attributed to the word " wrong "—namely, as including that which is culpable or blameworthy—in the second branch of the M'Naghten rules is stated at p. 472, letter A, post. This may be distinguished from the meaning of the word in the rules when applied as a defence in criminal law; for there it means " contrary to law " (see *R.* v. *Windle*, [1952] 2 All E.R. 1; *R.* v. *Holmes*, [1953] 2 All E.R. 324). A further distinction, as authorities now stand, may be drawn in regard to the tort of trespass to the person, where, if the assaulter knew the nature and quality of the act, lack of knowledge that it was wrong is no defence, as liability in tort does not depend in such a case on culpability of the wrongdoer (see *Morriss* v. *Marsden*, [1952] 1 All E.R. 925 at p. 928). LORD GODDARD, C.J., however, intimated in *Palmer* v. *Palmer* ([1954] 3 All E.R. at p. 496) that there seemed to be no reason, when dealing with insanity and assaults, for any difference between the rule applied in divorce and that applied in crime.

As to the defence by a respondent spouse that he or she does not know that his or her acts are wrong, see 12 HALSBURY'S LAWS (3rd Edn.) 273, para. 521, note (l); and for cases on the subject, see 27 DIGEST (Repl.) 310, 311, *2581-2587*, and 3rd DIGEST Supp.**]**

Cases referred to:

Hanbury v. *Hanbury*, (1892), 8 T.L.R. 559; *affg.*, [1892] P. 222; 61 L.J.P. 115; 27 Digest (Repl.) 374, *3086*.

Palmer v. *Palmer*, [1954] 3 All E.R. 494; [1955] P. 4; [1954] 3 W.L.R. 756; 3rd Digest Supp.

R. v. *Windle*, [1952] 2 All E.R. 1; [1952] 2 Q.B. 826; 116 J.P. 365; 14 Digest (Repl.) 61, *253*.

White v. *White*, [1949] 2 All E.R. 339; [1950] P. 39; 113 J.P. 474; 27 Digest (Repl.) 310, *2586*.

Petition.

This was a petition by the husband for divorce on the ground of the wife's cruelty. The wife, by her guardian ad litem, denied that she had been guilty of cruelty, and pleaded that if she had committed any of the acts alleged she was not responsible therefor in that at all material times she suffered from such a defect of reason, from disease of the mind, as not to know the nature and quality of her acts, or, alternatively, if she did know that, as not to know that her acts were wrong. The facts appear in the judgment.

John Latey, Q.C., K. B. Campbell and *Viscount Stormont* for the husband.

R. J. A. Temple, Q.C., and *A. B. Hollis* for the Official Solicitor, as guardian ad litem for the wife.

Cur. adv. vult.

July 29. **COLLINGWOOD, J.,** read the following judgment: The parties were married on Jan. 10, 1937, at the synagogue in Rangoon, both of them then being twenty-two years of age. There are four children living, Flora, now twenty-two, Sally, born in December, 1943, Saul in May, 1951, and Esther in July, 1955. From 1937 to 1942 the parties lived in Rangoon. The evidence of the husband is that the marriage was unhappy from an early stage due to the wife's constant nagging, complaining and outbursts of temper. In 1942 they

were evacuated to Bombay during the invasion of Burma, and they were there until the end of 1946 when they returned to Burma. In 1948 they went to Bombay again. The husband says that throughout this time the same conduct continued. In 1946 the wife went to a doctor who procured an abortion for her. Afterwards she informed the husband that this had been done, saying that they could not afford another child. The husband was very upset about this, but she said that it had nothing to do with him and was solely her concern.

From 1946 her behaviour became worse. He said that there was constant nagging and complaints (frequently over money) constant abuse and a number of assaults. She flew into a temper if the husband failed to comply with her wishes, however unreasonable those wishes might be. She constantly complained, threw various articles at him and hit him and scratched his face. She ill-treated the children, ignoring the husband's protests in that regard. On a number of occasions she accused the husband, and also his sister, of practising black magic on her and " using an evil influence on her ". The husband says that his health became affected, his nerves suffered, he suffered from loss of sleep and had to resort to drugs. He told her of this, but she said that she did not care and that if it did not suit him he could go his own way.

In 1950 the family moved to Israel, where they lived in a camp, occupying a canvas hut known as a " sreef ". On several occasions the wife threatened to burn the sreef down (and everyone in it) in order to compel the husband to do what she wanted. At first, he says, he took these threats seriously. She resented the poor living conditions in Israel and one night woke him up in the middle of the night demanding that he should immediately go to the manager of the camp and make him, the manager, arrange for better accommodation for her. She threatened the husband with a knife which she had in her hand, and he ran out of the sreef. She followed him out, went to the manager's sreef, as she said, to teach him a lesson, and aroused him, and when he told her to come to his office next day she cut a hole in his sreef. On another occasion, when the husband was in the adjoining sreef in the evening, she called to him to come immediately and, on his so doing, leapt at him scratching the side of his face with her nails. In 1953 to 1954, in order to make the husband do what she wanted, she threatened to commit suicide on several occasions by swallowing acid or throwing herself in the river. On an occasion when she was complaining of having to live in the sreef she threw a meat-chopping board at him, striking him on the head, as a result of which he was away from work for several days.

Early in 1954 a child Leah was born. In March this child died, being then some two-and-a-half months old. The wife had prevented the husband from even seeing the child for two months prior to the child's death, and it was only after the death that he knew that the child had been ill. She then accused him of being responsible for the death, saying that he had given her no peace so that she could not look after the child properly. Later she accused him of having caused the child's death by black magic. On several occasions she woke him up at night by throwing things at him (such as shoes) and then demanded sexual intercourse, even threatening him with a knife if he did not comply with her demands. She also woke him up violently in order to discuss money matters, continuing to nag him for long periods.

In the summer of 1954 the husband felt that he could not carry on any longer like this and he left the camp and went to Haifa where he remained for two months. He told her why he was going and her reply was, " Do what you want, it doesn't concern me. All I want is money ". During the two months that he was away he visited her at the camp each week giving her half his salary. While he was living with her, he says, he had always handed over the whole. In August she asked him to return to her, promising to try to behave better towards him and to make the children happier; she expressed sorrow for her past behaviour, and said things would be all right in the future. He returned

to her and for a short time things were better, but not for very long. She then started her course of nagging and grumbling again and things got worse.

On Nov. 16, 1954, when she was two months pregnant, she entered the Blumenthal Mental Hospital in Haifa as a voluntary patient, remaining there until Dec. 22, 1954, when the husband took her away in consequence of her insistence that she wished to leave, though the physician advised against it. She said that she would continue as an out-patient and she was so treated. After her return home on Dec. 22, 1954, her temper got worse again and after some weeks she became violent. In March, 1955, she threw a bottle at him, having earlier in the day accused him of planning to get her put back in the hospital. On July 19, 1955, the child Esther was born.

As I have said, the wife was very dissatisfied with the conditions in which they were living in Israel and had often expressed the wish to go to England to join her own people and live there, a course with which the husband agreed. After the birth of Esther the wife abused the husband for the delay in making arrangements for their departure, for which she held him responsible, and in the course of a violent temper because of this, she smashed a number of articles of furniture. She insisted on keeping the girls away from school, saying that girls did not need education and ought to help her in the house, and this also led to several angry scenes when she lost her temper and in which she assaulted the girls. On Apr. 26, 1956, she was again admitted to the Blumenthal Hospital. On July 4 she was discharged, and the same day the family left for England, arriving here on July 12. They went to the Jewish temporary shelter in Mansell Street. They did not live together there—the sexes were segregated—but they saw each other and the husband says that her attitude towards him was unchanged and the daughter Flora said that she had her meals with her father as her mother did not want her and was quarrelsome because she wanted to go and live with her brother and sister, which she did in September, 1956. In the previous month the husband had gone into furnished rooms.

The husband's evidence as to the wife's behaviour in Israel was corroborated in a number of details by the daughter Flora, who was twelve years old when they went there in 1950. She spoke of the constant nagging and abuse. She says that her father did nothing to provoke the wife, but that she, the wife, had complaints ready for him the moment he entered the door from work, and that though he gave her everything she wanted she was always discontented. She spoke of seeing her mother throw things at the husband, she witnessed the incident when she frightened him out of the sreef with a knife, also she saw the wife holding a knife in her hand in the night and threatening to stab the husband. She heard the threats to burn the sreef and everybody in it, and spoke of their being constantly kept awake at night by her mother. Further corroboration was afforded by the husband's sister, Mrs. Rachel Solomon. I accept the husband's evidence as to the wife's conduct and, in my opinion, it was conduct which was calculated to injure the husband's health. I am also satisfied that it did in fact injure his health, as is shown by the evidence of Dr. Bard, Mrs. Rachel Solomon, and the daughter Flora, in addition to the evidence of the husband himself. I find, therefore, that unless the evidence shows that the M'Naghten rules (1) are applicable, the husband has established conduct which amounts to cruelty in law.

This being so, the onus of showing that she is not legally responsible for her actions is on the wife, who must discharge it by proving, on a balance of probabilities, that she was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of her acts; or, if she did know, that she did not know that what she was doing was wrong. As to the first of these alternatives, there is no question that she knew the nature and quality of her acts. All the evidence is one way.

---

(1) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200.

The next question, therefore, is: "Did she know that what she was doing was wrong?" Although *R.* v. *Windle* (2) was cited to me on behalf of the wife, I think that having regard to the judgment of ASQUITH, L.J., in *White* v. *White* (3), in which he quoted with approval from the judgment of the Court of Appeal in *Hanbury* v. *Hanbury* (4), in this connexion the word "wrong" is to be understood as meaning not merely punishable by law but including that which is culpable or blameworthy. As to the wife's present condition, there is no doubt whatever. On Jan. 21, 1958, after having been charged with larceny from one of Woolworth's stores, she was certified as insane and detained at Long Grove Mental Hospital, Epsom, where she has remained ever since. On Jan. 21, 1959, she was discharged on the lapse of the reception order, but re-admitted at once as a voluntary patient, and, on Jan. 21, 1960, she was re-graded as an informal patient. All the medical witnesses agree that she was suffering from paranoid schizophrenia.

As I have said, she was admitted to the Blumenthal Mental Hospital, Haifa, on Nov. 16, 1954, and the medical report and case history from Dr. Bental, the specialist for mental diseases at that hospital, have been produced in evidence on behalf of the wife. His medical report dated Nov. 22, 1958, is as follows:

> "[The wife] is suffering from schizophrenia of a paranoid type, which has developed gradually over a long time with increasing severity. The date of onset of the illness cannot be determined exactly, the only way to form an opinion is by accepting the husband's statements. However, in view of the progress of the illness one is justified in surmising that the oddities in her behaviour were already the symptoms of her illness. The statements of the husband regarding the bizarre actions of the patient are perfectly credible since they are in accordance with the symptomatology of paranoid schizophrenia in general, and with the symptoms observed in the patient here in particular. I arrive at the conclusion that [the wife] is suffering from schizophrenia of the paranoid type and that at the present state of our psychiatric knowledge there is practically no hope for her recovery."

With that general report there was a case history. It is a very long document. I do not think that it is necessary for present purposes to read the whole of it, but there are certain passages in it to which I should refer. In the course of this case history Dr. Bental says:

> "The onset of the present illness was insidious, it may be traced back to the death of her child in April, 1954. At that time she began to be depressive. The condition became worse when after the death of her child an aunt came to visit with her and stayed for four months. The aunt caused considerable disharmony between the patient and her husband. Finally, the husband left his family for two months, since he could not stand the nagging of his wife, when she could not sleep at night. The patient was inclined to believe in witchcraft, and this superstition was aggravated under the influence of this aunt. Twelve days prior to her admission to hospital, the patient became acutely ill. She suddenly came down with severe anxiety with the idea that she had been bewitched and the witch was coming for her. She insisted that the aunt had bewitched her and had driven the husband from the house."

He then refers to her condition on admission:

> "The patient, who entered the hospital voluntarily on Nov. 16, 1954, was two months pregnant. She was whiny-agitated, unkempt, refused to wash and use a comb. The patient was afraid that something would happen to her husband, begged fervently to permit the husband to visit her. He came almost daily and brought sweets to her. However, when they were together, they had nothing to say to each other."

(2) [1952] 2 All E.R. 1; [1952] 2 Q.B. 826.
(3) [1949] 2 All E.R. at p. 348; [1950] P. at p. 53.
(4) (1892), 8 T.L.R. at p. 560.

A Dr. Bental then goes on to say that she had the attitude of the paranoid, and a little lower down he speaks of her hearing voices and sounds without clearly understanding their meaning. She also said she felt her pregnancy was due to the witchcraft of the aunt, and that she was going to die of it. He concludes by saying—" In spite of all this, her husband gave into her persuasion and insisted on the patient's discharge "—she herself having insisted for some time, and the B patient was discharged from hospital on Dec. 22, 1954, unimproved and against the advice of the physician. Dr. Bental then sets out the serious treatment which the patient had undergone, pointing out that it was limited owing to her pregnancy and the Largactil treatment had to be interrupted because of her premature departure from the hospital.

She was again admitted to this hospital on Apr. 26, 1956, but for some four C months prior to this admission she had been treated by a Dr. Valin, from whom two reports have been admitted. One of them, sent in December, 1957, from Haifa, reads as follows:

> " I have been for a short time in medical charge of the family Sofaer and I will be glad to do my best to assist you in the aforementioned case. D [The wife] was suffering from delusions and obsessions, mainly that the perils to the state of Israel are caused by lack of piousness of the population and because of the sexual coolness of her husband towards her. Even during her quiet period her household was sordidly neglected, her husband had to care for her and the children. He was during his stay in Israel a minor customs official, because of his wife's condition he had to neglect his job and the financial and general condition of the family was in a pitiful E state. [The wife] was sometimes a raving maniac and I remember several occasions when I had to administer injections of sedatives by force and with the help of neighbours. She became finally absolutely demented and violent and had to be admitted to a mental hospital where her condition improved after treatment with shocks and Largactil. I remember that [the husband] did mention several times that his wife used physical violence F against him. I can state that during the time of my observation [the wife] never appeared to me as a mentally sane person, at times, however, she was a raving maniac and entirely irrational. As far as I know [the husband] behaved well to his wife and did all he could to help her."

Then there is a later report, dated Jan. 9, 1958, which is quite short and in G these terms:

> " Only today I was shown by Dr. Wohlstein a copy of the petition. In addition to my last letter I would like to state that I witnessed at several occasions during my professional visits at the flat of Sofaer's, that [the wife] abused her husband in front of her children using the vilest expressions. I consider all the other allegations of [the husband] as likely to be true and I H remember him as a soft and always well behaving man. To judge how far her character or her mental deterioration can be made responsible for her behaviour, I don't feel to be competent."

Dr. Bental's report regarding her second period in the Blumenthal Hospital starts by giving what he calls the interim history, which he says was obtained from the husband. The husband would not accept that in its entirety; he agreed I that he did say that she dreamt of her late father and woke up in fear, but he said the information which followed—" She believed everybody was against her and that people spoke and laughed about her "—was not obtained from him and must have been obtained from the wife herself. Dr. Bental says that after she left the hospital on the previous occasion

> " she still suffered from fear of death and although she took good care of the house, she had no interests, did not go out and never saw company in her home."

He then refers to the birth of the child, which was on July 19, 1955, who was placed in an institution by a welfare worker and the wife did not see the child thereafter. He goes on to say with regard to the wife:

> "She knew that her family were prepared to move to England, and she shouted in the irrational fear that they would force her to move to England without the child. She ate very little, occasionally refusing all food, slept very little, the last few nights not at all, and finally refused food entirely."

The doctor says that on admission to the hospital the wife appeared severely neglected, and he continues:

> "She states that she is very well and that she came to the hospital only because God promised her that she could see her youngest child here. Her conversation reveals that she communicates constantly with God and she asks to see her baby as God had promised her. She curses the nursing staff, she shouts, runs to the male ward with the upper part of her body bare. Patient is confused, at times she shows pressure of speech and her talk is incoherent. She states that the physician, together with neighbours and police, talked ill about her. She asked one of the doctors whether he was the one who wanted to kill her and her baby. At times she is negativistic, has to be fed, hides under her blankets and is out of contact with her surroundings. She stubbornly refuses to sign a form for emigration presented to her by her husband, who needs to obtain her signature on it. She tears the paper saying that in this house, where people want to poison her, she is not going to sign anything. When her husband for a few days is not permitted to visit the patient, she believes that he has gone abroad and has deserted her. The patient is full of paranoid ideas—'there is something in the air—a disaster is imminent, there was an earthquake because people wanted to kill her; she could not sign any papers because that would sign her death-warrant; if she were dead her husband and her daughter could live together as man and wife and that was why she could not sleep at night, in order to prevent this from happening.' She also stated that she had heard at night, that she was the queen of Israel and Dr. Bental was the king of Israel. Under treatment with Largactil the patient calmed down, she is not neglecting herself any more, keeps herself and her things clean and orderly, but her delusions persist and her thought-processes are limited."

Then again he states the treatment which she underwent in that hospital, which was similar to her treatment in her previous stay there.

In addition to this a questionnaire was submitted to Dr. Bental together with a supplementary one, consisting in all of one hundred and seventy questions, inviting his opinion with regard to every one of the allegations in the petition and the particulars thereof as to the wife's capacity to appreciate the nature and quality of her acts and whether she would have known that her conduct was wrong. These answers, I think, may be summarised by saying that Dr. Bental thought that while in every case she knew what she was doing she did not know that what she was doing was wrong.

As to the wife's condition since her reception, Dr. Alan Munro, physician superintendent at Long Grove Hospital, said that there had been little change since January, 1958, though her condition had varied, she was suspicious and resentful, and held the belief that she was being persecuted, though she would not say by whom. There had been a number of violent outbursts. He expressed the opinion that the onset of her mental illness was about 1948, though he admitted that estimate was somewhat speculative. In coming to this conclusion he said that he attached weight to the time when she expressed the belief that her husband was practising black magic on her as distinguished from her previous general belief in the efficacy of black magic. He considered that since that

time she had suffered from disease of the mind and from defect of reason, though again he says that this involved a considerable element of speculation. He accepted that she knew what she was doing, but thought that it was more likely that in the majority of the incidents she did not know that what she was doing was wrong.

Dr. Denham, who became responsible for her in the hospital in April, 1958, expressed the opinion that she had been schizophrenic for at least twelve years. He said that she had various delusions, for example that she was losing weight, whereas the contrary was the fact, that her body was diseased, that the food was unclean. He was satisfied that she had disease of the mind and a defect of reason, but he says that he found it difficult to say from what date the defect started, though he thought that it was probably 1948. He said that her capacity to distinguish right from wrong had been severely distorted throughout the time that she had been under his care, certainly since the time she entered the hospital in Haifa in November, 1954, and quite likely, he said, before then. He also said that there was a possibility that from 1948 she did not appreciate that what she did was wrong. His reasons for saying that she could not distinguish right from wrong were (i) she suffered from delusions, and (ii) that if she could so distinguish, one would look for some measure of restraint in her behaviour, that being a reasonable criterion of the capacity to distinguish, even in a mental patient.

Dr. Madgwick, psychiatrist, had her under his care from January, 1958, to April, 1958. He said that on admission she had no idea that she had done wrong, and in his opinion she was not able to distinguish right from wrong. The reasons he gave for this opinion were: (i) she is a schizophrenic; (ii) that her mind is distorted to the extent that it was obvious that she could not so distinguish, this distortion being indicated by her delusions of persecution. From the medical history in Israel he thought that by 1954 the schizophrenia had become serious, and before that had been increasing in severity, and he thought it more than possible—but not certain—that at that time she did not know right from wrong.

Dr. Desmond Curran, the senior psychiatrist at St. George's Hospital, interviewed the wife on Feb. 6, 1960, at Long Grove. He had been provided with the hospital records and also with the medical reports from Israel. He thought her, he said, reasonably co-operative, though apt to be evasive. She was well orientated and not mentally confused, and her memory was good. She expressed vague persecutionary ideas, she thought that she might have been poisoned, and he said that she was very apathetic. As to her husband's behaviour towards her, she said that he had always been nice and she had no grounds for complaint. When asked how she behaved to him she replied: "I do not know". Dr. Curran agreed with all the other doctors that she was suffering from paranoid schizophrenia, but he said that schizophrenics generally have an intellectual capacity of determining whether an act is something which one should or should not do, and that typically one does not get an impairment of consciousness, nor of intellectual capacity. He agreed that the evidence rather pointed to the onset of schizophrenia as dating from round about April, 1948, and that the schizophrenic illness was developing insidiously over the years. He could see no reason to think that she did not know, when she behaved as she did towards her husband, that she was behaving in a way that was unjustified, and that she ought not to have done it. It was, he said, an inquiry which was largely speculation. In his opinion, the probability was that the second limb of the M'Naghten rules (5) did not apply here.

Certain parts of the evidence, it was urged on behalf of the husband, were inconsistent with an inability on the wife's part to distinguish right from wrong. The first of these was the fact (6) that in August, 1954, after the husband had

(5) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200.
(6) See p. 470, letter I, ante.

left her and gone to Haifa, she expressed regret for her past behaviour and promised to behave better in the future. Dr. Curran agreed that the only reasonable conclusion to draw from this was that she had the capacity to distinguish right from wrong. Dr. Munro, however, said that he attached little weight to this, saying that an expression of contrition merely indicated that her mental illness had taken a temporary turn for the better. Dr. Denham said that if the patient gives voice to an expression of regret it does follow that she then appreciates the difference between right and wrong, but this does not show any awareness of the impropriety of the act at the time when it took place. Dr. Madgwick said that it would amount merely to a general expression of regret, without reference to any specific acts, showing merely a vague awareness of deterioration in family relationship and an equally vague promise of reform. He then added this: "I do not think she was able to appreciate what she was promising, as shown by the fact that she did not keep her promise". I make no comment on that.

With all respect to these views, I confess to finding a difficulty in ascribing an expression of regret to anything other than a realisation that there was something to regret, and, if language means anything, a promise of reform for the future connotes a realisation that what has been done in the past was wrong, and to assume that the expression of contrition is merely the reflection of the person's mind on a temporary higher plane with respect to a former lower one is to indulge in speculation in which I am neither inclined nor entitled to indulge.

In this connexion, I would refer to a portion of the judgment of HODSON, L.J., in *Palmer* v. *Palmer* (7). At the trial Mr. Commissioner GRAZEBROOK, Q.C., dismissed the petition and in the course of his judgment said that he was satisfied that the husband did not realise what he was doing when he committed the acts of violence against his wife, and, further, that when he committed the acts, he did not think that they were wrong. In the course of his judgment HODSON, L.J., said this (8):

> "The real point in this case is whether the husband did not know the acts were wrong when he committed them. That contention succeeded before the learned commissioner and has been supported here, and I think it is based entirely on the evidence of a very experienced medical man, the medical superintendent at the Knowle Hospital, where the husband has been for many years. He was obviously familiar with what lawyers call the M'Naghten rules (9), and, when asked 'Would he know that those acts were wrong?', he answered: 'No.' On that, counsel for the husband was fully entitled to argue that there was evidence before the court which would justify it in saying that the second branch of the M'Naghten rules (9) applied and, therefore, that the husband had a good defence.
>
> "The doctor, in answering 'No', gave his reason for that answer. The Lord Chief Justice (10) has already read that answer, which indicates that the doctor was basing himself on the husband's motive for acting in the way in which he did, the delusion from which he suffered giving him that motive. The doctor reasoned from that, that the husband did not know the act was wrong. With all respect to the doctor, I think that reasoning is unsound. As counsel for the wife put it, one must look at the matter as if the wife had indeed been unfaithful, as the deluded man thought she had. The fact that that was the motive does not mean that the husband did not know that what he was doing was wrong. In fact, the contrary appears from the evidence, because, as was pointed out in the cross-examination of the doctor, the relieving officer had seen the husband in January of the same year, 1952, in which he was certified, and he then expressed regret for the assaults which

(7) [1954] 3 All E.R. 494; [1955] P. 4.
(8) [1954] 3 All E.R. at p. 497; [1955] P. at p. 9.
(9) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200. (10) LORD GODDARD, C.J.

A he had committed on his wife. That is, surely, the strongest possible evidence that he knew that what he was doing was wrong. In that state of the evidence, which was fairly recognised by the doctor in cross-examination when counsel for the wife put it to him, I think it is quite impossible to come to the conclusion that this case is covered by either branch of the M'Naghten rules (11). Accordingly, the husband being responsible for his B acts and the cruelty being established against him, this wife is entitled to a decree."

Another aspect of the wife's conduct which was inconsistent with an inability to distinguish right from wrong was her condemnation of the conduct of a relative who had been found to have been making illicit profits in the " black market ". This would seem to indicate a capacity to take an objective view of right and C wrong, and this was the opinion of Dr. Curran. But here, again, Dr. Denham's view was that this merely showed that at times she evinced a better awareness than at others, and that her delusions would be centred in one field, so that anything outside that field might be appreciated in its proper perspective. Dr. Madgwick expressed much the same view.

Another matter was her threats to commit suicide, to burn down the sreef— D to state the husband (12)—none carried out but all made with a view to obtaining her own ends. Dr. Denham was not prepared to infer from that, that she realised that what she threatened to do was wrong. There is also the evidence of Mrs. Solomon, the sister, that the wife confided to her that she had been greatly troubled in her mind about the abortion which she had had performed in Bombay and she urged the witness not to have it done herself because it had E troubled her so much.

It was suggested on behalf of the wife that Dr. Curran, having seen the patient on one occasion only and that for a comparatively short time, was not in a position to dispute the opinions of those who had had charge of the wife over some two years. If the question in issue was as to diagnosis or prognosis there would be considerable weight in this comment; but neither of these matters is in F issue, both are common ground. The question is as to the state of mind of this wife years before she was admitted to Long Grove (13). I agree with the view of Dr. Curran that, on the material before the court, a determination would be nothing more than guesswork. No one is in a position to give a positive answer, and I unhesitatingly prefer the opinion of Dr. Curran that the probabilities lie in favour of the view that at the material times the wife did know G that her conduct was morally unjustified.

There is one reservation which must, I think, be made, and that is in respect of her accusations against the husband of practising black magic towards her (14). Accepting that these accusations were prompted by delusional ideas, then I do not think that they can be held to amount to cruelty. These accusations form but a small part of the whole and their exclusion does not affect the issue. H Apart from this particular matter, I do not think that it is possible to say that at any given point of time her behaviour must be regarded as having ceased to stem from her abnormal personality, her vicious temper, selfishness and a determination to get her own way at whatever cost, and thereafter must be regarded merely as a manifestation of schizophrenia.

One other issue was raised on behalf of the wife, namely, condonation, though I it was not pleaded. The evidence is that intercourse took place up to a date some two months prior to the wife entering the Blumenthal Hospital on Nov. 16, 1954. Thereafter, there were no physical assaults apart from the throwing of a bottle at the husband. But condoned cruelty may be revived by acts

(11) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200.
(12) See p. 470, letter D, ante.
(13) The wife was admitted there in about January, 1958, see p. 472, letter B, ante.
(14) See p. 470, letter H (black magic causing the death of Leah), and p. 470, letter C, ante.

which, taken by themselves, are insufficient to amount to legal cruelty, and, in my opinion, the conduct of the wife after her return from hospital was sufficient to revive the previous cruelty.

I find, therefore, that the wife has been guilty of cruelty and that she has not discharged the onus of proof that at the material time she did not know that her conduct was wrong. The husband is, therefore, entitled to a decree nisi.

Decree nisi.

Solicitors: *Cardew-Smith & Ross* (for the husband); *Official Solicitor* (as guardian ad litem for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

BEST *v.* GLENVILLE.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), October 10, 1960.]

Landlord and Tenant—Agreement for lease—Illegality—Use of premises—Town and country planning—User requiring planning permission—Permission refused—Landlord's right to recover rent—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6 *c.* 51), *s.* 12 (1).

The landlord let to the tenant a room for the purposes of a bridge club. The user of the premises for that purpose was to the knowledge of both parties a development within the meaning of the Town and Country Planning Act, 1947, s. 12 (1), for which planning permission was required. The tenant went into possession and the club was opened. It was contemplated by the parties that the tenant should apply for planning permission, and the county court judge found that the proper inference was that the landlord would not have let the premises if he had known that they would be used without planning permission. Application for planning permission was made by the tenant, but it was refused. In an action for rent the tenant contended that the purpose for which the premises were let was unlawful, and therefore that the contract of letting was illegal and unenforceable.

Held: the tenancy agreement was not illegal, for the parties had contemplated that planning permission should be obtained, and the refusal of planning permission did not affect the legality of the agreement; rent was, therefore, recoverable.

Dictum of LORD GODDARD, C.J., in *A.-G.* v. *Smith* ([1958] 2 All E.R. at p. 558) explained.

Appeal dismissed.

[As to lettings for illegal purposes, see 23 HALSBURY'S LAWS (3rd Edn.) 433, 434, paras. 1029-1031; and for cases on the subject, see 31 DIGEST (Repl.) 159, 160, *2968-2974.*]

Case referred to:

A.-G. (*at the relation of Egham U.D.C.*) v. *Smith*, [1958] 2 All E.R. 557; [1958] 2 Q.B. 173; [1958] 3 W.L.R. 81.

Appeal.

This was an appeal by the defendant from an order of His Honour JUDGE ANDREW made at Marylebone County Court on Feb. 11, 1960, whereby the defendant was ordered to pay to the plaintiff arrears of rent amounting to £140. The facts appear in the judgment of ORMEROD, L.J.

S. N. Bernstein for the defendant, the tenant.

A. L. Price for the plaintiff, the landlord.

ORMEROD, L.J.: This is an appeal by the defendant, Mrs. Glenville, from a decision of His Honour JUDGE ANDREW given at Marylebone County Court on Feb. 11, 1960, when he gave judgment for the plaintiff, Mr. Best, for

£140 due to him as rent, at the rate of £10 per week, of a room on the ground floor of No. 64, West End Lane, Hampstead.

The circumstances in which this matter comes before the court are as follows. The plaintiff was the lessee of the dwelling-house No. 64, West End Lane, Hampstead. He was approached early in 1959 by a Mr. Thomas on behalf of the defendant with a view to arranging for a letting of a room on the ground floor for the purpose of a bridge club, and it was hoped that intoxicating liquors could be supplied at appropriate times. Some negotiation went on between Mr. Thomas and the plaintiff, and it was arranged that the room should be let to the defendant for £10 a week for the purpose of a bridge club.

On Mar. 25, 1959, the defendant attended at the plaintiff's office and produced for approval a draft underlease, which had been drafted by her solicitors. That underlease has been put before the court, and counsel for the defendant relies, to some extent at least, on one of the provisions of the underlease. The underlease was for a period of ten years from May 4, 1959, at a rent of £10 per week inclusive of rates, and by cl. 2 (2), the lessee covenanted with the lessor "to use the demised premises for the purposes of a club for which purposes the premises are let". The plaintiff was unable at that time to approve or sign the underlease because it was necessary for him to obtain the permission of his head-lessor for the premises to be let for this particular purpose. He wrote to his head-lessor, and asked for this permission. Permission was eventually refused, but it appears from the correspondence that the plaintiff was allowed to let the premises to the defendant for this purpose, on the understanding that if the head-lessor objected to the way in which the premises were being used, he would give some reasonable notice to the plaintiff that the matter must be brought to an end. I think that is approximately the way in which the matter was finally agreed, according to the correspondence, between the parties. Be that as it may, the defendant went into possession of the premises. She paid £40, which appears either to have been the first month's rent in advance or to have been a deposit. It does not seem to matter very much which because it does not affect the final result one way or the other. She made certain alterations to the premises, and eventually the club was opened on Apr. 13.

It is admitted by both parties that the use of these premises as a club was a development of the property within the meaning of the Town and Country Planning Act, 1947, s. 12, and that in those circumstances the consent of the planning authority was required. There appears to be no doubt from the evidence that that was known to both parties during the negotiations; and the evidence of the plaintiff, and the evidence of Mr. Thomas, which was accepted by the learned county court judge, was that this matter was discussed, certainly at the final meeting and probably at an earlier meeting, and the evidence of both of them was that the defendant would see to getting the necessary planning permission, as well as complying with any necessary formalities under the Licensing Acts.

It appears that rent was paid altogether for a period of sixteen weeks, until July 3. The premises remained in the possession of the defendant until October, 1959, but no rent was paid after July. The defendant refused to pay it, and this claim for £140 was brought in respect of the rent during the period from July to October when the defendant was in possession of the premises. It appears that the defendant applied for planning permission to the local authority, which was refused. She then appealed to the Minister and there was an inquiry and a report to the Minister, and that appeal was dismissed. In those circumstances, of course, the local authority could at any time have served on her an enforcement order, and if she did not comply with that enforcement notice she would have been liable to a penalty under the Town and Country Planning Act, 1947.

Counsel for the defendant contends that the plaintiff is not entitled to the rent of these premises for the period from July until October because the agreement by

the plaintiff to let the premises to the defendant was an illegal contract, and, therefore, a contract which could not be enforced in the courts.

It is necessary to refer to the Town and Country Planning Act, 1947, of which s. 12 (1) provides:

> "Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

It is not disputed that the particular user of these premises was a development which was carried out after the appointed day, and that therefore s. 12 (1) applied. Then it is necessary to turn to s. 23 (1) which provides (1):

> "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

In other words, an enforcement notice could be served by the local authority on the person whom they considered to be contravening the regulations and using the premises for purposes other than that permitted under the Act; but discretion is in the local authority to do that if they consider it to be expedient, and it is to be noted that if an enforcement notice is not served within four years, then the enforcement notice cannot be served at all, and the user of the land can continue even though it is a development, and, therefore, a contravention of s. 12 (1). Section 24 (3) provides (2):

> "Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50 . . ."

The scheme of the Act appears to be that the local authority may, in a proper case, serve an enforcement notice if in the view of the local authority there has been a development and, therefore, a contravention of the Act; and if that enforcement notice is not complied with by the occupier of the land, he will be liable to a penalty, but unless an enforcement notice has been served there is no liability for a penalty.

In this case counsel for the defendant says this: When the agreement for this letting was negotiated—and it was never more than a letting, because the underlease was never signed—both parties knew perfectly well that the premises were to be used for the purpose of a club. Further, both parties realised at the time when the negotiations were taking place, that this user as a club would be a development within s. 12 (1), and therefore that planning permission was required. Counsel for the defendant then argues that the premises were let to the defendant so that they could be used immediately as a club, and in those circumstances

(1) The subsection is printed in its original form without the small amendments effected by the Town and Country Planning Act, 1959, s. 58 and Sch. 7, and the Town and Country Planning Act, 1951, s. 2, which are not material for present purposes.

(2) The subsection is printed in its form prior to the amendments effected by the Caravan Sites and Control of Development Act, 1960, s. 48 and Sch. 4, and the Town and Country Planning Act, 1959, s. 58 and Sch. 7.

what was contemplated by the parties, at the time this agreement was made, was an illegal user of the premises; therefore the contract was illegal in itself, and cannot be enforced in a court of law. That I think is putting fairly the argument which counsel for the defendant has addressed to us with very considerable persuasiveness.

Counsel for the defendant cited as authority for his proposition a passage from the judgment of LORD GODDARD, C.J., in *A.-G.* v. *Smith* (3). This was the case of land used for the purpose of a caravan site. It was agreed that the use of land for the purpose of caravan sites was a development within the meaning of the Act, and there the question was whether and at what time the penalty was incurred. After stating what the question is, LORD GODDARD, C.J., says (4):

> "The machinery provided by the Act is this. Section 12 (1) provides that: 'Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day'. The sense of that subsection is perfectly obvious, so it seems to me, and is that development of land carried out without permission is unlawful; it is contrary to the Act. It does not follow, because it is contrary to the Act, that a penalty is incurred at once."

Counsel for the defendant submits in effect that LORD GODDARD, C.J., is holding that a contravention of the Act is illegal in the sense that it is unlawful because it is contrary to the Act, and in those circumstances a contract based on such a contravention must be unenforceable. I find that I cannot accept this contention. The facts as found by the learned county court judge are these. The plaintiff let these premises to the defendant, admittedly so that they could be used as a club and admittedly knowing that planning permission was required. It has been found by the learned county court judge on both the evidence of the plaintiff and of the defendant's own witness, Mr. Thomas, that the defendant knew about obtaining planning permission and intended to see to it herself. It was also found by the learned county court judge that the proper inference to draw from the evidence of the plaintiff was that he would not have let the premises had he known they were going to be used without planning permission. In those circumstances for my part I find it very hard to see what there is illegal in the contract so far as the plaintiff is concerned. He let the premises for a perfectly proper purpose, i.e., for their use as a club, as he was entitled to do. There was no duty on him to obtain planning permission. It was unnecessary, in the circumstances, for him to say, as it was suggested he should have said: "These premises are let only on the understanding that if they are for the use of a club there must be planning permission", because that had already come to the knowledge of the defendant, and she was prepared to deal with it by applying for planning permission. In those circumstances why should this be an illegal agreement? If neither party took the trouble to take any steps to obtain planning permission, or if each party knew that no steps were to be taken, it might well be the case, if proved, that there was something unlawful in this agreement. But that is not this case and I can see no reason why the landlord should be held to have entered into an illegal agreement.

LORD GODDARD, C.J., in *A.-G.* v. *Smith* (3), is not saying in terms, as I read his judgment, that development of land carried out without permission is illegal in the sense that any agreement relating to that land which has that development in view would be illegal. He is saying that it is unlawful because it is contrary to the Act. Counsel for the defendant has, quite rightly, pointed out that the fact that no penalty may be inflicted is not necessarily the criterion whether a contract is illegal or legal; but it seems to me he is reading too much into the passage which he has cited from the judgment of LORD GODDARD, C.J. Be that as it

(3) [1958] 2 All E.R. 557; [1958] 2 Q.B. 173.
(4) [1958] 2 All E.R. at p. 558; [1958] 2 Q.B. at p. 180.

may, I am quite satisfied here that this contract was entered into by the plaintiff for a perfectly proper, legal purpose. Further, it appears clear from the evidence that it was the intention of the parties that that purpose should be carried out in a legal way and in accordance with the terms of the Town and Country Planning Act, 1947. The fact that permission was not granted—which apparently was not in the contemplation of the parties at the time of the negotiations—makes no difference to the question whether the agreement was a legal one or not.

It follows that in my judgment the appeal must fail.

WILLMER, L.J.: I have reached the same conclusion, and for the same reasons.

UPJOHN, L.J.: I agree. I desire to add this. The argument of counsel for the defendant necessarily involves the view that an agreement between two parties which involves a user of land for which development permission is required is necessarily illegal if such permission is not previously obtained. I am quite unable to accept so broad a proposition.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Beach & Beach* (for the defendant); *Richardson, Sadler & Co.* (for the plaintiff).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

COMMERCIAL BANKING COMPANY OF SYDNEY, LTD. *v.* MANN.

[Privy Council (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest), July 19, 20, October 6, 1960.]

Bank—Cheque—Conversion—Property in bank cheque—Cheque fraudulently drawn by one partner on partnership account—Partnership assets belonging to other partner—Bank cheque issued in exchange for cheque fraudulently drawn—Bank cheque cashed with another bank—Whether bank cheque was the property of the partner defrauded—Whether collecting bank liable in conversion.

Privy Council—Australia—New South Wales—Bank—Conversion—Unauthorised cheques drawn on partnership trust account by one partner—Bank cheques issued by bank thereon pursuant to partner's application—Bank cheques cashed by payee with collecting bank—Whether collecting bank converted bank cheques.

The respondent was a solicitor practising at Sydney in partnership with R. Under the partnership agreement, all the assets of the partnership, including all money to the credit of any bank account in the partnership name, were the respondent's property, but R. was entitled to the income of the partnership save for small weekly drawings by the respondent. Cheques might be drawn on the partnership banking account by either partner and the respondent had given the necessary authority for that purpose to the A.N.Z. bank where the respondent and R. maintained a trust account in the partnership name. Between August, 1954, and May, 1956, R., in purported exercise of such authority, fraudulently drew thirteen cheques on the partnership trust account with the A.N.Z. bank. In each case an application on a printed form for a bank cheque, or bank draft, in favour of H.W. for an amount equal to the cheques was completed and signed by R. in the partnership name. These documents were taken to the A.N.Z. bank and in each case that bank debited the partnership trust account with the amount of the cheque and at the same time issued a bank

A cheque for an equal amount in the form " Pay [H.W.] or bearer ". The bank cheques were taken by H.W., who was not a client of the partnership nor a person to whom any client had authorised the payment of any money held in the trust account, to the appellant bank, where he had an account, and were cashed over the counter. In due course, each of the cheques was paid by the A.N.Z. bank to the appellant bank against delivery. The B respondent sought to recover from the appellant bank the amount of the bank cheques on the ground of conversion.

Held: the respondent's claim in conversion could not be maintained unless it were shown that the bank cheques were the respondent's property, and, accordingly, the claim failed because—

(i) the bank cheques did not become the respondent's property on being C issued by the A.N.Z. bank since R. was not authorised, as between himself and the respondent, to obtain the bank cheques, and

(ii) the respondent could not subsequently ratify R.'s obtaining of the bank cheques (and thus make them the respondent's property) without also ratifying the subsequent dealing with the cheques by R. and the appellant bank.

D *Union Bank of Australia, Ltd.* v. *McClintock* ([1922] 1 A.C. 240) applied.

Appeal allowed.

[As to the right of a person defrauded of goods to sue in conversion a stranger depriving him of possession, see 33 HALSBURY'S LAWS (2nd Edn.) 63, para. 99; and for cases on the subject, see 43 DIGEST 496-498, *351-378*.

As to a banker's liability in conversion where the customer's title is defective, E see 2 HALSBURY'S LAWS (3rd Edn.) 178, para. 337.

As to bankers' drafts, see 2 HALSBURY'S LAWS (3rd Edn.) 190, para. 358; and for cases on the subject, see 3 DIGEST 200, 201, *451-454*.

As to ratification not being partial, see 1 HALSBURY'S LAWS (3rd Edn.) 178, para. 416, text and note (g).

As to ownership of property acquired with partnership assets, see 28 HALS- F BURY'S LAWS (3rd Edn.) 530, para. 1027.]

Cases referred to:

Bird v. *Brown*, (1850), 4 Exch. 786; 19 L.J.Ex. 154; 154 E.R. 1433; 1 Digest 403, *1035*.

Cundy v. *Lindsay*, (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; sub nom. *Lindsay & Co.* v. *Cundy*, 47 L.J.Q.B. 481; 35 Digest 98, *72*. G

Union Bank of Australia, Ltd. v. *McClintock*, (1920), 20 S.R. (N.S.W.) 494; *revsd.* P.C., [1922] 1 A.C. 240; 91 L.J.P.C. 108; 126 L.T. 588; Digest Supp.

Appeal.

Appeal by the Commercial Banking Company of Sydney, Ltd., from a judgment H of the Supreme Court of New South Wales in Commercial Causes (WALSH, J.), dated Apr. 27, 1960, whereby the respondent, Edward Rolf Mann, recovered £3,505 from the appellant. The facts are set out in the judgment of the Board.

J. D. Holmes, Q.C., R. M. Hope and *P. A. Twigg* (all of the Australian Bar) for the appellant.

D. A. Staff, Q.C., Russell Bainton and *P. G. Saywell* (all of the Australian Bar) I for the respondent.

VISCOUNT SIMONDS: This appeal is from a judgment of WALSH, J., in the Supreme Court of New South Wales in favour of the respondent, Edward Rolf Mann, a solicitor, in an action in which he sought to recover from the appellant, the Commercial Banking Company of Sydney, Ltd., the sum of £3,505 on each of two counts, the first that the appellant had received that sum to his use, the second that the appellant had converted thirteen documents described as bank cheques, the property of the respondent. Bank cheques

are similar to " bank drafts " as known in the United Kingdom and are commonly used by solicitors in the settlement of conveyancing transactions and by other persons engaged in commercial transactions where it is inconvenient to use cash but the creditor wishes for some further assurance of payment than the debtor's personal cheque. They are in legal significance promissory notes made and issued by the bank. A

The relevant facts are not in dispute, though there are some gaps in the evidence which could to advantage have been filled. The respondent was at all material times a solicitor practising his profession at Sydney in partnership with Gordon Arthur Richardson under the firm name of E. R. Mann & Co. The appellant carries on the business of banking in the Commonwealth of Australia. At the Pitt and Hunter Street branch at Sydney of the Australia and New Zealand Bank, Ltd. (which will be called the A.N.Z. bank) the respondent and Richardson maintained a " trust account " in the name of the partnership. Under the partnership agreement, all the assets of the partnership, including all money to the credit of any bank account in the partnership name, were the property of the respondent, but Richardson was entitled to the income of the partnership save for small weekly drawings by the respondent. It was also a term of the partnership that cheques might be drawn on its banking account by either partner, and that the respondent should give the necessary authority for that purpose. Such authority was given to the A.N.Z. bank. B C D

The transactions which gave rise to these proceedings can now be stated. Between Aug. 6, 1954, and May 8, 1956, Richardson, in purported exercise of the authority that has been mentioned, drew thirteen cheques on the trust account of the partnership with the A.N.Z. bank. In each case after the printed word " Pay " in the printed form of cheque was written " Bank cheque favour H. Ward " or " Bank cheque H. Ward "; the printed words " or bearer " were not struck out. In each case, an application on a printed form for a bank cheque in favour of H. Ward for an amount equal to the amount of the first mentioned cheques was completed and signed " E. R. Mann & Co. per G. Richardson ". These documents were taken to the A.N.Z. bank; in each case the bank debited the trust account of the partnership with the amount of the cheque and at the same time issued a bank cheque for an equal amount in the form " Pay H. Ward or bearer ". It does not appear whether these cheques were handed to Richardson or Ward or some third person, but each one of them was taken by Ward to the Maroubra branch of the appellant, where he had an account, and was cashed over the counter. In due course, each of the cheques was paid by the A.N.Z. bank to the appellant against delivery. From first to last the part played by Richardson was fraudulent. Ward was not a client of the partnership, and no client had authorised the payment to him of any money held in the trust account. Richardson concealed his fraud by fictitious entries in the books of the partnership. E F G

Their Lordships will follow the course taken by the learned judge and in the first place consider the respondent's claim that the appellant converted the bank cheques in question. It appears to have been assumed (and, as their Lordships think, rightly assumed) that, if the claim in conversion fails, so also must the alternative count in money had and received to the use of the respondent. The claim in conversion can be maintained only if the cheques were the property of the respondent, and it was sought to maintain it in alternative ways. In the first place it was contended that they became the property of the respondent from the moment that they were issued and never ceased to be his property; in the second place it was contended that they became his property by his ratification of the acts of his partner Richardson. No other act of ratification was advanced than the issue of the writ in the action. It appears to their Lordships that both these contentions must fail. It is important to distinguish between what was Richardson's authority in relation on the one hand to the A.N.Z. bank and on the other to the respondent. No question arises in these H I

proceedings between the respondent and the A.N.Z. bank. It is clear that the respondent could not, as between himself and the bank, question Richardson's authority to draw cheques on the trust account. The position as between the respondent and Richardson was different. Richardson had no authority, express or implied, from the respondent either to draw cheques on the trust account or to obtain bank cheques in exchange for them except for the proper purposes of the partnership. If he exceeded those purposes, his act was unauthorised and open to challenge by the respondent. It is in these circumstances that the question must be asked whether, as the learned judge held, the bank cheques were throughout the property of the respondent. It is irrelevant to this question what was the relation between Richardson and Ward and whether the latter gave any consideration for the bank cheques that he received and at what stage the respondent learned of the fraud that had been practised on him. The proposition on which the respondent founds his claim is simple enough: Richardson was his partner, and in that capacity was able to draw on the trust account and so to obtain from the bank its promissory notes; therefore, the notes were the property of the partnership and belonged to the respondent, and Richardson could not give a better title to a third party than he himself had.

At this stage it is convenient to refer to *Union Bank of Australia, Ltd.* v. *McClintock* (1), which, in its facts and the law applicable to them, bears a remarkable resemblance to the present case. It came before the Judicial Committee on appeal from the Full Court of the Supreme Court of New South Wales which had set aside a verdict in favour of the appellant bank on a trial before judge and jury. The relevant facts were as follows. The plaintiffs in the action, of whom one was named McClintock, as trustees of a will carried on the business of newspaper proprietors and in that business employed as general manager a person also named McClintock. He opened an account under the fictitious name of Robert Haynes with the appellant bank and, having done so, drew on the plaintiffs' account with the bank a number of cheques which were duly signed and counter-signed in accordance with the authority given by the plaintiffs to him and obtained in exchange from the bank its own cheques for similar amounts in favour of R. Haynes, Robt. Haynes, Robert Haynes or Robert Haynes, Esq. These cheques were indorsed or purported to be indorsed by the payees and were paid into the " Robert Haynes " account which was operated on by McClintock. The plaintiffs accordingly brought their action against the bank for conversion of the bank cheques, alleging that they were their property either from the time of their issue or at least by subsequent ratification. Their Lordships note how close is the parallelism of the two cases. As has been said, the jury returned a verdict in favour of the bank and it is clear from the summing-up of the learned chief justice (CULLEN, C.J.) which their Lordships have taken the opportunity of studying in the Privy Council record of proceedings that they could only have done so on the footing that the cheques did not become the property of the plaintiffs, and that that was so because the acts of McClintock in procuring them were as between himself and the plaintiffs unauthorised. On appeal to the Full Court, that court held by a majority that McClintock, as general manager, acted within the scope of his authority in obtaining the bank cheques, that he received them solely as the servant of the plaintiffs, and that, accordingly, they were the property of the plaintiffs and had been converted by the bank; it was unnecessary to have recourse to the doctrine of ratification. GORDON, J., who dissented, held that the plaintiffs had no such property in the cheques as to enable them to sustain the plea of conversion. For him, too, the crucial point was whether McClintock had the plaintiffs' authority to procure the bank cheques in question, but he rightly considered that the relevant authority was that given by the plaintiffs to McClintock. Thus the question was plainly posed. Were the

(1) [1922] 1 A.C. 240.

acts of McClintock in obtaining the bank cheques authorised by the plaintiffs, not as between themselves and the bank but as between themselves and him? If they were, the bank cheques became the property of the plaintiffs; if not, not. In the latter event, the further question of ratification arose.

On the case coming before their Lordships' Board the main question was dealt with somewhat summarily. The issue was raised in the formal reasons of the parties, the appellant bank submitting that the plaintiffs (respondents) failed to establish that the bank cheques were their property, the plaintiffs that they became immediately on issue their property. LORD SUMNER, delivering the judgment of the Board, said (2):

> "This evidence was used to show that, as in some cases it might be necessary—or at least common and advantageous—to obtain a bank cheque, it must be deemed to have been within a general manager's actual authority to do so whenever he thought proper. It is enough to say that it was for the jury, if they thought proper, not to accept either the contention or the grounds for it, and their Lordships think that their general verdict for the defendants shows that they negatived the plaintiffs' case on this issue—namely, that the bank cheques were theirs when their agent and manager obtained them, but were forthwith converted by the appellants."

This is a direct decision that, if the acts of McClintock were unauthorised in the relevant sense of that word, the bank cheques did not, when issued, become the property of the plaintiffs. It appears to their Lordships that the majority of the Full Court in *McClintock's* case (3) erred in regarding as decisive the fact that, as between the plaintiffs and the bank, McClintock was authorised to obtain bank cheques, whereas the relevant question was whether McClintock was, as between the plaintiffs and himself, authorised to obtain the particular cheques that were converted. On the verdict of the jury that he was not so authorised, they should have come to the opposite conclusion. In the same way, in the present case the learned judge, having found that Richardson obtained the bank cheques in question in fraud of the respondent and without his authority, should have gone on to hold that they did not become the property of the respondent. Whether they became his by his subsequent ratification of the acts of Richardson is another question, which their Lordships will examine just as it was examined in *McClintock's* case (4). On what has been called the main question, they observe that they could not hold that the respondent acquired a property in the bank cheques without directly contradicting a decision which has in forty years been the subject of no adverse comment. And they would add that it appears to be in accordance with principle. They agree with the analysis of the transaction which was submitted by learned counsel for the appellant. In effect, Richardson, by means of unauthorised cheques, misappropriated moneys in the trust account and used them to acquire bank cheques from the A.N.Z. bank which bound that bank to pay Ward or bearer out of its own money the amounts specified in the cheques. Their Lordships were not referred to any case in which in such circumstances property so acquired has been held to belong automatically to the party defrauded. In the present case, as in *McClintock's* case (4), counsel sought to rely on such cases as *Cundy* v. *Lindsay* (5), but it appears to their Lordships, as it must have done to the Board in *McClintock's* case (4), that the principle that the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities of title has no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes. That there is a remedy, perhaps more than one, available to the person defrauded is obvious, but that is not to say that the property so acquired at once belongs to him so that he can sue in conversion a third party into whose hands it has come.

(2) [1922] 1 A.C. at p. 246.
(3) (1920), 20 S.R. (N.S.W.) 494.
(4) [1922] 1 A.C. 240.
(5) (1878), 3 App. Cas. 459.

Their Lordships turn to the alternative contention that the bank cheques became the property of the respondent by reason of his ratification of Richardson's acts. This is necessarily stated somewhat vaguely, for it is nowhere specifically pleaded what acts of Richardson the respondent ratified nor how he ratified them. It rests on the argument of counsel that the ratification was effected by the issue of the writ in the action, but, even so, it remains obscure what acts the issue of the writ is supposed to ratify. It will be remembered that, by the time the writ was issued, the wheel had gone full circle; the bank cheques had been issued to Richardson (or to Ward) and had been purchased by the appellant from Ward and had been duly honoured on presentation by the issuing bank. It appears to their Lordships that both on principle and on the direct authority of *McClintock's* case (6) it is impossible for the respondent to pause at any point in this chain of events and claim to ratify the act of Richardson in obtaining the issue of bank cheques in favour of " H. Ward or bearer " without also ratifying the subsequent dealing with the cheques by him and the appellant. To adopt the words used in *McClintock's* case (6), the respondent fails to prove a conversion by the appellant of cheques which he seeks to make his own by ratification, for, if he ratifies at all, he ratifies the dealing by Ward and the appellant with the cheques, and, if he does not ratify, nothing has been converted that ever belonged to him. Their Lordships think with great respect to the learned judge, that the minor differences of fact in the two cases which he points out do not prevent the application to them both of the same principle. If authority is needed, reference may be made to the full exposition of the principle by ROLFE, B., in *Bird* v. *Brown* (7).

Their Lordships will, for the reasons that have been stated, humbly advise Her Majesty that the appeal should be allowed and the action dismissed with costs. Counsel for the appellant intimated that in the event of success he would not ask that the respondent should pay the costs of the appeal. Therefore there will be no order as to the costs of the appeal.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray* (for the appellant); *Light & Fulton* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(6) [1922] 1 A.C. 240.

(7) (1850), 4 Exch. 786.

ULLAH *v.* HALL LINE, LTD.

[QUEEN'S BENCH DIVISION (Davies, J.), July 20, 28, 29, 1960.]

Legal Aid—Costs—Taxation—Expert evidence—Solicitor and client costs—Disallowance, or partial disallowance, of items allowed in full on party and party taxation—Disbursements not previously authorised—Amounts received in full by legal aid fund from defendants—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6 *c.* 51), *s.* 12 (1)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 14 (4), (5), (6), *as amended by the Legal Aid (General) (Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954 *No.* 166) *and Legal Aid (General) (Amendment No.* 2) *Regulations*, 1955 (*S.I.* 1955 *No.* 1829).

The purpose of the prohibition against payment for the costs of expert evidence, imposed by reg. 14 (6) of the Legal Aid (General) Regulations, 1950, where the evidence was not authorised, or the cost exceeded that authorised, by the area committee, was to protect the legal aid fund; where, therefore, costs of expert evidence had been allowed to a successful plaintiff on party and party taxation, and would actually be received by the legal aid fund, no question of disallowance of any part of the amount so allowed arose, by reason of reg. 14 (6), on solicitor and client taxation under Sch. 3 to the Legal Aid and Advice Act, 1949, because there would be no detriment to the legal aid fund in paying to the plaintiff's solicitor the full amount allowed on the party and party taxation and received by the fund (see p. 496, letter H, and p. 497, letter C, post).

The plaintiff, who had been granted a civil aid certificate under the Legal Aid and Advice Act, 1949, was awarded damages for personal injuries in an action against the defendants. On taxation of costs as between solicitor and client under Sch. 3 to the Act of 1949, two items in the plaintiff's solicitor's bill of costs were partly disallowed and a third was completely disallowed under reg. 14 (6) of the Legal Aid (General) Regulations, 1950, which read: "Save as provided by this regulation, no payment shall be made for the report or opinion of an expert or for expert evidence tendered . . . on behalf of an assisted person". These items had been allowed in full on the party and party taxation and had been or would be recovered in full from the defendants and paid into the legal aid fund. They were paid by the solicitor to the expert witnesses. The item which had been completely disallowed (item 3) was £31 10s. to a consulting engineer for two days' attendance at the hearing; no general or specific authority under reg. 14 to cover this item had been previously obtained. The other two items were £5 5s. for a medical expert's report (item 1) and £94 10s. as fees to the medical expert for three days' attendance at the hearing (item 2). The solicitor had received specific authority from the appropriate area committee, under reg. 14 (5) (b)*, to call the expert medical evidence at a fee of £31 10s. Under a general authority issued by the Law Society pursuant to reg. 14 (4)†, a solicitor was entitled to pay a fee not exceeding £3 3s. for a medical expert's report, and to tender one medical expert's evidence at a fee not exceeding £15 15s. for the first day and £10 10s. for any subsequent day (the maximum thus allowable in the present case being £39 18s.). On solicitor and client taxation, the taxing master allowed £3 3s. for the medical expert's report (item 1), and £31 10s., under the specific authority, for the medical expert's attendance at the hearing (item 2). The taxing master held, in regard to item 2, that, as the solicitor had obtained specific authority under reg. 14 (5) (b), he was not entitled to rely on the general authority under reg. 14 (4). On a summons by the solicitor to review the taxation,

* The terms of reg. 14 (5) are printed at p. 492, letter H, post.

† The terms of reg. 14 (4), as substituted by S.I. 1955 No. 1829, are printed at p. 493, letter A, post; and reg. 14 (6) is printed at p. 495, letter A, post.

Held: (i) in regard to item 2 the solicitor was entitled to rely on the general authority given by the Law Society under reg. 14 (4) of the Legal Aid (General) Regulations, 1950, although he had applied for specific authority under reg. 14 (5) and had received an authority limited to a smaller amount.

(ii) items Nos. 1, 2, 3, having been allowed on party and party taxation, should be allowed on the solicitor and client taxation, it being shown in the present case that the legal aid fund would not suffer by their payment.

[**Editorial Note.** The Legal Aid (General) Regulations, 1960, have replaced those of 1950 (as amended) and reg. 15 of the 1960 regulations is comparable with, but not in the same words as, reg. 14 of the 1950 regulations. It is thought that there is no such alteration in wording of the new reg. 15 (4), (5) as to render holding (i) above inapplicable under the present regulations.

The wording of the present reg. 15 (7)* is different from that of the comparable reg. 14 (6) of the 1950 regulations. Regulation 15 (7) retains a prohibition on payment, save in accordance with allowance by the taxing master on taxation, in those cases where no prior authority of an area committee etc. has been obtained; reg. 15 (7) contains no prohibition on payment where authority has been obtained. Thus it seems that there is scope under the present reg. 15 for the application of the principle stated at p. 488, letters C and D, and of the decision stated in holding (ii) above. See, further, the distinctions of wording drawn at p. 496, letter E, post.

As regards the costs of expert witnesses in legal aid cases, see 30 HALSBURY'S LAWS (3rd Edn.) 525, 526, para. 995; and as regards the general principle of allowance on solicitor and client legal aid taxations, see ibid., p. 527, para. 997.

For the Legal Aid and Advice Act, 1949, s. 12 (1), and Sch. 3, para. 2 (1), para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 548, 566.

For the Legal Aid (General) Regulations, 1950, reg. 14, see 5 HALSBURY'S STATUTORY INSTRUMENTS 213 and SERVICE.]

Summons to review taxation.

This was an application by the plaintiff's solicitor for a review of the taxation of his costs as between solicitor and client under Sch. 3 to the Legal Aid and Advice Act, 1949, and pursuant to a judgment of PILCHER, J., dated Mar. 17, 1959, in an action for damages for personal injuries. The applicant's objections, dated Dec. 11, 1959, were in regard to three items which had been allowed on the party and party taxation: item No. 1 was £5 5s., which had been paid for a report made by Sir Hugh Griffiths, a medical expert; item No. 2 was £94 10s., the fees to the medical expert for attending three days at the hearing of the action; and item No. 3 was £31 10s., the fees to a consulting engineer for two days' attendance at the hearing. Items Nos. 1 and 3 were completely disallowed on the solicitor and client taxation, and £31 10s. was allowed for item No. 2. On May 13, 1960, the taxing master gave his answers and overruled the objections, except that £3 3s. was allowed for item No. 1.

Under reg. 21 of the Legal Aid (General) Regulations, 1960 (S.I. 1960 No. 408), which came into operation on Mar. 28, 1960, and governed the procedure in regard to the application, the Lord Chancellor appointed a solicitor to intervene in the review of taxation, and the intervening solicitor was represented by counsel at the hearing. Argument was heard in chambers, but judgment was given in open court.

---

* Regulation 15 (7) of the Legal Aid (General) Regulations, 1960 (S.I. 1960 No. 408), provides: "Where prior authority or approval has been given under the provisions of para. (4), (5) or (6) of this regulation, no question as to the *propriety of the act* shall be raised on taxation as between solicitor and client in accordance with the provisions of Sch. 3 to the Act; but where no such prior authority or approval has been obtained, payment for the act shall be made only if the taxing master allows it on the taxation after exercising his discretion in accordance with the usual practice."

The facts, the reasons for the applicant's objections and the taxing master's answers are set out in the judgment.

S. J. Waldman for the applicant solicitor.
Colin Duncan for the intervening solicitor.

Cur. adv. vult.

July 29. **DAVIES, J.**, read the following judgment: This is a summons at the instance of Mr. Sydney Silverman, the plaintiff's solicitor (referred to hereinafter as " the applicant "), to review a taxation under Sch. 3 to the Legal Aid and Advice Act, 1949. It came originally before McNAIR, J., on May 31, 1960, when it was adjourned for the Law Society to be represented. At the hearing before me, on July 20 and 28, 1960, the Law Society were not represented, but by that time the Lord Chancellor, acting under reg. 21 of the Legal Aid (General) Regulations, 1960, had appointed Messrs. Joynson-Hicks & Co. to intervene in the review. Under reg. 21 (4):

> " The solicitor appointed by the Lord Chancellor to intervene in a review of taxation shall be entitled to production of all documents . . . and to appear by counsel and be heard on the review, with a view to ensuring that all considerations which are proper to be taken into account are placed before the court . . ."

Accordingly, Messrs. Joynson-Hicks & Co. instructed counsel to appear before me at the hearing to put forward the considerations that he thought appropriate. It was agreed by him and by counsel for the applicant that reg. 21 (which came into operation on Mar. 28, 1960), being a procedural regulation, applied to this review, although the questions at issue in the review fall to be decided under the old regulations, namely, the Legal Aid (General) Regulations, 1950, as amended, because the original taxation took place in November, 1959, pursuant to a judgment dated Mar. 17, 1959.

The action was one in which the legally-aided plaintiff, Kolim Ullah, recovered damages against the defendants, Hall Line, Ltd. Under the judgment the applicant brought in his bill for taxation (a) as between party and party and (b) as between solicitor and client, under Sch. 3 to the Legal Aid and Advice Act, 1949. No question arises as to the party and party taxation: it is on the solicitor and client taxation that the taxing master's decision is objected to. The matter arises in this way. In the party and party bill the following items of disbursements were claimed: " Paid Sir Hugh Griffiths' [the well-known doctor] charges " for a report, five guineas; " Sir Hugh Griffiths' fees for attending three days at the hearing ", ninety guineas (that is three lots of thirty guineas); "A. V. Evans, consulting engineer, fees for two days attending at the hearing ", thirty guineas. The decision to which the taxing master felt himself in the first place to be obliged to come was this: he allowed one fee of thirty guineas for Sir Hugh Griffiths; he disallowed entirely the five guineas for Sir Hugh Griffiths' report; and he disallowed entirely the fee of thirty guineas to the engineer, Mr. Evans. However, on the objection to that being laid, the taxing master altered his decision to this extent (and I will explain in a moment how it arises): he allowed a further three guineas in respect of the report given by Sir Hugh Griffiths.

The result in terms of money is this. The applicant has paid out of his own pocket in respect of these three items a total of 125 guineas (£131 5s.). All these items were allowed on the party and party taxation and have been or will be paid into the legal aid fund, there being no question of the solvency of the defendants. Of this sum the applicant was originally allowed only thirty guineas (£31 10s.). That was increased by the taxing master after the objections to thirty-three guineas (£34 13s.). Therefore, if the taxing master's decision stands, the applicant will be out of pocket by ninety-two guineas (£96 12s.) and the fund will be unjustifiably enriched by the same amount. This is obviously a remarkable state of affairs and appears to be a manifest injustice. So strongly did this aspect of

the matter strike me at the first hearing that before the argument ended I adjourned the summons in order to see whether it might not be possible for an ex gratia payment to be made to the applicant in full so as to avoid any injustice, whatever the legal position might be. As a result of this, on July 26 the Law Society wrote to the applicant offering to pay the disputed amount in full as an ex gratia payment, with the consent of the Lord Chancellor and the Treasury. This offer was, however, refused by the applicant, on the ground that he wished the legal point to be decided. To what extent the legal point which I have to try to decide this morning will recur I do not know. It may be that there are various pending cases in which the same point may arise. But, so far as the main point is concerned, it is unlikely to arise in the same form under the new regulations, the Legal Aid (General) Regulations, 1960, for this reason: save as to the question of the employment of two counsel and certain other matters set out in reg. 15 (3), under the new regulations, even though authority in advance has not been obtained, the taxing master will enjoy an overriding discretion (1).

Having referred to the financial aspect of the matter, I shall now read the objections and the taxing master's answers. These are the objections:

> " The taxing master, having held that these disbursements are properly chargeable against the defendants and allowed them in the party and party bill of costs so that on proof of payment they will be included in the party and party certificate of taxation and recovered from the defendants, has no authority or power to deduct them or any part of them in the solicitor and client taxation under the Legal Aid and Advice Act, 1949, or any regulation validly made thereunder, or from his certificate of taxation under that Act. Alternatively, if he had discretion to make any such deduction, he ought not in respect of these items to have exercised it. In the further alternative on the true interpretation of the correspondence between the [applicant] and the secretary of the No. 1 (London) Legal Aid Area Committee, item No. 2 was in fact authorised by the said committee. In the yet further alternative, the amounts to be excluded from the solicitor and client allocatur should be only £2 2s. in respect of item 1 and £42 in respect of item 2, the sums of £3 3s. for Sir Hugh Griffiths' report and £21 in respect of his attendance at court on the second and third days of the hearing being authorised under the general authority."

To that, the master's answers are in the following terms:

> " No. 1. I have allowed £3 3s. part of this item [i.e., the five guineas for the report] under the general authority given by the Law Society pursuant to reg. 14 (4) of the Legal Aid (General) Regulations.
>
> " No. 2. There is nothing in the Legal Aid and Advice Act which invalidates reg. 14 (6) of the regulations made thereunder, which regulation in my view means that no allowance is to be made on taxation under Sch. 3 for expert evidence which has not been authorised in manner laid down by the regulations. The area committee by the letter dated Dec. 8, 1958, authorised the calling of Sir Hugh Griffiths the medical expert to give evidence at the hearing at a fee of thirty guineas. This letter in my opinion means thirty guineas only, and not thirty guineas per day, even when read with the letter of Dec. 1, 1958, to which it is a reply. The authority is a specific authority given under reg. 14 (5) (b) which requires the maximum fee to be stated. It supersedes the general authority under reg. 14 (4) published in June, 1952, by the Law Society and is not an extension of such general authority. The [applicant] must be deemed to have elected to rely on the specific authority relative to calling the medical expert. The fact that thirty guineas per day has been allowed on the party and party taxation does not override the regulations requiring prior authority on a taxation under Sch. 3.

(1) See reg. 15 (7) of the Regulations of 1960.

A

> "No. 3. There is no authority either general or specific to cover the consulting engineer. I am not prepared to hold that reg. 14 (6) does not apply merely because the solicitor in obtaining a pre-legal aid report from the witness was impliedly authorised by the plaintiff to call such witness at the trial. I overrule this objection."

Three questions, therefore, arise. (i) Was the report from and the calling of Sir Hugh Griffiths at a higher figure than that prescribed in the general authority authorised, that is to say, was the applicant specifically authorised to engage Sir Hugh Griffiths at thirty guineas a day plus his five guinea report? This question does not arise in connexion with the fees of the consulting engineer because there is no suggestion that there was any specific authority there. (ii) If not, then is the authority limited to the specific thirty guineas, or can the applicant rely on the general authority, which would entitle him to the three guineas for the report, which has been allowed, plus fifteen guineas for the first day, ten guineas for the second day, and ten guineas for the third day? That is to say, he would have been entitled to thirty-eight guineas (£39 18s.), if the answer to question (ii) were "Yes". The all-important question, however, is question (iii): If these disbursements have been allowed and recovered or are certain to be recovered on the party and party taxation, is the applicant ipso facto entitled to them on the solicitor and client taxation?

B C D

As to the first question, the specific authority, the facts are quite short. On Dec. 1, 1958, the applicant wrote to the area secretary in these terms:

> "It will be necessary to call as a witness on the plaintiff's behalf Sir Hugh Griffiths. I have been in communication with Sir Hugh as to fees and he informs me that he is willing to attend and to accept the fee which is usually allowed to him in legal aid cases, namely twenty-five guineas per day. I do not think that special authority is required, but nevertheless I should be glad if you will confirm that there is no objection to calling Sir Hugh Griffiths as witness on these terms."

E

The answer from the area secretary is the kind of answer one often gets in court: it is not an answer at all. What the letter of Dec. 8 says is:

F

> "Your letter of Dec. 1 has now been considered by my committee, who authorise you to call Sir Hugh Griffiths to give evidence at the hearing, if this is necessary, at a fee of thirty guineas, subject to any order made by the master on directions."

G

So there one has the applicant asking whether Sir Hugh Griffiths may be called at a fee of twenty-five guineas a day, and the answer is: "You can call him for thirty guineas".

The regulations which apply to this matter are these. First, reg. 14 (5) of the Regulations of 1950 (as amended by the Legal Aid (General) (Amendment No. 2) Regulations, 1955) reads:

H

> "Where it appears to an assisted person's solicitor necessary for the proper conduct of the proceedings either—(a) to obtain a report or opinion of one or more experts or to tender expert evidence in a case of a class not included in any general authority under the foregoing paragraph; or (b) in a case of a class so included, to pay a higher fee than that stated by the Law Society or to obtain more reports or opinions or to tender more experts as witnesses than have been authorised, he may apply to the appropriate area committee for authority so to do and if the area committee give authority they shall state the maximum number of reports or opinions that may be obtained, or the maximum number of persons who may be tendered to give expert evidence, and the maximum total fee to be paid therefor."

I

One has to look also at reg. 14 (4), which (as substituted by the Regulations of 1955) provides:

A "The Law Society may give general authority to solicitors acting for assisted persons in any particular class of case to obtain experts' reports or opinions and to tender expert evidence, and if so they shall state the maximum fee to be paid for any report or opinion or expert witness."

The general authority given by the Law Society is in these terms (2):

B "The Law Society, pursuant to the power conferred on it by reg. 14 (4) of the Legal Aid (General) Regulations, 1950, hereby gives a general authority to solicitors acting for assisted persons in proceedings for damages for personal injuries to obtain the report or opinion of one medical expert at a fee not exceeding £3 3s. and to tender one medical expert's evidence at a fee not exceeding £15 15s. for the first day (£10 10s. for half a day or for any C subsequent day) and his proper expenses of attending the hearing."

This is a short question of construction as to specific authority on the two letters which I have read; and it seems to me quite impossible to say that, when the area secretary, in reply to the question "Can we have Sir Hugh Griffiths at twenty-five guineas a day?", says "You can have Sir Hugh Griffiths at thirty D guineas", that can possibly mean that it is an authority to call Sir Hugh Griffiths at thirty guineas a day. It is said that Sir Hugh Griffiths could have been called under the general authority for thirty-five guineas, the case having lasted three days. But, as was pointed out by counsel for the intervening solicitor at the hearing of the summons, non constat that the case was going to last three days; and, if the case had finished on the first day, the fee would have been limited E under the general direction to fifteen guineas. Since the applicant must be taken to have known the provisions of reg. 14 (5) that the authority must state the maximum total fee, I think that the conclusion is inevitable that—albeit that it was not at all a helpful answer to the inquiry when the area secretary said "thirty guineas"—that was the maximum total fee. Therefore, in my judgment on this question of specific authority the applicant does not make out any case.

F The second of the two minor points is the question whether, thirty guineas having been authorised by the letter of Dec. 8, the applicant can say: "Nevertheless, I am entitled to have more than the thirty guineas, namely, the thirty-five guineas under the general authority" in addition, of course, to the three guineas to which he is entitled for the report. The taxing master has come to the conclusion that the applicant is not entitled to have more than thirty guineas, that G he elected to rely on the specific authority. I do not think that that is right. It seems to me that the taxing master's decision is inconsistent. If the election for thirty guineas applies to the fee for calling Sir Hugh Griffiths in the witness-box or having him present in court, one would have thought it would apply equally to the fee for the report. The taxing master has agreed on re-consideration that three guineas is allowable for the report. I cannot see that it is possible to say H that the applicant has elected in any shape or form here. He thought that he was right in his construction of the letter. It turned out that he was wrong. In my opinion, therefore, on any view he would be entitled, in addition to the three guineas for the report, to the thirty-five guineas for the three days on which Sir Hugh Griffiths was present in court, which would be thirty-eight guineas in all.

That, however, is not what makes the matter important. The important I matter is to deal with the problem whether all these amounts, having been allowed in full as reasonable disbursements on the party and party taxation, are to be paid or not out of the pocket of the applicant.

In addition to the statutory provisions to which I have already referred, I shall refer shortly to one or two other provisions, the first being s. 12 (1) of the Act of 1949 under which the regulations are made. Section 12 (1) reads:

"The Lord Chancellor may make such regulations as appear to him

---

(2) Law Society's Gazette, June, 1952, p. 227.

necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof." A

The word " abuses " is perhaps not unimportant in this connexion. It is relied on very strongly by counsel for the applicant, because it would appear that, if this decision is right and if the regulations do mean what counsel for the intervening solicitor says that they mean, so far from preventing abuses they obviously in this case would create a manifest abuse. B

I need not, I think, concern myself with the Lord Chancellor's power to modify the Act under s. 17 (4). I will turn to consider the provisions of Sch. 3 to the Act, and I think that I need only refer to two paragraphs of the Schedule. Paragraph 2 (1) reads (3):

" The sums allowed to a solicitor in connexion with proceedings in the House of Lords or the Supreme Court shall be the full amount allowed on taxation of the costs on account of disbursements and eighty-five per cent. of the amount so allowed on account of profit costs . . ." C

By para. 4 (1):

" Subject to the last foregoing paragraph, costs shall be taxed for the purposes of this Schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested: Provided that no question shall be raised as to the propriety of any act for which prior approval was obtained as required by regulations." D

Then one turns finally to reg. 14 of the Legal Aid (General) Regulations, 1950, parts of which I have already read. It is most important, in considering reg. 14, to observe that it is not a regulation that is dealing only, or indeed primarily, with taxation: it is a regulation which deals (as it is said to deal) with the " Conduct of Proceedings on behalf of Assisted Persons ", and it deals with all manner of things, such as, for example, the right of solicitor or counsel to give up the case. The only paragraphs of the regulation to which I think it necessary to refer are these. First, reg. 14 (3) reads (4): E F

" Where it appears to the assisted person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely:—(a) to add any further party to the proceedings; or (b) to bespeak any transcript of shorthand notes of any proceedings; or (c) to lodge any interlocutory appeal; or (d) to instruct more than one counsel; or (e) to set up or set off any right or claim having the same effect as a cross-action (other than a counter-claim or set-off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party; he shall (unless the certificate provides for the act in question to be done) apply to the appropriate area committee for authority so to do, and . . ." G H

—and these are the important words—

". . . no payment shall be allowed on taxation for any such step taken without their approval."

I have already read (5) reg. 14 (4): that deals with the general authority. I have also read (6) reg. 14 (5), and the matters with which we are concerned I

(3) By s. 2 of the Legal Aid Act, 1960, which came into force on Apr. 13, 1960, after the words " eighty-five per cent.", wherever occurring in para. 1 and para. 2 of Sch. 3 to the Act of 1949, the words " or such larger percentage as may be prescribed " are to be inserted.

(4) The provisions of reg. 14 (3) of the Regulations of 1950 (except for reg. 14 (3) (b)) are now contained in reg. 15 (3) of the Regulations of 1960.

(5) See p. 493, letter A, ante. (6) See p. 492, letter H, ante.

A come directly under that paragraph. The attendance of Mr. Evans, the engineer, at the hearing comes under reg. 14 (5) (a), and the charges and fees to Sir Hugh Griffiths come under reg. 14 (5) (b).

Regulation 14 (6) of the Legal Aid (General) Regulations, 1950, reads:

> " Save as provided by this regulation, no payment shall be made for the report or opinion of an expert or for expert evidence tendered by or on
B behalf of an assisted person."

Finally (and it is only for comparison, because it does not touch the present case), reg. 14 (6A), added by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166) reads:

> " Where it appears to the assisted person's solicitor necessary for the
C proper conduct of the proceedings for any act to be done, but that the act is either unusual in its nature or involves unusually large expenditure, he may request the appropriate area committee to obtain the Law Society's prior approval of the act, and, where such prior approval has been obtained, no question as to the propriety of the act shall be raised on taxation as between solicitor and client in accordance with the provisions of Sch. 3 to
D the Act."

It being conceded, in view of my finding (7), that there was no prior authority for the retainer (if that is the right word) or calling of Sir Hugh Griffiths at a fee higher than that under the general authority, and it being beyond question that there was no prior authority in the case of Mr. Evans, the question which I have posed arises for decision. The argument of counsel for the applicant is, in sub-
E stance, this: (i) if a payment of the sort in question here has been authorised on party and party taxation, that payment is ipso facto allowed on a solicitor and client taxation under Sch. 3 to the Act of 1949, and there is no occasion for any further consideration or taxation in respect of that matter; (ii) the regulations made by the Lord Chancellor are made (as I have already pointed out) for " preventing abuses " of the Act, and the decision to which the taxing master
F felt himself driven, so far from preventing an abuse, obviously creates a gross abuse; (iii) if and so far as the regulations are ambiguous, the court, while not of course straining the language, should lean towards a construction which is in accordance with justice and common sense. At one time I thought that counsel for the applicant was asking me to hold that the regulations were ultra vires if in the present circumstances they prevented the solicitor from being reimbursed
G the moneys which it was decided inter partes that he had properly expended. In my judgment, it would have been quite impossible so to hold; but in his reply learned counsel made it plain that that was not his contention. His submission was that, on the assumption that the regulation is intra vires, a reasonable interpretation is to be preferred to an unreasonable one. On this basis one observes, dealing with the first point, that para. 4 (1) of Sch. 3 to the Act of 1949
H refers to

> ". . . the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested . . ."

It is said with some force that, if one were to have a solicitor and client taxation
I following on a party and party taxation, it would be inconceivable that a disbursement which had been allowed as between party and party should be disallowed as between solicitor and client.

Attention was also drawn to the direction of the senior registrar of the Probate, Divorce and Admiralty Division, dated Nov. 17, 1950, which is to be found in the Law Society's LEGAL AID HANDBOOK (Revised Edn.) (1956) 177, 178. That sets out the form in which the bills are to be presented, with parallel columns for " Solicitor and Client " and " Party and Party ", respectively. It says this:

(7) See p. 493, letter E, ante.

A

> " The Solicitor and Client columns should show only those items which do not appear in the Party and Party columns. After taxation separate summaries for the two sets of columns should be completed. The sum of the two totals will give the Solicitor and Client costs."

B

That direction in its terms applies, of course, only to the Probate, Divorce and Admiralty Division, but the form of the bill specified therein appears to have been generally adopted, and certainly was in the present case. The important points to be noted are: (a) that items in the party and party columns should not be included in the solicitor and client columns; and (b) that the total of the two columns is said to be the solicitor and client costs. The solicitor followed this practice in the present case. The disputed items were in the party and party column and not in the solicitor and client column. As a result, however, of the disallowance on solicitor and client taxation of the amounts in question, the total of the two columns comes to £607 19s., but the solicitor and client costs come to only £511 7s. Reference was also made by both sides to other passages in the LEGAL AID HANDBOOK, but as these are not authoritative I do not consider it necessary to refer to them.

C

D

As to counsel's second point, which is really another way of putting his third point, and also his point on what I at first thought was the ultra vires argument, no one would, I apprehend, seek to dispute that, if words are ambiguous, the preferable construction to put on them is that which is the more reasonable and the more just.

E

The argument of counsel for the intervening solicitor, on the other hand, really comes to this. He submits that the words in reg. 14 (6), " no payment shall be made ", mean precisely the same as the words in reg. 14 (3), " no payment shall be allowed on taxation ". Indeed, he goes further and submits that precisely the same meaning is to be attached to the words which I have read in reg. 14 (6A), though in a converse sense—" no question as to the propriety of the act shall be raised on taxation ". This argument from counsel appearing, in effect, for the Lord Chancellor strikes me as a bold one. I find myself quite unable to contemplate that the Lord Chancellor, in framing the regulations, would, in such a short space, use entirely different words to mean the same thing, and I do not accept that that is the proper construction of the regulations. The material words in this case are the words in reg. 14 (6), " no payment shall be made ". I hold that those words do not mean the same as " no payment shall be allowed on taxation ". That is a fairly simple step. What, then, do the words mean? Counsel for the intervening solicitor concedes that they do not import a prohibition against the payment of Sir Hugh Griffiths or Mr. Evans, the engineer, by the applicant in the first place. Indeed, if they meant that, it would seem that these payments could not be allowable on a party and party taxation.

F

G

H

It is impossible, in my view, to give any effective meaning to these words unless one writes in some qualifying words. It is plain that the purpose and intent of the regulations is to protect the legal aid fund—or, using the words of s. 12 (1) of the Act of 1949, to prevent abuses of the Act. In my opinion, therefore, it is implicit in reg. 14 (6) that the payment may be made if it does not injure the fund: ". . . no payment shall be made ", therefore, is equivalent to " no payment may be made to the detriment of the fund ". The costs claimed in this case would, of course, fall to be paid out of the fund, but they would not be paid to the detriment of the fund since, ex concessis, the fund has recovered or will recover them from the defendants.

I

Regulation 14 (6), therefore, does not, in my opinion, prohibit the allowance on solicitor and client taxation, under Sch. 3 to the Act, of disbursements of the sort in question made without prior authority, if those disbursements have been allowed as between party and party. What it does do is to prohibit the payment out of the fund of such disbursements unless the fund recovers or is in a position

actually to recover them from the other party to the litigation. If the legally-aided litigant had failed, then of course there would be no question of recovering from the other party. Even if the legally-aided litigant had won, it would not be by any means certain at the date of the taxation that the party and party costs taxed in favour of the legally-aided litigant would actually be recovered. Items such as those in dispute would nevertheless, in my view, be properly included in the solicitor and client costs, having already been " allowed " as between party and party. The prohibition imposed by reg. 14 (6) is, in my view, a prohibition against actual payment to the solicitor out of the fund unless and until it is ascertained that the fund will not suffer by such payment. How this would work out in practice I do not know. But this is the interpretation which, in my view, is the correct one to put on these not altogether clear regulations.

In the result, therefore, since all the disputed items were allowed on the party and party taxation, no question of their allowance arose for consideration on the solicitor and client taxation under Sch. 3, and the taxing master erred in disallowing them. That is all that I have to decide. But in view of the fact that it is admitted here that the fund has recovered or will unquestionably recover those items from the defendants, there can be no question of any detriment or loss to the fund, and these items are, therefore, payable to the applicant solicitor.

Order accordingly.

Solicitors: *S. Sydney Silverman* (for the applicant); *J. D. Haslam* of *Joynson-Hicks & Co.* (the solicitor appointed to intervene).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

PRACTICE NOTE.

CHANCERY DIVISION.

Practice—Chambers—Chancery Division—Masters' powers—R.S.C. (Chancery Provisions), 1954 (S.I. 1954 No. 1728)—R.S.C., Ord. 55, r. 15.

The following is published by permission of the judges of the Chancery Division for the information of the profession and supersedes their memorandum on this subject dated Mar. 30, 1955.*

Under r. 15 of R.S.C., Ord. 55, which came into force in 1955 by virtue of the Rules of the Supreme Court (Chancery Provisions), 1954 (S.I. 1954 No. 1728), the masters of the Chancery Division have all the powers of a judge in chambers except such as the judges of the Division may direct, or as are prescribed by rule to be dealt with by a judge in person.

The judges of the Division do not propose at present to give any directions under that rule limiting the powers thereby conferred on masters but issue the following memorandum for their guidance in exercising their powers.

1. Before the present rule came into force the masters were, by virtue of the former r. 15, r. 15A and r. 35A of Ord. 55, unable to make the following orders:—

(a) for service out of the jurisdiction
(b) for appointment of a new trustee (except a judicial trustee)
(c) vesting property or appointing a person to convey land or to make or join in making a transfer of stock or a share in a ship
(d) for general administration (except in a creditor's action where there was evidence of insolvency) or for execution of a trust
(e) for accounts and inquiries concerning the property of a deceased person
(f) to bind persons on whom service of a notice of judgment or order for accounts and inquiries had been dispensed with.

2. In cases falling within para. 1, the masters should not make orders:—

(a) for service out of the jurisdiction except in clear cases
(b) for the appointment of a trustee or trustees except
(i) a judicial trustee

* See *Practice Note*, [1955] 1 All E.R. 913.

T

(ii) in the case of incapacity
(iii) where all the former trustees are dead
(iv) where there is no power to appoint additional trustees except in the court (e.g., where a trust corporation is a trustee) and such trustees are required
(v) by approving the appointment of new trustees in an administration action, or
(vi) where the fund is small, i.e., not substantially in excess of £500.

(c) vesting property or directing or authorising some person to assign or convey except
(i) consequent on an appointment of new trustees, whether in or out of court
(ii) where the transaction giving rise to the application has been previously approved or directed by a judge
(iii) where the master has ordered a sale of property or specific performance of a contract, or
(iv) where a corporation has been dissolved and its property has vested in the Crown and a successor to or purchaser from the corporation is entitled and the Crown does not claim the property as bona vacantia

(d) for the administration of an estate or execution of trusts in a beneficiary's action

(e) for inquiries relating to the next of kin of a deceased person, including special inquiries for particular persons and their issue, except in clear cases.

3. The power of the masters as deputies for the judge in chambers to make orders in matters other than those falling within para. 1 has long been limited by well-settled practice. That practice is, except as hereinafter mentioned, to be maintained. For example, a master should not sanction any compromise, arrangement or transaction.

4. Masters may make summary orders for specific performance under Ord. 14A by consent or if the following conditions are satisfied:—
(i) the agreement sued on is a formal written contract, and
(ii) the defendant is in default of appearance or does not appear at the hearing or there is clearly no defence.

5. Before the adoption of the present r. 2 of Ord. 55, it was necessary in certain cases for applications for payment or transfer of funds out of court to be made by petition. Other applications might be made by summons and on such applications masters might in proper cases make the appropriate order, regardless of the amount of the fund, and nothing in this memorandum shall be taken to restrict their former powers. In cases where a petition would have been necessary under the previous rules, masters may make orders where the value of the fund, or the share or part thereof the subject of the application, does not significantly exceed £2,000 at the date of the issue of the summons.

6. In future, masters may make orders giving general liberty to wards of court to go out of the jurisdiction on condition that on each occasion:—
(i) the written consent of all persons concerned, or their solicitors, is obtained, and
(ii) the order provides that proper undertakings for the ward's return shall be lodged with the master.

7. Cases involving difficulties or complications should be referred by the master to the judge, as heretofore, and before exercising his extended powers a master should consider in every case whether it is one in which it would be more appropriate that the judge should make the order.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

Oct. 26, 1960.

PRACTICE DIRECTION.

CHANCERY DIVISION.

Costs—Taxation—Review by court—Procedure in Chancery Division—Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2, r. 35.

The following directions have been given by the judges of the Chancery Division:

1. An application in the Chancery Division, under r. 35 of the Supreme Court Costs Rules, 1959*, for review of taxation of costs shall be heard by one of the judges taking the non-witness list.

2. The application shall be made by ordinary summons in the proceedings in which the taxation has been ordered, and shall identify the item or items of the bill and the amount allowed in respect of which the application for review is made and shall be served on the parties affected.

3. The summons shall be issued in the chambers of the judge and will be returnable before the appropriate Chancery master in the first instance.

4. After the issue of the summons the party applying shall forthwith give notice thereof to the appropriate taxing master and on receipt of such notice the taxing master shall cause to be lodged in chambers the bill of costs, and the objections and answers made and given by the parties respectively on the review of the taxation of the bill of costs by the taxing master.

5. Each party shall within four days after service of the summons lodge with the master all documents produced in evidence by that party at the hearing before the taxing master relating to the item or items or the amount or amounts under review.

6. When the summons is heard by the master, he will ensure that the application is in order and that all the relevant documents have been lodged and will then adjourn the summons to the judge in chambers for directions. If the judge thinks fit to exercise the power conferred on him by s. 98 of the Supreme Court of Judicature (Consolidation) Act, 1925, to appoint assessors, a day shall be fixed by him for the hearing of the summons. If not, the summons shall take its ordinary place in the non-witness list.

7. If the judge decides to appoint assessors, the party applying shall, within seven days of the judge's directions being given, lodge with the master two or more copies, as the case may be, of the summons, objections and answers mentioned in para. 4 for the use of the assessors, and the master shall forthwith advise the assessor or assessors who have been nominated to serve.

8. The party applying shall give notice to the parties affected of the date for the hearing forthwith after this has been fixed by the judge.

9. When each of the assessors has signified his acceptance of his appointment, the master shall send to each of them the notice of his appointment and the date fixed for the hearing of the summons, and a copy of the documents mentioned in para. 7.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

Oct. 26, 1960.

* The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

A

THOMPSON *v.* STIMPSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 20, 1960.]

Landlord and Tenant—Notice to quit—Validity—Notice to quit dwelling—Notice of not less than four weeks' duration—Four clear weeks necessary—Rent Act, 1957 (5 & 6 *Eliz.* 2 *c.* 25), *s.* 16. B

Time—"Not less than four weeks before the date on which"—Exclusive of both first and last days—Rent Act, 1957 (5 & 6 *Eliz.* 2 *c.* 25), *s.* 16.

Statute—Construction—Words interpreted in accordance with prior judicial interpretation of words in pari materia—Rent Act, 1957 (5 & 6 *Eliz.* 2 *c.* 25), *s.* 16. C

By s. 16* of the Rent Act, 1957, "No notice . . . to quit any premises let . . . as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect".

On Friday, May 15, 1959, a landlord's agent gave a tenant notice to quit his cottage on Friday, June 12, 1959.

Held: the length of notice required by s. 16 was four clear weeks, viz., a period of four weeks excluding the day from which it ran and the day on which the notice expired; accordingly the notice to quit (being a notice of four weeks' but not four clear weeks' duration) was invalid. D

Appeal allowed.

[Editorial Note. The question whether there was a tenancy at all was raised before the magistrates, who decided that there was. The Divisional Court did not direct their judgments to this aspect of the case. Accordingly the report is framed on a basis that there was a subsisting tenancy. By the finding of the magistrates the tenant's right of occupation of the cottage was contractually terminable by a month's notice. E

As to the length of notice to quit a dwelling, see 23 HALSBURY'S LAWS (3rd Edn.) 530, para. 1185; as to computation of a period on expiration of which an act may be done, see 32 HALSBURY'S LAWS (2nd Edn.) 140, para. 205; and for cases on the subject, see 42 DIGEST 949, *223-229*. F

As to the assumption that Parliament is aware of the interpretation of words construed by the court before their use in a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 492, para. 624; and for cases on the subject, see 42 DIGEST 667-670, *774-805*. G

For the Rent Act, 1957, s. 16, see 37 HALSBURY'S STATUTES (2nd Edn.) 567.]

Cases referred to:

Chambers v. *Smith*, (1843), 12 M. & W. 2; 13 L.J.Ex. 25; 2 L.T.O.S. 101; 152 E.R. 1085; 42 Digest 956, *290*.

Hector Whaling, Ltd., Re, [1935] All E.R. Rep. 302; [1936] Ch. 208; 105 L.J.Ch. 117; 154 L.T. 342; 9 Digest (Repl.) 618, *4114*. H

R. v. *Long*, [1959] 3 All E.R. 559; [1960] 1 Q.B. 681; 124 J.P. 4; [1959] 3 W.L.R. 953; 3rd Digest Supp.

R. v. *Turner*, [1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367; 74 J.P. 81; 14 Digest (Repl.) 580, *5797*.

Case Stated.

This was an appeal by way of Case Stated by justices for the county of Norfolk in respect of their adjudication as a magistrates' court sitting at Reepham, Norfolk. On Nov. 2, 1959, a complaint was preferred by the respondent, George Edward Stimpson against the appellant, Sidney George Thompson (hereinafter referred to as the "tenant"), that the respondent as agent for Edward Stimpson (Farms), Ltd. (who, so acting, is hereinafter referred to as the "landlord"), let the cottage and garden at Reepham to the tenant on a monthly tenancy at an I

* Section 16 is printed at p. 502, letter A, post.

annual rent of £20, viz., at the rate of 6s. per week, and that the tenancy was determined by a notice to quit given by the landlord on May 15, 1959, for June 12, 1959. The tenant refused to give up possession. At the hearing the following facts were found: (a) the said Edward George Stimpson was secretary of Edward Stimpson (Farms), Ltd., which farmed about seven-hundred and fifty acres and employed sixteen to twenty men; (b) when employing married men the company found it essential to provide a house; (c) the company owned the cottage occupied by the tenant who, in October, 1957, was taken into the company's employ as a tractor driver and general farm worker being employed weekly from Friday of each week; (d) in consequence of this employment the tenant was allowed to occupy the cottage on the following terms, viz., (i) that the occupation should be terminated by one month's notice by either party, and (ii) that in consideration of this occupation the appellant's wages, which were paid weekly, were reduced by the sum permitted by the current Agricultural Wages Board (Norfolk) Order, which amount at the date of the hearing was 6s. weekly; (iii) there was no obligation on the tenant to reside in this or any other cottage; (iv) on May 15, 1959, the landlord handed to the tenant a notice in writing in the following terms:

> " We hereby give you one week's notice to terminate your employment with us on Friday, May 22, 1959, and four weeks' notice to vacuate and give up possession of our cottage . . . on Friday, June 12, 1959.
>
> Geo. E. Stimpson."

The tenant contended that the notice to quit was invalid because it did not comply with the Rent Act, 1957, s. 16, in that the words " four weeks " therein meant " four clear weeks ", and that the period from Friday, May 15 to Friday, June 12, was not four clear weeks. The tenant also contended that there was no tenancy and that therefore the magistrates had no jurisdiction under the Small Tenements Recovery Act, 1838. The landlord contended that the notice to quit was valid and that the tenant was tenant of the cottage;

The magistrates decided that the landlord had given not less than four weeks' notice and that therefore the notice to quit was valid, and, further, that the tenant was tenant of the cottage. They accordingly made an order for possession.

The questions for the opinion of the High Court were (i) whether they were right in law in holding that the notice to quit was valid; (ii) whether there was evidence on which they could properly come to such a decision; (iii) whether they were right in law in holding that the tenant was the tenant of the cottage; and (iv) whether there was evidence on which they could properly come to such decision.

L. K. E. Boreham for the tenant.
J. D. Alliott for the landlord.

LORD PARKER, C.J.: Several points have been raised but it is sufficient to deal with one point, namely, whether a valid notice to quit was given within s. 16 of the Rent Act, 1957. The respondent landlord was acting as agent for a company called Edward Stimpson (Farms), Ltd., who farm some seven hundred and fifty acres, and the appellant tenant was employed, prior to the matters with which we are now concerned, by that company and was allowed to occupy this cottage, the 6s. a week being deducted from his wages. By a notice given on Friday, May 15, 1959, the landlord determined that employment on Friday, May 22, that is, a week's notice, and also gave four weeks' notice to vacate and give up possession of the cottage on Friday, June 12, 1959. In other words, the notice was served on the tenant on Friday, May 15, to determine on Friday, June 12. The tenant continued to occupy the premises. The steps laid down by the Act were taken, and he was served with a notice in writing of the landlord's intention to apply for possession, and the matter came before the justices on Nov. 2, 1959.

The point taken before the justices, and the point taken before this court, is

that the notice to quit, albeit a four weeks' notice, was not a notice of four clear weeks, and it is said that s. 16 of the Rent Act, 1957, on its true construction provides for a notice of four clear weeks. The wording of s. 16 is as follows:

> "No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect."

Similar words have come before the court on a number of occasions. The most recent instance is to be found in *R.* v. *Long* (1), which turned on the construction of the words in s. 23 (1) of the Criminal Justice Act, 1948, which provided that a notice should be given three days before the trial. The Court of Criminal Appeal decided that in that context three days meant three clear days. In the course of giving judgment in that case I myself referred with approval to a passage in 32 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 140, para. 205, where it is said:

> "When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed has the benefit of the entire period, and accordingly in computing it the day from which it runs as well as the day on which it expires must be excluded."

That principle is an exception from the ordinary rule that the day of service is not included but the date of the later event is. In so deciding the court followed a decision of CHANNELL, J., in *R.* v. *Turner* (2).

In this court we have also been referred to other cases, in particular to a case concerning the Companies Act, *Re Hector Whaling, Ltd.* (3). In that case BENNETT, J., was considering the meaning of the words in s. 117 (2) of the Companies Act, 1929, which referred to a general meeting "of which not less than twenty-one days' notice . . . has been duly given." In giving his judgment BENNETT, J., said this (4):

> "In the interests of everybody it is of importance that there should be no doubt as to the meaning of a phrase in a section of almost daily use. I do not think there is any doubt about its meaning, and I propose to found my decision on *R.* v. *Turner* (2) and *Chambers* v. *Smith* (5) and to decide that the phrase means twenty-one clear days exclusive of the day of service and exclusive of the day on which the meeting is to be held."

As against that, counsel for the landlord refers us to the context and the circumstances in which the Rent Act, 1957, was passed. Prior to that Act, it is quite clear that, when a notice was given to determine a weekly tenancy, a seven days' notice sufficed, and it was unnecessary to have seven clear days. Accordingly, says counsel for the landlord, looked at against that background, s. 16 is in effect saying merely that the seven days' notice was to be extended to a four weeks' notice, and that there is nothing in the Rent Act, 1954, to suggest that in addition to multiplying the time by four an extra day was to be included to make it a four weeks' clear notice. I was impressed by that argument, but at the same time it is to be observed that when s. 16 of the Rent Act, 1957, was passed Parliament must be presumed to know the way in which these words had been interpreted in the past. If the intention had been merely to multiply the seven days' notice by four, it would have been perfectly possible to provide that in the case of a weekly tenancy a four weeks', and not a one week's, notice must be given. Parliament here, however, has gone further and used the words which have been interpreted in the past as providing for

(1) [1959] 3 All E.R. 559; [1960] 1 Q.B. 681.
(2) [1910] 1 K.B. 346.
(3) [1935] All E.R. Rep. 302; [1936] Ch. 208.
(4) [1935] All E.R. Rep. at p. 303; [1936] Ch. at p. 210.
(5) (1843), 12 M. & W. 2.

four clear weeks. Like BENNETT, J., in *Re Hector Whaling, Ltd.* (6), I think that there ought to be certainty on this matter, and I prefer the view that the word should be construed as four clear weeks. Accordingly, on that view of the law the justices came to a wrong decision, and this appeal must be allowed.

ASHWORTH, J.: I agree.

ELWES, J.: I agree.

Appeal allowed.

Solicitors: *Wm. Easton & Sons*, agents for *Mills & Reeve*, Norwich (for the tenant); *Haslewoods*, agents for *Hood, Vores & Allwood*, Dereham (for the landlord).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

FAWCETT PROPERTIES, LTD. *v.* BUCKINGHAM COUNTY COUNCIL.

[HOUSE OF LORDS (Lord Cohen, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Denning and Lord Jenkins), July 12, 13, 14, 18, 19, October 26, 1960.]

Town and Country Planning—Development—Permission for development—Condition—Permission to build cottages on condition that occupants employed in agriculture, etc.—Validity—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 14 (1), *s.* 36.

In pursuance of their powers under the Town and Country Planning Act, 1947, a local planning authority gave permission for the erection of a pair of farm workers' cottages, subject to the condition that "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." The reason given for imposing this condition was "because the council would not be prepared to permit the erection of dwelling-houses on the site unconnected with the use of the adjoining land for agricultural or similar purposes". At the date of the planning permission, no development plan in relation to the land was in operation, but its inclusion in a green belt area was envisaged. On the question whether the condition was void as being ultra vires the local planning authority or for uncertainty or as being spent,

Held: the condition was valid for the following reasons—

(i) it was not ultra vires because, although the wording of the condition might be open to criticism, it was fairly and reasonably related to the permitted development (see particularly p. 519, letter C, post), and did not impose an unreasonable restriction on the use of the cottages.

Associated Provincial Picture Houses, Ltd. v. *Wednesbury Corpn.* ([1947] 2 All E.R. 680) applied.

Dictum of LORD DENNING in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* ([1958] 1 All E.R. at p. 633) applied.

(ii) (LORD MORTON OF HENRYTON dissenting) the condition was not void for uncertainty since it was based on words used in the Housing Acts which had a definite and ascertainable meaning and it must be construed as applying to agriculture or industry mainly dependent on agriculture within the area of the local planning authority.

---

(6) [1935] All E.R. Rep. at p. 303; [1936] Ch. at p. 210.

(iii) the condition was not spent but was a continuing one. A

Per LORD COHEN: in construing a statute or a contract, a court should not hold a provision thereof to be void for uncertainty unless it cannot resolve the ambiguity (see p. 508, letter C, post).

Decision of the COURT OF APPEAL ([1959] 2 All E.R. 321) affirmed.

[For the Town and Country Planning Act, 1947, s. 14 and s. 36, see 25 HALSBURY'S STATUTES (2nd Edn.) 511, 544.] B

Cases referred to:

Associated Provincial Picture Houses, Ltd. v. *Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 2nd Digest Supp.

Bromley v. *Tryon*, [1951] 2 All E.R. 1058; [1952] A.C. 265; 2nd Digest Supp.

Clavering v. *Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; C 44 Digest 440, *2667*.

Clayton v. *Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.

Crisp from the Fens v. *Rutland County Council*, (1950), 1 P. & C.R. 48; 114 J.P. 105; 2nd Digest Supp.

Doe d. Winter v. *Perratt*, (1843), 6 Man. & G. 314; 9 Cl. & Fin. 606; 7 Scott, D N.R. 1; 134 E.R. 914; 44 Digest 862, *7175*.

Elmdene Estates, Ltd. v. *White*, [1960] 1 All E.R. 306; [1960] A.C. 528; [1960] 2 W.L.R. 359.

Gestetner, Re, Barnett v. *Blumka*, [1953] 1 All E.R. 1150; [1953] Ch. 672; 3rd Digest Supp.

Green v. *Wood*, (1845), 7 Q.B. 178; 14 L.J.Q.B. 217; 5 L.T.O.S. 72; 115 E E.R. 455; 42 Digest 677, *884*.

Inland Revenue Comrs. v. *Broadway Cottages Trust, Inland Revenue Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; 35 Tax Cas. 577, 585; [1954] 3 W.L.R. 438; 3rd Digest Supp.

Kruse v. *Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 13 Digest (Repl.) 239, *639*. F

London & North Eastern Ry. Co. v. *Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.

Manchester Ship Canal Co. v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352; 69 L.J.Ch. 850; 83 L.T. 274; *affd.* C.A., [1901] 2 Ch. 37; 70 L.J.Ch. 468; 84 L.T. 436; 42 Digest 472, *399*. G

Pyx Granite Co., Ltd. v. *Ministry of Housing and Local Government*, [1958] 1 All E.R. 625; [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; *revsd.* H.L., [1959] 3 All E.R. 1; [1960] A.C. 260; [1959] 3 W.L.R. 346; 3rd Digest Supp.

R. v. *King*, (1826), 2 C. & P. 412; 172 E.R. 186.

R. v. *Saddlers' Co.*, (1863), 10 H.L. Cas. 404; 32 L.J.Q.B. 337; 9 L.T. 60; H 28 J.P. 36; 11 E.R. 1083; *subsequent proceedings*, 4 B. & S. 570; 13 Digest (Repl.) 236, *605*.

Roberts, Re, Repington v. *Roberts-Gawen*, (1881), 19 Ch.D. 520; 45 L.T. 450; 44 Digest 850, *7042*.

Roberts v. *Hopwood*, [1925] All E.R. Rep. 24; [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, *83*. I

Salmon v. *Duncombe*, (1886), 11 App. Cas. 627; 55 L.J.P.C. 69; 55 L.T. 446; 42 Digest 676, *874*.

Scott v. *Pilliner*, [1904] 2 K.B. 855; 73 L.J.K.B. 998; 91 L.T. 658; 68 J.P. 518; 25 Digest 436, *333*.

Sifton v. *Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

Vince, Re, Ex p. Baxter, [1892] 2 Q.B. 478; 61 L.J.Q.B. 836; 67 L.T. 70; 36 Digest (Repl.) 442, *140*.

A *Westminster Corpn.* v. *London & North Western Ry. Co.*, [1905] A.C. 426; 74 L.J.Ch. 629; 93 L.T. 143; 69 J.P. 425; 42 Digest 724, *1440.*

Appeal.

Appeal by Fawcett Properties, Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and PEARCE, L.JJ.), dated Apr. 27, 1959, and reported [1959] 2 All E.R. 321, reversing an order of ROXBURGH, J., dated Oct. 29, 1958, and reported [1958] 3 All E.R. 521, in which he held that a condition imposed on a permission for development given by the respondents, Buckingham County Council, was ultra vires and void, because it did not fairly and reasonably relate to any local planning consideration. The facts are set out in the opinion of LORD MORTON OF HENRYTON, p. 509, letter I, post.

C *R. E. Megarry, Q.C., C. F. Fletcher-Cooke, Q.C.*, and *T. S. Legg* for the appellants. *B. J. M. MacKenna, Q.C.*, and *Alan Fletcher* for the respondents.

Their Lordships took time for consideration.

Oct. 26. The following opinions were read.

D **LORD COHEN:** My Lords, the question for your decision is as to the validity of a condition, which the respondents in exercise of powers conferred on them by s. 14 (1) of the Town and Country Planning Act, 1947, imposed on the appellants when granting, on Dec. 5, 1952, planning permission for the development of two farm workers' cottages. The condition is in the following terms:

E "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

F The appellants impugn the validity of the condition on four grounds. They say—(A) That the imposition of a condition restricting the user of premises according to the personal circumstances of the persons using them is ultra vires the respondents. (B) That the condition now under consideration is ultra vires in that it is so wide that, in the result, it cannot fairly and reasonably be said to relate to the permitted development or to any policy possible under the Act G of 1947. (C) That the condition is void for uncertainty, and (D) That, in any event, the condition has been fulfilled and its force is now spent. ROXBURGH, J., rejected the first of those arguments but accepted the second and did not find it necessary to reach a conclusion on the third or fourth. The Court of Appeal rejected all four arguments.

My Lords, I have been privileged to read the opinion about to be delivered by H my noble and learned friend, LORD MORTON OF HENRYTON, and do not find it necessary to restate the facts or the relevant sections of the Act of 1947 and of the various Housing Acts.

Finding myself as I do in complete agreement with the opinions expressed by all your Lordships on the first, second and fourth of the arguments summarised above, I shall state my conclusions thereon quite shortly.

I Dealing with the first of them, I agree entirely with what was said on the subject by their Lordships in the Court of Appeal. The argument that a planning authority cannot specify which persons may live in a house but only the purposes for which it is to be used, apparently concedes that the respondents in the present case could have made it a condition that the cottages should only be used for the purpose of housing agricultural workers, and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. The difficulties in counsel for the appellants' argument are further

illustrated by ROMER, L.J. (1), and I cannot usefully add anything to what he said on the subject. A

The fourth argument, namely, that the condition has been fulfilled and its force is now spent, was not, I think, seriously pressed before us. Like the Master of the Rolls (LORD EVERSHED) (2), I cannot think that any planning authority could sensibly, in a case of this kind, have supposed that it was discharging its statutory duty by imposing a condition restricted to the first occupation of the cottages. B

I return to the second argument. Here, too, I find myself in complete agreement with their Lordships in the Court of Appeal. I assume, in dealing with this argument, that the condition which has been imposed is not so uncertain as on that ground to be invalid. I shall deal with the question of uncertainty as a separate matter. On this basis, it seems to me quite plain that, though the C wording of the condition may be unfortunate, it cannot be said to be unrelated to the planning purposes the fulfilment of which is the duty of the respondents. The Master of the Rolls relied on the decision of the Court of Appeal in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (3), where the question at issue was as to the validity of a condition imposed by the Wednesbury Corporation in granting a licence to the plaintiff for Sunday cinema performances. D The condition was to the effect that no child under fifteen years of age should be admitted to Sunday performances at the cinema with or without an adult. It was sought to impeach the validity of this condition on the ground that it constituted an unreasonable exercise of the powers of the corporation. The court upheld the validity of the condition. The relevant passages of the judgment of LORD GREENE, then Master of the Rolls, are fully set out in the judgment E of the Master of the Rolls in the present case. I will content myself with citing one passage, which reads as follows (4):

> "I do not read him [ATKIN, J.] as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether the condition imposed by F the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose."

In that case, their Lordships were concerned with the policy of the local authority. In the present case, it would, perhaps, be more accurate to say that what the House is concerned with is not planning policy but means of effectuating a policy predetermined. Be that so. I agree with ROMER, L.J. (5), that the G principle of the Wednesbury umbrella covers decisions reached in effectuating planning policy.

In support of this second alleged ground of invalidity, counsel for the appellants relied mainly on the following argument. He said that the scope of the condition was unrelated to the policy declared in the outline plan or to any other sensible planning policy. He conceded that, if his first argument was H ill-founded, the condition that the occupation of the houses should be limited to persons whose employment is employment in agriculture as defined by s. 119 (1) of the Act of 1947 was unobjectionable. But he said that extending the list of permitted occupants to (i) persons whose latest employment had been in agriculture, a category which would include persons who had been employed in agriculture overseas, (ii) persons employed in "an industry mainly dependent I upon agriculture", and (iii) dependants of such persons as aforesaid, had so wide an effect that the condition could not be said to be reasonably related to the planning policy indicated in the permission. Counsel gave a number of

(1) [1959] 2 All E.R. at p. 332; [1959] Ch. at p. 572.
(2) [1959] 2 All E.R. at p. 324; [1959] Ch. at p. 559.
(3) [1947] 2 All E.R. 680; [1948] 1 K.B. 223.
(4) [1947] 2 All E.R. at p. 684; [1948] 1 K.B. at p. 233.
(5) [1959] 2 All E.R. at p. 330; [1959] Ch. at p. 569.

A illustrations in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages could bear no relation to any sensible planning policy and certainly not to the policy outlined in the outline development plan.

The respondents by their counsel, both in the Court of Appeal and before your Lordships, frankly admitted that curious and anomalous positions might B arise under the terms of the condition, and that certain persons whose connexion with agriculture was non-existent or remote might qualify as tenants, whilst other persons who might ordinarily be expected to qualify would find themselves excluded. But they submitted that the condition made a broad division between persons whose employment is such that they may have to live in a rural area and persons whose employment is such that they need not; and that the effect C of the condition was to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore made a sensible contribution to the retention of the rural character of the part of the county concerned. The condition, it was said, was right in principle, and the imperfection of detail afforded insufficient grounds for holding it to be ultra vires. ROMER, L.J., agreed with this contention but thought the condition was unfor- D tunately worded. He added that absurd results could follow but that, having regard to its terms, it did seem that, broadly speaking, it was in line with the Outline Development Plan. He said (6):

> "It is not possible to say that the condition *could* not implement the policy outlined in that document; on the contrary it seems to me that E it almost certainly will implement it, notwithstanding that it is dissociated from the policy in certain of its aspects."

I agree with this view. It seems to me impossible to say that no reasonable planning authority acting within the four corners of their authority could have decided to impose it and, in my opinion, your Lordships, applying the decision in the *Wednesbury* case (7), should hold that it is not ultra vires the respondents. F

I turn now to the third argument, namely, that based on uncertainty. I confess that this point has caused me much difficulty but, on consideration, I have come to the conclusion that, for the reasons so clearly stated in the opinions which will soon be delivered by my noble and learned friends, LORDS DENNING and JENKINS, this argument also fails. It is based in the main on the principle relating to penal provisions of a statute which was concisely stated G by my noble and learned friend, LORD SIMONDS, in *London & North Eastern Ry. Co.* v. *Berriman* (8) in these words: "A man is not to be put in peril upon an ambiguity . . ." This principle involves that, if a statutory provision is ambiguous, the court should adopt any reasonable interpretation which would avoid the penalty, but the court should not, I think, strike a provision out of an Act on the ground of uncertainty unless it is impossible to resolve the ambiguity H which it is said to contain. In the present case, your Lordships are considering not a statutory provision but a condition imposed in a planning permission. But the language of the condition is taken from the definition of "agricultural population" in s. 34 (2) of the Housing Act, 1930. See also s. 115 (2) of the Housing Act, 1936 (9). It is true that the context in which the expression under consideration is used in those Acts is different from that in which it is I used in the condition imposed under the Town and Country Planning Act, 1947. But I agree with the Master of the Rolls (10) that it is

> ". . . inescapable that, if the arguments of counsel for the [appellants]

(6) [1959] 2 All E.R. at p. 331; [1959] Ch. at p. 571.
(7) [1947] 2 All E.R. 680; [1948] 1 K.B. 223.
(8) [1946] 1 All E.R. at p. 270; [1946] A.C. at pp. 313, 314.
(9) Replaced by the Housing Act, 1957, s. 114 (5); 37 HALSBURY'S STATUTES (2nd Edn.) 414.
(10) [1959] 2 All E.R. at p. 329; [1959] Ch. at p. 568.

that the language in the condition to which I have referred is void for uncertainty in the context of the condition, it is no less void for uncertainty in the context of the Housing Acts."

Counsel for the appellants also relied on *Sifton* v. *Sifton* (11) and other cases on defeasance clauses. I agree with my noble and learned friend, LORD DENNING, that these cases are sui generis. Such clauses may involve a forfeiture, and the courts have insisted that they must be so worded that persons affected by them can know with certainty what events will give rise to the forfeiture. In the present case, the words which are alleged to create the uncertainty are not added to restrict the landowner's enjoyment of his land but to mitigate the severity of the restriction which the respondents are imposing on that enjoyment. It would, indeed, be unfortunate if these words were now to be held to have the effect of nullifying entirely a restriction which was in part at any rate plainly within the policy of the Act. I do not find myself driven to this conclusion. In my opinion, in construing a statute or a contract, a court should not hold a provision thereof to be void for uncertainty unless it cannot resolve the ambiguity which is said to be contained therein. I am not satisfied that the condition in the present case contains any such insoluble ambiguity. I do not desire to anticipate what the decision will be if, at some future time, any particular occupancy of these cottages is challenged as infringing the conditions. It is sufficient to say that, as at present advised, I see no reason to think that the court would be unable to resolve the ambiguity.

For these reasons, I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, the appellants are the owners of two cottages situate off Dibden Hill Lane, Chalfont St. Giles, in the county of Buckingham. The respondents are the local planning authority for that county under the Town and Country Planning Act, 1947. The cottages were erected by the appellants' predecessor in title, pursuant to a permission granted by the respondents under powers contained in that Act. In this appeal, the appellants challenge the validity of a condition attached by the respondents to the permission so granted.

It will be convenient to refer at once to certain provisions of the Act of 1947. The opening words of the title are:

> "An Act to make fresh provision for planning the development and use of land, for the grant of permission to develop land and for other powers of control over the use of land; . . . "

There follow other objects of the Act, and the title ends with the words—" and for purposes connected with the matters aforesaid."

> " 5 (1) As soon as may be after the appointed day [July 1, 1948], every local planning authority shall carry out a survey of their area, and shall, not later than three years after the appointed day, or within such extended period as the Minister may in any particular case allow, submit to the Minister a report of the survey together with a plan (hereinafter called a ' development plan ') indicating the manner in which they propose that land in that area should be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development should be carried out.
>
> " (4) The Minister may approve any development plan submitted to him under this section either without modification or subject to such modifications as he considers expedient . . .
>
> " 12 (1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

(11) [1938] 3 All E.R. 435; [1938] A.C. 656.

A "(2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . .

"14 (1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission
B to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.

"(2) Without prejudice to the generality of the foregoing subsection,
C conditions may be imposed on the grant of permission to develop land thereunder—(a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connexion with the development authorised by the
D permission; . . .

"36. Where, under the foregoing provisions of this Part of this Act, a local planning authority are required to have regard to the provisions of the development plan in relation to the exercise of any of their functions, then, in relation to the exercise of those functions during any period before such a plan has become operative with respect to the area of that authority,
E that authority shall have regard to any directions which may be given to them by the Minister as to the provisions to be included in such a plan, and subject to any such directions shall have regard to the provisions which in their opinion will be required to be so included for securing the proper planning of the said area."

By art. 5 (9) of the Town and Country Planning General Development Order,
F 1950 (S.I. 1950 No. 728), which was made under powers contained in the Act of 1947,

"Every such notice [of the local planning authority's decision] shall be in writing and (a) in the case of an application for planning permission or approval, where the local planning authority decide to grant such permission
G or approval subject to conditions or to refuse it, they shall state their reasons in writing . . ."

My Lords, it is to be observed that, under s. 14 (1) of the Act of 1947, the planning authority may impose "such conditions as they think fit" when they grant permission to develop land. These words are extremely wide, but the appellants rely on the words of my noble and learned friend, LORD DENNING,
H in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (12):

". . . nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

They submit (inter alia) that the condition imposed in the present case fails to answer this test, and, further, that the condition is void for uncertainty.

I The events leading up to this appeal are as follows. On Nov. 22, 1952, Mr. D. D. Clark, who was then the owner of the land on which the two cottages were subsequently erected, applied in writing for permission to develop the said land by "the erection of a pair of farm workers' cottages." At the date of this application, no development plan under s. 5 of the Act of 1947 had become operative in the county of Buckingham and the Minister had not given any directions as to the provisions to be included in such a plan, but the respondents had published, in February, 1950, a document described as an "Outline

(12) [1958] 1 All E.R. at p. 633; [1958] 1 Q.B. at p. 572.

Development Plan for Buckinghamshire " which recognised that certain parts of the said county, including the site in question, should form part of the " Metropolitan Green Belt " and should be preserved against building development so as to form a barrier against the further outward spread of London. On Dec. 5, 1952, the Amersham Rural District Council, acting as agents for the respondents, granted permission in writing for the erection of a pair of farm workers' cottages in accordance with Mr. Clark's application subject to a condition that:

> " The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

The definition of " agriculture " referred to in the condition is as follows:

> " ' agriculture ' includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes . . ."

The language of the condition, from the word " persons " onwards, is identical with the language employed in s. 34 (2) of the Housing Act, 1930 (now s. 114 (5) of the Housing Act, 1957), except that the words " or in forestry " do not appear in either of these statutes. The permission included a statement of the reason for imposing the condition as follows:

> " Because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agricultural or similar purposes."

It is common ground between the parties that the cottages now in question were occupied for some time by farm workers after they had been erected by Mr. Clark. On Dec. 31, 1956, the appellants bought the cottages with knowledge of the condition, which had been registered as a local land charge. Letters were exchanged between the parties on the subject of the removal or modification of the condition, but they led to no result and, on Jan. 21, 1958, the appellants issued the specially indorsed writ in this action. By their statement of claim, the appellants asked for a declaration that the condition is and was ultra vires, alternatively is and was void for uncertainty and of no effect, and that the cottages might be lawfully occupied without regard to the nature of the employment of the occupants. Alternatively, they asked for a declaration that the condition had been fulfilled and that its force was spent. They further asked for an order to rectify the Register of Local Land Charges. Before the learned trial judge, ROXBURGH, J., in the Court of Appeal and in your Lordships' House, counsel for the appellants contended that the condition was invalid on one or more of the following grounds:—(i) The imposition of a condition restricting the occupation of premises according to the personal circumstances of the occupants is ultra vires the respondents. (ii) It is ultra vires the respondents to impose the condition that they sought to impose in this case, since the condition as a whole, or alternatively a substantial part thereof, cannot fairly and reasonably be said to relate to the permitted development or to any policy possible under the Act of 1947. (iii) The condition is void for uncertainty. (iv) The condition has already been fulfilled and its force is spent. ROXBURGH, J., rejected the first contention, but accepted the second contention, granted a declaration that the condition was ultra vires on that ground, and ordered the vacation of the entry in the Register of Local Land Charges. He expressed no

A opinion on the third and fourth contentions. The Court of Appeal (LORD EVERSHED, M.R., ROMER and PEARCE, L.JJ.) in a reserved judgment rejected all four contentions, allowed the appeal of the present respondents and dismissed the action.

My Lords, I agree with the reasoning and the conclusion of the Court of Appeal in regard to the first, second and fourth contentions, but, in my opinion, the B condition ought to be held void on the ground of uncertainty.

On the question of uncertainty, the Master of the Rolls, after referring to the criticisms directed at the language of the condition by leading counsel for the present appellants observed (13): "It is undeniable that these criticisms have much force." ROMER, L.J., said (14):

C "It remains to consider whether the condition imposed by the [respondents] is void for uncertainty and this question has caused me considerable doubt."

Later, he said (15):

"It is, in my judgment, quite wrong that a condition couched in such vague and ambiguous terms should be imposed by any planning authority, D and I can only hope that it will never be imposed again."

PEARCE, L.J., said (16): "There is no doubt that the condition is cumbrous and unsatisfactory and can in extreme instances produce ridiculous results." My Lords, I agree with these last two observations. Before returning to the words of the condition, I desire to say this. It is, to my mind, particularly important that the language of a condition imposed under the provisions of the Act of 1947 E should be clear and unambiguous, for s. 23 (as amended by s. 2 of the Town and Country Planning (Amendment) Act, 1951 (17)) and s. 24 of the Act (17) impose penal sanctions on any breach of such a condition. As my noble and learned friend, LORD SIMONDS, said in *London & North Eastern Ry. Co.* v. *Berriman* (18): "A man is not to be put in peril upon an ambiguity . . ." In my opinion, a condition which is accurately described in the words of ROMER and PEARCE, F L.JJ., already quoted, should not be allowed to remain as a permanent burden attached to the ownership of these two cottages.

Counsel for the appellants in this House submitted that the condition was "riddled with uncertainty". His criticisms were most forcibly directed to the words "an industry mainly dependent upon agriculture", but he pointed out that the opening words—"The occupation of the houses shall be limited to G persons", etc., at once raise an ambiguity. Do these words mean that no one is ever to live in either house unless he comes within the condition, or is it enough that the rateable occupier is within the condition, so that he can take in lodgers or paying guests who are not within it? If the former is the true meaning, a farmer occupying one of the cottages could not have living with him an adult son who was earning his own living, e.g., in the county council offices, for he H would not be a "dependant". If the latter is the true meaning, as there is no limitation on the land whereon the "person" is or was employed, a retired farmer from, e.g., Devonshire could become tenant of the two cottages and take in as paying guests persons who daily travelled to work in London. It is difficult to see what planning purpose could possibly be served by such a condition, and equally difficult to reconcile it with the reason which the respondents gave I for the imposing of the condition, referring to "the use of the *adjoining* land". Counsel for the respondents submitted that the word "agriculture", read in the light of the reason so given, ought to be construed as meaning "agriculture

(13) [1959] 2 All E.R. at p. 328; [1959] Ch. at p. 565.
(14) [1959] 2 All E.R. at p. 332; [1959] Ch. at p. 573.
(15) [1959] 2 All E.R. at p. 333; [1959] Ch. at pp. 573, 574.
(16) [1959] 2 All E.R. at p. 334; [1959] Ch. at p. 576.
(17) Also amended by the Town and Country Planning Act, 1959, s. 58 (1) (a) and Sch. 7.
(18) [1946] 1 All E.R. at p. 270; [1946] A.C. at pp. 313, 314.

in the locality." My Lords, there are two fatal objections to this submission. First, to insert the words " in the locality " is not to construe the condition but to rewrite it. Secondly, the insertion of the words " in the locality " merely makes the condition even more uncertain. Counsel was asked to define the limits of the territory designated by the words " the locality ", and it is not surprising that he was unable to do so.

Other criticisms were directed to other words in the condition, but I shall not detain your Lordships by travelling through them, for, in my opinion, the words " mainly dependent upon agriculture " are of themselves enough to lead your Lordships to declare the condition void. The word " mainly " at once gives rise to difficulties. Probably it means " more than half ", and this was the meaning which this House gave to the phrase " the bulk thereof " in *Bromley* v. *Tryon* (19). Even so, one must ask " more than half of what? " There is no context in the condition which gives any assistance. Does the word refer (for instance) to turnover, to value or volume of goods produced *for* agriculture, to value or volume of raw material supplied *by* agriculture, or to profits? There is no reason, in a planning condition, for selecting one alternative rather than another. Indeed, two or more of these possible alternatives were suggested from time to time in the course of the argument, either by your Lordships or by counsel for the respondents, as being the correct solution of the problem. Moreover, all these factors may vary from time to time, and a business which is " mainly dependent " at one time may cease to be " mainly dependent " at another. In these circumstances, a tenant who was within the condition when he entered on his tenancy would become outside the condition, and the owner and occupier would both be in peril under s. 23 and s. 24 of the Act of 1947. Again, in what sense is the word " dependent " used? Does it mean dependent for its supplies, as in the case of a beet sugar factory, or dependent for its customers, as in the case of a business which produces tractors and fertilisers to be used in agriculture? Or does it mean dependent in some other sense ?

My Lords, ambiguity in any part of the condition may at any time put the owner of the cottages in grave peril under the provisions of s. 23 and s. 24 of the Act of 1947. The condition remains in effect as long as the cottages are in existence, and a time may come—it may have come already—when no one employed in agriculture or forestry desires to occupy them or one of them. The owner may then have great difficulty in determining whether a tenant or prospective tenant is or is not within the terms of the condition. It may be said that the court can interpret the condition and apply it to the particular facts of each case on an appeal under s. 23 (3) of the Act of 1947, but to this there are two answers. First, that the owner of the cottages ought not to be put to the trouble and expense of going to the court by reason of ambiguity in the condition. Indeed, he might have to go to the court on several occasions, in regard to several successive tenants. Secondly, in choosing between the various possible meanings of the words the court would be merely making a guess. There is no context which points to any one meaning of the words " mainly " and " dependent " and reveals the concept in the mind of the draftsman. The Master of the Rolls and ROMER, L.J., were strongly influenced by the fact that the wording of the greater part of the condition had been taken from s. 34 (2) of the Housing Act, 1930, but I would adopt the words of PEARCE, L.J. (20):

> " . . . it is no answer, as counsel for the [appellants] rightly says, to an accusation of uncertainty that the condition contains words used in an Act of Parliament in another context."

If any court has to interpret the statutory words hereafter, it may well find in the context some clue to the meaning of the words. In the present case one gets no such guidance.

---

(19) [1951] 2 All E.R. 1058; [1952] A.C. 265.
(20) [1959] 2 All E.R. at p. 335; [1959] Ch. at p. 577.

A For these reasons, my Lords, I would allow the appeal and grant a declaration that the condition in question was and is void for uncertainty. I add that it was not, I think, suggested by counsel for the respondents that it is not open to your Lordships to take this course, if you are satisfied that the words of the condition are so uncertain as to justify it.

B **LORD KEITH OF AVONHOLM:** My Lords, in his argument for the appellants, counsel placed in the forefront the submission that the condition attached to the planning permission given by the respondents, the county council, was void for uncertainty. The other challenges of the validity of the condition put forward by the appellants do not need to be considered if this submission is sound. Logically, therefore, it should be considered first.

C As stated, the point is one of uncertainty of concept. If it is impossible, on construction of the condition, to reach a conclusion as to what was in the draftsman's mind, the condition is meaningless and must be read as pro non scripto. It is not a question of ambiguity. If a clause may convey several different meanings, it is for the court to say, looking to the general background, surrounding circumstances, subject-matter of discourse and other aids derived D from the context of the clause, supplemented not infrequently by certain legal presumptions, what meaning is to be attributed to the clause. Reference was made in the course of the argument to a dictum of LORD SIMONDS in *London & North Eastern Ry. Co.* v. *Berriman* (21) that a man is not to be put in peril on an ambiguity. That has much force in a penal statute, as was the Act there under consideration. Where two constructions are open, one of which involves penal E consequences, or even civil liability, and the other does not, it may be proper to adopt the construction which avoids these consequences, though I should not accept this as a universal rule in all circumstances. (See also *Elmdene Estates, Ltd.* v. *White* (22) per VISCOUNT SIMONDS.) But the question here is different. It is whether one or more intelligible concepts can be extracted from the condition here under challenge.

F The condition is a condition attached to a planning permission, and the permission was for the erection of a pair of farm workers' cottages. The argument for uncertainty consisted largely in dissecting various words or phrases in the condition and submitting that their width, or scope, was such as to make it impossible to say what was in the draftsman's mind. Reading the condition as a whole, I do not find any insuperable difficulty in arriving at a reasonable and G clear idea of the content of the condition. It refers in the first place to " the occupation of the houses ", which I read as being confined to occupation by persons having certain defined qualifications and to the dependants of these persons. There may be a certain ambiguity here, but your Lordships are not concerned here with resolving ambiguities or placing a considered and final meaning on the condition. Speaking for myself, I would not read the occupation H as covering an independent occupation by dependants of the persons mentioned, but as including occupation by such dependants while living in family with such persons and occupying the houses along with them. Death, or removal from the houses, of the persons defined would terminate the occupation of the dependants. Nor can I see any difficulty in construing " dependants ", when brought within the confines of a house, as meaning persons living in family with the person I defined and dependent on him in whole or part for their subsistence and support. Then I come to the words " whose employment or latest employment ". Latest employment would, I think, cover the case both of a man who was temporarily unemployed or of a man who from old age, or illness, was no longer able to work. Nor, as I see it, need the words necessarily exclude a man who was engaged in other part-time, or temporary, employment, if he could still be regarded as a farm worker, or retired farm worker, or worker in one of the other specified categories.

(21) [1946] 1 All E.R. at p. 270; [1946] A.C. at pp. 313, 314.
(22) [1960] 1 All E.R. at p. 309; [1960] A.C. at p. 539.

The words " [in] agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947 ", were next prayed in aid as showing the width of the condition. A man retired from sheep farming in New Zealand or fur trapping in Canada would, it was said, come within the condition. So be it, if that was the proper construction of the condition. That does not establish uncertainty. But again, for myself, I should doubt if any such result followed. This is an Act applying to England. We were not referred to the use of the word " agriculture " in the body of the Act. But I see no reason to suppose that it was intended to refer to agriculture outside England, and I should be disposed to construe " agriculture ", as defined in the Act, with that limitation. In para. 4 and para. 5 of Sch. 3 (in which, on a cursory survey of the Act, I have found the word used), it could have no other meaning. It may be that, in a planning scheme for a particular area, it should further be confined to agriculture within that area. That point may be left for future determination should it ever arise. Lastly, there are the words employment " in an industry mainly dependent upon agriculture ". What, it is said, does this connote? In a very wide sense, it may be said that all industry depends on agriculture, inasmuch as the workers in industry, to enable them to work, require the corn, meat and to some extent clothing produced by agriculture. If so, the industry of agriculture itself depends on agriculture. So wide a meaning need hardly be considered. But an industry may be dependent on agriculture in a more limited sense, if it depends for its raw material on the products of agriculture. Such, for instance, would be a corn mill, a sugar beet factory, or a harvester combine. The converse case of an industry which produces machinery, implements or material for agriculture may be more doubtful. There it might be said rather that agriculture is dependent on the manufacturing industry. I say nothing, however, to prejudice any particular case that may arise. On either or both of the views indicated, the general concept seems to me to be clear enough, and in relation to the occupier of one of these small cottages I would anticipate no difficulty in deciding on which side of the line he falls or in dubio giving him the benefit of the doubt.

The argument for invalidity is largely countered by the fact that the condition is substantially borrowed from words found in the Housing Acts. It will be sufficient to refer to the definition of " agricultural population " in s. 34 of the Housing Act, 1930 (23) which is, I think, more apt for a solution of the present question than counsel for the appellants would suggest. It was said that the agricultural population there referred to was the agricultural population of the district, that is, under s. 34, the rural district of the district council concerned, and that the definition of agricultural population had to be construed in this context. The suggestion, as I understood it, was that, in this context, the definition was capable of a definite meaning which, in the absence of any such context, was not possible in this town planning condition. On the contrary, I think there is considerable correspondence in the respective situations in which the definitions fall to be construed. Under s. 34 (2) of the Housing Act, an estimate has first of all to be made of the number of houses likely to be required by the district council for the housing of the agricultural population of the district. If matters had stood thus, there might have been no great difficulty in forming an estimate in light of the definition. The difficulty would arise under the latter part of the subsection and this has, I think, great relevance in the present case. Within the ceiling estimated the county council had to undertake to pay to the district council, and I quote,

> " in respect of each of the forty years next following the completion of the houses a contribution at the rate of £1 per house payable, subject as hereinafter provided, in respect of so many of the houses provided with the

(23) Now replaced by the Housing Act, 1957, s. 114 (5); 37 HALSBURY'S STATUTES (2nd Edn.) 414.

approval of the Minister as are in that year occupied for a period or periods exceeding nine months by members of the agricultural population:

"Provided that no such contribution shall be payable in respect of a number of houses greater than the number of houses so determined as aforesaid to be required for the accommodation of the agricultural population of the district."

That means that each year for forty years a calculation had to be made of the number of houses provided under the Act occupied by members of the agricultural population, before the subsidy could be paid in respect of a particular house. Thus, the definition had to be considered with reference to each occupant of the respective houses every year to see whether or not he came within the definition. If the definition fitted, he was necessarily a member of the agricultural population "of the district", for he was living "in the district". The same questions, as I see it, would arise there as here. In particular, the respondents might have to consider the question which was so much stressed in argument, whether some of the occupants were employed "in an industry mainly dependent upon agriculture". This particular requirement disappeared with the Housing Act, 1935, but that does not touch the matter and the definition of agricultural population was left standing for the other purposes of the Acts. The question as I see it is precisely the same as arises in the present case. The houses are in the area of the planning authority, and the only question is, are they occupied by persons who come within the definition. I should find it difficult, as the Court of Appeal found it difficult, to say that the definition in the Housing Acts had no intelligible or ascertainable content, in which case it could not have been applied to the important matter of ascertaining, in some cases as least, whether subsidy was payable to the district council. And if it had a definite and ascertainable meaning in the statute, I should find it impossible to say that it could not have the same meaning for the purposes of this town planning condition.

In my opinion, the argument that the condition is void for uncertainty fails and your Lordships are left with the other grounds on which the condition is attacked. It is said that the condition is not related to the permitted development or to the reason given for imposing the condition. Prima facie, I should have thought there was a close relationship between the permission to erect a pair of farm workers' cottages, the condition imposed and the reason for the condition. Under s. 14 (1) of the Act, the planning authority may grant permission to develop land "subject to such conditions as they think fit". I agree with what my noble and learned friend, LORD DENNING, said in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (24) that "conditions, to be valid, must fairly and reasonably relate to the permitted development". The condition here would cover the occupation of the cottages by farm workers on adjacent land or such workers when unemployed and the condition does not, in my opinion, become invalid because some persons may creep under the umbrella of the condition who may not have been contemplated as normal occupants of the houses. Some of the illustrations that were given in argument were, I thought, somewhat far-fetched and unlikely to arise and, as I indicated when dealing with the question of uncertainty, probably not covered by the condition at all. The policy of the planning authority was to protect the green belt by limiting the kind of buildings that should be built there and the kind of occupier that should occupy them and I cannot say that that was not a reasonable and proper exercise of the powers of the planning authority under the Act. It was said that there was no power to restrict the occupation of the cottages by reference to the personal circumstances of the occupants. This I have covered in what I have already said. There might be personal attributes or circumstances required of the occupants which had no conceivable relevance to planning policy and, if so, such requirements would be bad. But that cannot, in my opinion, be said here. The power to

(24) [1958] 1 All E.R. at p. 633; [1958] 1 Q.B. at p. 572.

impose conditions is given by the statute and, if exercised with due regard to the principles already mentioned, cannot be successfully challenged. I agree also that the point taken that the condition is spent and has now no operative effect must be rejected, for the reasons stated by the Court of Appeal.

I would dismiss the appeal.

LORD DENNING: My Lords, in 1952, Mr. Clark, a farmer at Chalfont St. Giles, sought permission from the respondents to build two cottages for farm workers. His farm was somewhat isolated and he needed the cottages for his men. The respondents, as the local planning authority, gave him permission to build a pair of farm workers' cottages. But the land was in the green belt and the respondents were anxious to preserve its character. They wanted to see the cottages occupied by persons connected with the land. So when the respondents granted the farmer permission to build the cottages, they attached a condition which was intended to ensure that the cottages were occupied by members of the agricultural population. In pursuance of this permission, the farmer built the cottages, and they were occupied at first by farm workers. But four years later they were acquired by the appellants, a property company called Fawcett Properties, Ltd., who now seek to remove the condition saying that it is bad. If this contention is correct, it means that the appellants can sell or let the cottages to town workers, and this part of Buckinghamshire will see a piece of " sporadic and isolated residential development " which is the very thing which the county plan condemned.

Now the whole of the attack on the condition springs from this: when the appellants framed their condition limiting the cottages to members of the agricultural population, they took the definition of " agricultural population " straight out of the Housing Acts. They used the self-same words as were used in those statutes. And these words are said by the appellants to be so riddled with uncertainty that the condition is void for uncertainty; or, alternatively, that the condition is so unrelated to any planning purpose that it is ultra vires the planning authority. To support these contentions, counsel for the appellants gave your Lordships a series of examples of difficulties that might arise in the application of the condition.

My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. Counsel for the appellants was unable to point to any case where a statute had ever been held void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it is uncertain. Thus, in *R.* v. *King* (25), a statute was so " inaccurately penned " that the judges thought that no conviction ought to take place on it. And in *Green* v. *Wood* (26) and *Salmon* v. *Duncombe* (27) a phrase in a statute was rejected because no sensible meaning could be given to it. But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute is to bear, rather than reject it as a nullity. As FARWELL, J., put it when speaking of a statute:

> " Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning, and not to declare them void for uncertainty ":

see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (28). Following the guidance of these authorities, I should have thought it quite impossible to suggest that the definition of " agricultural population " in the Housing Acts was void for uncertainty. Counsel for the appellants sought to overcome this difficulty by saying that the words in the planning condition were used in a different context from the Housing Acts; and he pointed out, truly enough, that the planning

(25) (1826), 2 C. & P. 412.
(26) (1845), 7 Q.B. 178.
(27) (1886), 11 App. Cas. 627.
(28) [1900] 2 Ch. at pp. 360, 361.

A condition had something of a penal character to it. The breach of it could—at one remove—be made the subject of a criminal prosecution. If the condition was not complied with, the local authority could serve an enforcement notice; and then, if the enforcement notice was not complied with, the offender could be brought before the magistrates and fined. The condition was, therefore, said counsel, to be construed subject to the same rule as a penal statute which pre-
B scribes a duty and a penalty for the breach of it. The rule, he said, was that "a man is not to be put in peril upon an ambiguity": see *London & North Eastern Ry. Co.* v. *Berriman* (29). But it seems to me that there is a short answer to this contention. The rule thus quoted by counsel may be a perfectly good reason for construing a penal statute narrowly, but it is no reason at all for holding it to be void. Let alone is it a reason for holding this condition to be void. Counsel was
C on stronger ground when he likened the condition to a bye-law. It is a local rule laid down by a local authority and enforceable by a penalty. And he said, rightly enough, that a bye-law might be held to be invalid not only because it was unreasonable but also because it was uncertain. The only case which he cited for this proposition was *Scott* v. *Pilliner* (30); but when examined, it turned out that the bye-law there was held void, not as being uncertain, but as being
D unreasonable. I can well understand that a bye-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But, if the uncertainty stems only from the fact that the words of the bye-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid. LORD WENSLEYDALE said so in this House in *R.* v. *Saddlers' Co.* (31):

E

> "As in one sense of the word the bye-law is good and in the other not, the rule is that it ought to be construed so as to make it valid, not to defeat it . . ."

Finding such slender support from bye-laws, counsel turned to defeasance clauses and showed truly enough that they could be avoided for uncertainty. He cited *Sifton* v. *Sifton* (32) for his purpose. But I do not think they advanced his case
F in the slightest; for it is apparent on the most casual examination that defeasance clauses are treated with peculiar stringency. They work a forfeiture; and the courts have insisted that they must be so worded that the persons affected can know with certainty the exact event which will give rise to the forfeiture: see *Clayton* v. *Ramsden* (33). Lastly, when he came to his reply on uncertainty, counsel mentioned the contract cases such as *Re Vince, Ex p. Baxter* (34). But
G here again he got nowhere; because in cases of contract, as of wills, the courts do not hold the terms void for uncertainty unless it is utterly impossible to put a meaning on them. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty: see *Doe d. Winter* v. *Perratt* (35) by LORD BROUGHAM, *Re Roberts, Repington* v. *Roberts-Gawen* (36) by JESSEL, M.R.

H Reverting now to the examples given by counsel, all of these were, it seemed to me, examples of ambiguity or absurdity and not of uncertainty, or at any rate, not of such uncertainty as makes a condition void. For I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of
I language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents. If you should take any of counsel's

---

(29) [1946] 1 All E.R. at p. 270; [1946] A.C. at pp. 313, 314.
(30) [1904] 2 K.B. 855. (31) (1863), 10 H.L. Cas. at p. 463.
(32) [1938] 3 All E.R. 435; [1938] A.C. 656.
(33) [1943] 1 All E.R. at pp. 18, 19; [1943] A.C. at pp. 326, 329.
(34) [1892] 2 Q.B. 478. (35) (1843), 6 Man. & G. at p. 361.
(36) (1881), 19 Ch.D. at p. 529.

examples, the courts, I am sure, could say whether the case came within the condition or not. They would not have to give up the task in despair. A

Next I turn to the question of ultra vires. The local planning authority is empowered to grant permission to develop land "subject to such conditions as they think fit". But this does not mean that they have an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, they must, to paraphrase the words of LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (37), have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat my own words in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (38), the conditions, to be valid, must fairly and reasonably relate to the permitted development; or, yet again, to borrow the words of LORD MACNAGHTEN and LORD WRENBURY in this House, a public authority which is entrusted with a discretion must act reasonably: see *Westminster Corpn.* v. *London & North Western Ry. Co.* (39), *Roberts* v. *Hopwood* (40). Out of these various shades of meaning I am not sure that the last is not the best; for it puts planning conditions on much the same footing as bye-laws made by a local authority, to which they are so closely akin. Indeed, I see no difference in principle between them. As with bye-laws, so with planning conditions. The courts can declare them void for unreasonableness, but they must remember that they are made by a public representative body in the public interest. When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered: see *Kruse* v. *Johnson* (41). B C D E

Such being the tests, how does this condition measure up to them? Counsel for the appellants contended that the condition was totally unrelated to any legitimate planning considerations. He put forward the wide proposition that the statute gives the planning authority power to say in what *way* property is to be used; but no power to say by what *persons* it is to be used. I cannot subscribe to this proposition for a moment. I should have thought that a planning authority could very reasonably impose a condition that cottages were to be reserved for farm workers and not let to city dwellers; for this would help to preserve the green belt. Forced from his wide proposition, counsel took up the issue on a narrower front. He said that this condition was so expressed that it carried out no conceivable planning policy. For this purpose he resorted again to his examples. He concentrated his main attack on the words "an industry mainly dependent upon agriculture", though he did not neglect the others. If these words are capable of any ascertainable meaning, he said, it is a meaning which is totally unrelated to any planning considerations. Agriculture is defined so widely that it includes the growing of cotton in Egypt, the raising of sheep in Australia and the breeding of chinchilla in South America; with the result that the industries which are mainly dependent on agriculture include the textile industry, the leather industry, the fur industry and many others. If this be right, he said, many London workers will be eligible to occupy the cottages. And take the word "latest". It means that a retired farmer from Australia would be eligible for the cottages equally with a retired furrier from London. But a telephone operator from Chalfont St. Giles would not. How can such distinctions, it is asked, be fairly related to any legitimate planning considerations? F G H I

My Lords, I think the true answer to this attack on the condition is that counsel is giving it too wide an interpretation altogether. The definition of "agricultural population" in the Housing Acts is limited by the context to the

(37) [1947] 2 All E.R. at p. 685; [1948] 1 K.B. at pp. 233, 234.
(38) [1958] 1 All E.R. at p. 633; [1958] 1 Q.B. at p. 572.
(39) [1905] A.C. at p. 430. (40) [1925] All E.R. Rep. at p. 42; [1925] A.C. at p. 613.
(41) [1898] 2 Q.B. at p. 99.

agricultural population " of the district ", that is, of the locality. So, here, the words of the condition are to be read in the light of the reasons which the planning authority are enjoined to give: see *Crisp from the Fens* v. *Rutland County Council* (42). So read, I am clearly of opinion that the word " agriculture " does not include world-wide agriculture, nor even all-England agriculture, but means agriculture *in the locality*. And " industry " does not mean far-off industry in London or the big towns. It means *local* industry. The condition, properly construed with the reason, means, I think, that the occupation of the cottages must be limited to persons who are employed in agriculture in the locality or in a local industry mainly dependent on agriculture in the locality. The word "occupation" is used to denote the head of the household. The word " latest " to show that he may stay on in the cottages after his retirement. The word " dependants " to show that he may have with him his wife and family and anyone else dependent on him. So construed, it seems to me that the condition fairly and reasonably relates to the permitted development. Its effect is to ensure that the cottages will be occupied by persons who will help to maintain the normal life and character of this part of the green belt and not by outsiders to use as a dormitory. The cottages are for farm workers, or for men who work at the smithy shoeing the horses, at the mill grinding the corn, or at the saw-mills cutting up wood; or in modern times at the milk depot bottling the milk or at the repair shop mending the tractors; and so forth. They are not for people who go up and down to London every day.

There is only one further point. Counsel for the appellants suggested that this condition was spent. It was satisfied, he said, as soon as the first occupant was installed in compliance with it. The only alternative, he claimed, was to hold that the condition applied in perpetuity; and this was an unreasonable construction seeing that the condition could not be modified. If this contention were correct, it would provide an easy escape from planning control, for the first occupant might only stay for a week or a fortnight. In my opinion, this contention is not correct. The condition is a continuing condition and applies to the land indefinitely. I am not prepared, as at present advised, to accept the suggestion that a planning condition can never be modified. When conditions are imposed limiting the purposes for which the property can be used, and afterwards fresh circumstances arise in which the owner seeks to use it for different purposes, he may be able to apply for permission under s. 12 on the ground that he wishes to make a " material change in the use ".

In my opinion, therefore, the challenge to this planning condition should fail and this appeal should be dismissed.

LORD JENKINS: My Lords, this appeal concerns the validity of a condition imposed by the respondents, as local planning authority under the Town and Country Planning Act, 1947, in granting permission to the appellants' predecessor in title, Mr. Donald Decimus Clark, to erect a pair of farm workers' cottages on freehold land belonging to him at Dibden Hill Lane, Chalfont St. Giles, in the county of Buckinghamshire. The permission in question was granted on Dec. 5, 1952. At that date the respondents had (in February, 1950) published a provisional document described as an " Outline Development Plan for Buckinghamshire ", but had not as yet submitted to the Minister the development plan called for by s. 5 of the Act. It was nevertheless incumbent on Mr. Clark (under s. 12) to obtain the permission of the respondents (under s. 13 (1) (b)) for the development constituted by the erection of the proposed pair of cottages.

The section of the Act on which the present dispute mainly turns is s. 14, which provides, by sub-s. (1), as follows:

> " Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop

(42) (1950), 1 P. & C.R. 48.

land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

By art. 5 (9) of the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), which was made under powers contained in the Act,

"Every such notice [of the local planning authority's decision] shall be in writing and (a) in the case of an application for planning permission or approval, where the local planning authority decide to grant such permission or approval subject to conditions or to refuse it, they shall state their reasons in writing . . ."

Reference should also be made to s. 36, which is in these terms:

"Where, under the foregoing provisions of this Part of this Act, a local planning authority are required to have regard to the provisions of the development plan in relation to the exercise of any of their functions, then, in relation to the exercise of those functions during any period before such a plan has become operative with respect to the area of that authority, that authority shall have regard to any directions which may be given to them by the Minister as to the provisions to be included in such a plan, and subject to any such directions shall have regard to the provisions which in their opinion will be required to be so included for securing the proper planning of the said area."

It should be observed that no such directions as are mentioned in s. 36 had been given by the Minister at the material time, but that the "Outline Development Plan" to which I have already referred recognised that certain parts of the county, including the site of the proposed cottages, should form part of the "Metropolitan Green Belt" and should be preserved against building development so as to form a barrier against the further outward spread of London.

The combined effect of s. 14 (1) and s. 36 in the circumstances of the present case, therefore, was that, in dealing with Mr. Clark's application, the respondents were to have regard to the provisions which, in their opinion, would be required to be included in the development plan for securing the proper planning of the area (such opinion having been to some extent indicated in their "Outline Development Plan"), and to any other material considerations.

At this point I should mention, to show I have not forgotten it, the circumstance that Mr. Clark had, on July 22, 1952, obtained permission from the respondents for a similar development on a different site, but had abandoned this project owing to some difficulty as to his rights in regard to building on it, and had substituted as the site of his proposed development the land to which the permission now in question relates. Notwithstanding some argument to the contrary, I am of opinion that differences in the terms of the abortive permission of July 22, 1952, and the effective permission of Dec. 5, 1952, are for present purposes irrelevant, and that your Lordships are concerned only with the terms of the latter document.

The effective permission of Dec. 5, 1952, was signed by the clerk to the Amersham Rural District Council as agents for the respondents and, omitting formal parts, was in these terms:

"In pursuance of their powers under the above-mentioned Act and order the Bucks County Council as local planning authority hereby permit

"Erection of pair of farm workers' cottages at Dibden Hill Lane, Chalfont St. Giles

in accordance with your application dated Nov. 22, 1952, and the plans and particulars accompanying it subject to the following conditions

"(1) The occupation of the houses shall be limited to persons whose

A employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid.

" The reasons for imposing the above conditions are

" (1) Because the council would not be prepared to permit the erection B of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes."

The condition to which the permission was expressed to be subject was duly registered in the Register of Local Land Charges.

For some time after the erection of the cottages, they were occupied by farm C labourers whose employment undeniably complied with the terms of the condition. On Dec. 31, 1956, the appellants bought the freehold interest in the cottages, with vacant possession, from Mr. Clark's mortgagees, admittedly buying with notice of the condition as registered. The cottages being vacant, the appellants wanted to let them to persons not qualified as occupants by the terms of the condition. The respondents refused to allow this, and, after considerable D correspondence, the present action was brought by the appellants as plaintiffs against the respondents as defendants, claiming substantially as follows:— (i) A declaration that the condition was ultra vires or alternatively void for uncertainty, and that the cottages might be lawfully occupied without regard to the nature of the employment of the occupants, (ii) alternatively, a declaration that the condition had been fulfilled and that its force was now spent, with similar E results; and (iii) rectification of the local land charges register.

The case was heard by ROXBURGH, J., who, on Oct. 29, 1958, gave judgment for the appellants on the ground that the condition was (43) " ultra vires as not fairly and reasonably relating to any local planning considerations ". That aspect of the ultra vires argument may be called the " narrow " ultra vires claim, turning as it does on the terms and apparent scope of the particular condition F in question. An alternative argument on ultra vires, which may be called the " broad " ultra vires claim, proceeds on the more general ground that the respondents had no power under the Act to impose a condition restricting the occupation of premises according to the personal circumstances of the occupant. The learned judge rejected the " broad " ultra vires claim, and reached no conclusion on the submission to the effect that the condition had been fulfilled and its force was now spent, or on the submission to the effect that the condition G was void for uncertainty, his decision on the " narrow " ultra vires claim making it unnecessary for him to do so. The Court of Appeal (LORD EVERSHED, M.R., ROMER and PEARCE, L.JJ.) agreed with the learned judge in rejecting the broad ultra vires claim, and also rejected the claim to the effect that the condition was spent, with which the learned judge had not dealt, and which had not been seriously pressed before them. I find myself in complete agreement with the conclusions H expressed by both courts on the former. and by the Court of Appeal on the latter, of these two points, and no useful purpose would be served by discussing them further.

There remain the more difficult matters of the " narrow " ultra vires claim and the claim of uncertainty, both of which were rejected by the Court of Appeal, who, accordingly, by the judgment now under appeal (delivered on Apr. 27, I 1959) discharged the judgment of ROXBURGH, J., and dismissed the action.

The considerations advanced in support of these two claims to some extent overlap. The law relating to the narrow ultra vires claim is not in dispute, and may be thus summarised:—(i) Under s. 14 (1) of the Act of 1947 the respondents as local planning authority were empowered to grant permission for the proposed development either unconditionally or subject to such conditions as they thought fit or might refuse permission and under s. 36 they were enjoined in the exercise

(43) [1958] 3 All E.R. at p. 527.

of their functions to have regard to the provisions which, in their opinion, would be required to be included in the development plan for securing the proper planning of the area. (ii) The power to impose conditions, though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit, is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly, the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy. This accords with the concluding passage in s. 36 above referred to. As was said by LORD DENNING in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (44):

> " The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose ' such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

(iii) This does not mean that the wisdom or merits of a condition imposed in any given case can be made the subject of an appeal to the court at the instance of a person objecting to the condition. See *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (45), the effect of which is for the present purpose sufficiently indicated in the following passage from the headnote:

> " Held, that the local authority had not acted unreasonably or ultra vires in imposing the condition.
>
> " In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power."

While fully accepting the principle of the *Wednesbury* case (45), counsel for the appellants submits that, in the present case, the persons to whom the condition purports to limit the occupation of the two houses are defined in such comprehensive terms that, on the face of it, the condition (though it cannot be said to be entirely unrelated to any planning considerations) bears as a whole no fair or reasonable relation to any conceivable planning policy and is, therefore, beyond the powers of the local planning authority, and open to review by the court under the limited jurisdiction described in the *Wednesbury* case (45). Moreover, the terms of the condition do not accord with the reason given for imposing it, or in other words are not related to the respondents' own statement of their planning policy as set forth in the reason.

The features of the condition mainly relied on by counsel in support of this branch of his argument for the appellants were these. The condition includes amongst the persons eligible to occupy the cottages persons whose latest employment was employment in agriculture as defined in s. 119 (1) of the Act. There is no geographical limit as to the place of such latest employment. Accordingly, the condition would permit occupation of either cottage by (e.g.) a retired sheep farmer from New Zealand. Occupation by such a person (said counsel) could have no possible relevance to the use of the green belt in the respondents' area, or anywhere else, for agricultural purposes. Again, the condition permits

(44) [1958] 1 All E.R. at p. 633; [1958] 1 Q.B. at p. 572.
(45) [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

occupation by persons currently employed in agriculture, with no geographical limit as to the place of such employment. This means that an agricultural labourer could be let into occupation of either cottage notwithstanding that his place of work was many miles away in a different county, so that his activities could have no relevance to the use of the green belt in the respondents' area for agricultural purposes. Counsel also contended that the definition of "agriculture" in s. 119 (1) of the Act was wide enough to include (e.g.) an assistant in a boot shop in a town in any part of the country, on the ground that "agriculture" as so defined includes the production of skins, that leather is made from skins, and that bootmaking is an industry mainly dependent on leather. He submitted that the condition would allow occupation by the supposed boot shop assistant, although in this and other imaginary cases of persons employed in industries mainly dependent on agriculture the employment of the individuals concerned could have no possible relevance to the use for agricultural purposes of the green belt in the respondents' area. This last category of hypothetical forms of employment was also strongly relied on by counsel in support of the claim based on uncertainty. As I have said, the two arguments to some extent overlap, and counsel gave us a large number of examples of varying degrees of probability or improbability in support of one or other or both of them. I cannot accept counsel's argument, or ROXBURGH, J.'s, conclusion, on the narrow ultra vires claim.

As I understand the position, it would have been open to the respondents as local planning authority simply to grant unconditional permission for the erection of the two cottages, relying on their situation and character as sufficient for practical purposes to ensure that they would, in fact, be occupied by agricultural workers or persons engaged in kindred employments in the locality. If the respondents had taken that course, so far as I can see, they would clearly have been acting within their powers. But, as stated in the reason, the respondents' policy was "not to permit the erection of dwelling-houses" on the site in question "unconnected with the use of the adjoining land for agricultural or similar purposes". They therefore thought it expedient to impose an express condition designed to implement that policy and, accordingly, did impose the condition now said to be ultra vires. The question then is whether (apart from the question of uncertainty, which at this stage I ignore) this condition with all its faults could fairly and reasonably be held to make it more likely that the policy stated in the reason would be implemented than it would have been if the respondents had simply given unconditional permission for the erection of the two cottages? In my opinion, the answer to that question must clearly be in the affirmative, and, if I am right in that opinion, it follows, in my judgment, that the narrow ultra vires claim must fail. The condition, no doubt, fell short of perfection, but, so far as it went, it was designed to carry out, and in practice might reasonably be expected to carry out, the respondents' planning policy. The various imaginary cases in which the respondents' object might be defeated without breach of the condition loomed large in argument, but appeared to me to be for the most part of little importance from a practical point of view, judged, that is to say, by reference to what would be likely to happen, as distinct from what might conceivably happen. Be that as it may, so far as these examples demonstrate that the condition might in various hypothetical cases fail to achieve its object, they merely show that the condition was imperfect, and not that it was ultra vires.

I may now turn to the argument that the condition was void for uncertainty, which seems to me to be the difficult point in the case. It is said that the condition is so imperfectly expressed and defines the persons to whom the occupation of the cottages is to be limited with such lack of precision that many cases might occur in which no owner of the cottages could tell, and no court could decide, whether by letting a given person into, or permitting him to remain in, occupation, the owner would be committing a breach of the condition. Counsel for

the appellants pointed out the penal consequences which would or might ensue from such a breach under the provisions of s. 23 and s. 24 of the Act, and placed in the forefront of his argument the principle that " A man is not to be put in peril upon an ambiguity ": see per LORD SIMONDS in *London & North Eastern Ry. Co.* v. *Berriman* (46). He pointed out further the difficulties which, in his submission, would confront the owner and the occupier in the event of the latter having been let into occupation while pursuing some plainly agricultural employment, but thereafter changing to a different employment with respect to which it was impossible to determine whether it did or did not exclude the occupier from the permitted range.

But it is first necessary to consider whether the condition ought, in all the circumstances of the case, to be held uncertain to the point of invalidity. If it was, then the present appeal must succeed. If it was not, then it cannot be invalidated on the ground that in certain hypothetical cases it might be fraught with untoward consequences. I will read it again:

> " The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

Counsel for the appellants claimed that this language is " riddled with uncertainty ". He contended that the word " occupation " was in itself an expression of doubtful import, and also criticised the reference to " dependants " as lacking in precision. These two points, though not without force, were, in my view, rightly rejected by the Court of Appeal and I say no more about them, except to observe that this part of counsel's argument involves the proposition that a simple condition to the effect that the occupation of the cottages was to be limited to persons employed in agriculture, uncomplicated by the other provisions included in the condition, would have been void for uncertainty—a proposition which, for my part, I find impossible of acceptance. I have already mentioned counsel's point as to the possibility of an occupier changing his employment after being let into occupation on the strength of undeniable employment in agriculture, but this, as I think, goes to the consequences of uncertainty rather than the question whether the condition ought to be held void for uncertainty. Counsel also (as I understood him) instanced the case of a person who divided his time with mathematical equality between agriculture and some other employment. But this does no more than indicate a possible (and highly improbable) case not provided for by the condition, and I cannot regard the remote possibility of such a casus omissus as a ground for holding the condition void for uncertainty.

But counsel's main attack was on the words " employment . . . in an industry mainly dependent upon agriculture ", the expression " agriculture " being defined in the condition by reference to the definition of that expression in s. 119 (1) of the Act of 1947. Counsel contended that no certain meaning could be attached to the words " dependent upon agriculture ", and, a fortiori, to the words " mainly dependent upon agriculture ". These words considered in vacuo are, no doubt, capable of a very wide interpretation. They might be said on the one hand to include any industry depending on agriculture for the raw materials used in the trade or manufacture which it carries on, and on the other hand also to include any industry which provides goods (e.g., fertilisers and agricultural machinery) required to enable agriculture to be carried on, and depends on persons engaged in agriculture as customers for such goods. Moreover, the former construction might be extended to include not merely raw materials received from agriculture in their original state, but any materials used in the industry concerned at no matter how many removes from agriculture, so long as they

(46) [1946] 1 All E.R. at p. 270; [1946] A.C. at pp. 313, 314.

A could be shown to have been in origin derived from agriculture. It could thus be plausibly claimed that the imaginary boot shop assistant referred to in argument would be employed in an industry dependent on agriculture, because, under s. 119 (1), agriculture includes the keeping of livestock for the production of skins, leather is made of skins and boots are made of leather. The same could be said (with the substitution of wool for skins) of the manufacture and sale of B woollen garments and I do not know how many other industrial activities. By way of reductio ad absurdum my noble and learned friend, LORD KEITH, suggested in the course of the argument that all industry might be said to be dependent on agriculture, inasmuch as no industry could be carried on without food.

Speaking for myself, I confess I have been attracted by the view that one C aspect of the argument on uncertainty could be met by construing the words " dependent upon agriculture " in close conjunction with the statutory definition of agriculture expressly adopted by the condition. That definition defines agriculture as including a number of activities, e.g.,

> " horticulture, fruit growing . . . the breeding and keeping of livestock . . . D the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds . . ."

and so forth. True it is that the definition is not exhaustive, but that only means that there are, or may be, other activities proper to be classed as " agriculture ". On this view, it would follow that, by the expression " an industry . . . dependent upon agriculture ", the condition means an industry which depends on some one E or more of these activities for its raw materials as distinct from an industry which depends on people engaged in agriculture as customers for the agricultural necessaries which it supplies, e.g., in the form of agricultural machinery or fertilisers. Thus, a fruit-canning factory would be carrying on an industry dependent on agriculture because it would depend for its supplies of fruit on agriculture in the shape of the agricultural activity of " fruit growing " to which F the definition refers. On the other hand, a company selling fertilisers to farmers would not be carrying on an industry dependent on agriculture within the meaning of the condition, for the definition of agriculture does not expressly include, and cannot be regarded as including by implication, the provisions of fertilisers for agricultural use. In short, I am tempted to hold that in the examples given the hypothetical fruit-canning factory would, for the purposes G of the condition, be dependent on agriculture (i.e., fruit growing), while agriculture (as represented by the farmers concerned) would be dependent on the hypothetical company for its supplies of fertiliser. This reasoning, if accepted, would dispose of so much of the argument on uncertainty as turns on the view that an industry is dependent on agriculture within the meaning of the condition if the demand for the goods or services which it supplies depends on the continuation of H agricultural activities. It must, however, be admitted that the words of the condition literally read are wide enough to include dependency in this sense and, for the purposes of this case, I am content to assume, without deciding, that they do include it.

There remains the argument, already touched on, that no sure line can be drawn to enable the point at which dependence on agriculture ceases in a case in I which a particular agricultural product after leaving the farm is put (perhaps by several stages) into a different state, in which it is sold or it may be subjected to some further manufacturing process. The examples of leather boots and woollen garments have already been mentioned, but many others could be devised. The miller depends on agriculture (i.e., wheat-growing) for making flour. The baker buys flour from the miller and makes it into bread. Is the bread-making industry, as carried on by the baker, dependent on agriculture within the meaning of the condition? A jam manufacturer is dependent on agriculture (i.e., fruit growing) for the fruit he makes into jam. Is the business of a grocer who buys jam from

the manufacturer and sells it by retail dependent quoad the jam on agriculture within the meaning of the condition? One may add the case of a tailor making suits out of cloth which originated as sheep's wool, and has since passed through many processes. Is the tailors' business dependent on agriculture within the meaning of the condition? I think that the answer is that the dependence on agriculture contemplated by the condition is a direct dependence. The condition is capable of that meaning, and, if construed as including any degree of dependence, however remote or indirect, it would lead to manifest absurdity. I would say that, in the examples given, the miller and the jam manufacturer would be dependent on agriculture, but that the baker and the grocer would be dependent not on agriculture but on the miller and the jam maker respectively. Each actual case would, no doubt, turn on its own facts, but I see no reason for supposing that, if the question ever arose in practice, it would be incapable of decision on the lines I have indicated.

As to the qualification of the word " dependent " by the word " mainly " in the condition, I do not think it gives rise to any real difficulty. I think that, as counsel for the respondents submitted, the question whether a given industry was " mainly " dependent on agriculture could legitimately be resolved by looking at the particular manifestation of that industry in which the potential occupier was employed, and determining by reference to that particular example whether the industry concerned was mainly so dependent. Approached in that way, I cannot believe that the court would find it impossible to decide whether the use of the word " mainly " was warranted by the facts.

As to the argument to the effect that, in view of the absence from the condition of any geographical limit as to the place in which a person must be employed, or must have been employed, in agriculture, or in an industry mainly dependent on agriculture, in order to be eligible to occupy one of the cottages, a retired sheep farmer from New Zealand or a farm labourer whose place of work was many miles away in a different county, would be eligible for that purpose, I do not see how this submission, if accepted, could assist the claim on uncertainty. Moreover, I find it impossible to accept. I think the condition must be construed as relating to employment in agriculture, or in an industry mainly dependent on agriculture, in the area falling within the jurisdiction of the respondents as local planning authority and moreover (I am disposed to think but need not now decide) in the part of that area which was to form part of the green belt. The object which the respondents had in view was that, if the cottages were built in the green belt contrary to the general rule against building there, they were to be used for the purpose of providing living accommodation for persons employed or last employed in agriculture or in an industry mainly dependent thereon, in the green belt. I think the respondents' much criticised reasons support this view.

It remains to consider whether, if and so far as the condition contains any element of uncertainty, the degree of uncertainty involved is sufficient in all the circumstances of the case to justify your Lordships in holding the condition void. In determining this question, it is right to remember that this is not a case comparable to that of a condition subsequent which, if valid, would create a forfeiture of a beneficial interest under a settlement or will, or that of a trust in favour of a class of persons so imperfectly described as to make it impossible to ascertain its composition. In cases of the former description, the condition is construed with the utmost strictness and, to be valid,

> " must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine ",

see *Sifton* v. *Sifton* (47), per LORD ROMER, citing LORD CRANWORTH in *Clavering* v. *Ellison* (48). See also *Clayton* v. *Ramsden*, per LORD WRIGHT (49):

(47) [1938] 3 All E.R. at p. 442; [1938] A.C. at p. 670.
(48) (1859), 7 H.L. Cas. at pp. 725, 726.
(49) [1943] 1 All E.R. at p. 19; [1943] A.C. at p. 329.

A " The modern idea perhaps is that the beneficiary should be in a position to know beyond a peradventure what he is to do or not to do if he is to avoid a forfeiture."

In cases of the latter description, it is obviously impossible to carry out the trust if the members of the class cannot be ascertained, and the result is no B different if the trust is for such members of an unascertainable class as the trustees may select. See *Inland Revenue Comrs.* v. *Broadway Cottages Trust* (50). So far as cases of these kinds have any bearing at all on the present case, it seems to me that *Re Gestetner, Barnett* v. *Blumka* (51) is nearer in point. In that case, it was held—I quote from the headnote—that

C " where a power does not impose a trust on the donee's conscience, it is not necessary to know all the objects to appoint to one of them ",

and that " a power may be good although in favour of an indefinite class ".

In the present case, there is no question of a trust for an undefined class or of a condition operating, if valid, to bring about the forfeiture of a beneficiary's interest. It clearly cannot be necessary to the validity of the condition here in D question that it should be possible to identify all the persons who, according to the terms of the condition, are at any given time eligible in point of employment or latest employment to be let into occupation of the cottages. The owner is under no obligation to let anyone into occupation, and, in particular, is under no obligation to any person who satisfies the condition to let such person into occupation on that account. If the owner was, indeed, subject to such an obli- E gation, it might well be necessary to the validity of the condition that it should be possible to decide with certainty as regards each and every claimant whether he satisfied the condition or not. But, as the case stands, the occupier's obligation is merely not to allow occupation by any person who does not fall within the limit as regards occupation imposed by the condition. That means that it behoves the owner to satisfy himself that any proposed occupier does fall within F the prescribed limit before he lets him into occupation. If, on investigation, the owner finds that the proposed occupier is clearly within the prescribed limit, he can, if he chooses, let him into occupation. If, on the other hand, the owner finds that the proposed occupier is clearly outside the prescribed limit, he must, in order to comply with the condition, refuse the application. Again, if it appears doubtful whether the proposed occupier does or does not fall within the pre- G scribed limit, the owner will be well advised to refuse, and will be perfectly free to do so. Such being the position of the owner, I see no reason why the possible occurrence of doubtful cases, which he would be free to reject, should be held to invalidate the condition so as to entitle him to let into possession persons clearly outside the permitted limit. The question should, perhaps, be regarded to some extent as one of degree. The above line of argument would, of course, have no H application to a condition framed in such terms that it would be ex facie impossible to attribute satisfaction of it to anyone, for in such a case the result would be to preclude the owner from letting altogether. But where, as here, the character and situation of the cottages are such as to make it highly improbable that there will be any lack of would-be occupants who do demonstrably satisfy the condition (e.g., as farm workers in actual employment as such, on neighbouring farms in the green belt, with or without wives and children (the latter, if I any, under twenty-one)), I think it would be unreasonable to hold the condition invalid on account of the theoretically possible emergence of cases in which the eligibility of the would-be occupants, whom, be it remembered, the owner would would be under no obligation to accept, might be open to doubt.

As regards the hypothetical case on which counsel for the appellants placed much reliance of the occupant who is qualified when he goes in but later becomes

(50) [1954] 3 All E.R. 120; [1955] Ch. 20.
(51) [1953] 1 All E.R. 1150; [1953] Ch. 672.

disqualified by a change in his employment, or through the industry in which he is employed ceasing to be mainly dependent on agriculture, I think the owner would be substantially protected by granting no more than weekly tenancies, and, perhaps, also making the tenancy expressly subject to the condition, and requiring the tenant to report any change in his employment. Having done this, I think the owner would have done all that in him lay to comply with the condition, apart from serving notice to quit and taking proceedings in ejectment if and when he deemed it necessary to do so, or was required to do so by an enforcement notice. If ejectment proceedings were precluded by some other enactment, he would not be to blame. In these circumstances, I can attach no great importance to the possibility of penal consequences. The opening words of the condition—" The occupation of the houses shall be limited "— are not, in my view, to be construed as obliging the owner to do the impossible. I would add that, as a matter of common sense, if there is any room for such in a case of this kind, timely consultation between the owner and the council would probably suffice to resolve most difficulties.

In conclusion, I would observe that, in common with the Court of Appeal and the majority of your Lordships, I attach great importance to the circumstance that the language of the condition from the words " persons whose employment " down to the words " the dependants of such persons as aforesaid " (omitting the words from " as defined " down to " or in forestry ") are borrowed ipsissimis verbis from the definition of the expression " agricultural population " contained in s. 34 (2) of the Housing Act, 1930, which definition is reproduced in s. 115 (2) of the Housing Act, 1936, and s. 114 (5) of the Housing Act, 1957. Having regard to the close similarity between the language of the condition now under consideration and that of the Housing Act definition to which I have just referred, I think it would be very difficult for your Lordships to hold the condition void for uncertainty. To do that it would be necessary (in effect) to overrule the implied opinion of the legislature that the definition in s. 34 (2) of the Housing Act, 1930, was sufficiently precise and certain to make it possible to determine by reference to that definition the question whether any given house was required for the accommodation of the agricultural population of the district so as to rank for subsidy under the same subsection. The context in which the definition in s. 34 (2) occurs is, of course, different from that of the condition, and it occurs in an Act of Parliament while the condition does not. The difference in context is not, I think, such as to be material for the present purpose, and, while your Lordships are not bound to accept the validity of the condition as if it was a statutory provision, the definition in s. 34 (2) does provide the language of the condition with statutory sanction which your Lordships should be slow to reject.

For these reasons, although I confess that I have found the case a difficult one, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *A. L. Philips & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Solicitor and Clerk to Buckingham County Council* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

DREWERY AND ANOTHER v. WARE-LANE.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), October 5, 1960.]

Estate Agent—Commission—Agreement to pay commission if a "prospective purchaser" signed agreement to purchase and if vendor signed agreement to sell—Vendor's and purchaser's agreements expressed to be subject to contract—Both agreements signed—Purchaser unable to complete until mortgage obtained—Property sold to another person within ten days of agreements being signed—Whether estate agent entitled to commission.

The defendant, who was the owner of a leasehold house, signed a printed "letter of authority", addressed to the plaintiffs, a firm of estate agents, instructing them to offer the house for sale at the price of £2,250. The letter of authority contained this clause: "I agree to pay you commission" at the customary rate "if and when (a) a prospective purchaser signs your 'purchaser's agreement' and (b) I sign your 'vendor's agreement' (receipt of a copy of a form of each of the above agreements is hereby acknowledged)". The plaintiffs introduced S., who offered to pay £2,160 for the house, and the offer was accepted by the defendant. On Jan. 3, 1959, the defendant signed the vendor's agreement prepared by the plaintiffs and S. signed the purchaser's agreement prepared by the plaintiffs. Both agreements were expressed to be subject to contract. S. was not able to complete the purchase unless he obtained a mortgage, but, as he also desired, if it were possible, to purchase the freehold of the premises, he did not intend to apply for a mortgage until he had been able to buy the freehold or had ended negotiations which he had entered into in connexion with the freehold. On Jan. 12, 1959, the defendant wrote to the plaintiffs saying that, as no further progress had been made with the sale to S., he had disposed of the property to another person. S. was prepared to go on with the purchase of the leasehold from the defendant, and would have gone on with it if the defendant had not sold the property to someone else. The plaintiffs claimed commission from the defendant on the sum of £2,160.

Held: the plaintiffs were entitled to their commission, because the term "prospective purchaser" in the letter of authority meant a person who had the buying of the property genuinely in prospect or contemplation and was prepared to make a bona fide offer with regard to it, and, on the facts, S. was a prospective purchaser and the conditions as to signing the purchaser's agreement and the vendor's agreement had been fulfilled.

Dictum of HODSON, J., in *Dennis Reed, Ltd.* v. *Goody* ([1950] 1 All E.R. at p. 927) applied.

Appeal dismissed.

[As to estate agents' commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198, para. 457; and for cases on the subject, see 1 DIGEST 488-493, *1664-1691*.]

Cases referred to:

Dennis Reed, Ltd. v. *Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277; 2nd Digest Supp.

Luxor (Eastbourne), Ltd. v. *Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

Appeal.

The defendant appealed from a judgment of His Honour JUDGE WINGATE SAUL, given at Dartford County Court on Jan. 25, 1960, whereby it was adjudged that the plaintiffs were entitled to recover estate agents' commission from the defendant under the terms of a written contract between the parties. The facts appear in the judgment of ORMEROD, L.J.

L. K. E. Boreham for the defendant, Dennis Arthur Ware-Lane.

M. H. Jackson-Lipkin for the plaintiffs, Walter Edward Drewery and Ruth Freda Drewery (trading as the Drewery and Drewery Organisation).

ORMEROD, L.J.: This is an appeal from a decision of His Honour JUDGE WINGATE SAUL, made at Dartford County Court on Jan. 25, 1960, when he gave judgment for the plaintiffs for the sum of £66 10s. The circumstances of the action were these. The defendant was, in 1958, the owner of a leasehold house, No. 81, Ridgeway West, Sidcup. There were still seventy-eight years of the lease to run and there was a ground rent on the premises of £6 10s. per annum. In December, 1958, the defendant was minded to sell the house and, in consequence, gave instructions, on Dec. 10, 1958, to the plaintiffs, a firm of estate agents. The price which he told them to ask for the premises was £2,250. The plaintiffs got into communication with Mr. Sinho, who, at some time between Dec. 10 and 21, offered the sum of £2,100 for the premises. This offer was communicated to the defendant, who refused to accept it. Some further negotiation appears to have taken place between the plaintiffs and Mr. Sinho, with the result that a further offer was made and, on Jan. 3, 1959, a meeting took place at the offices of the plaintiffs, when Mr. Lowman, the manager of the plaintiffs' Sidcup office, had a conversation with the defendant. It would appear from the findings of the learned county court judge that Mr. Lowman told the defendant that Mr. Sinho was prepared to pay the sum of £2,160 for the premises, and the defendant indicated that he was willing to accept that offer. In consequence, two documents were signed then and there by the defendant in the office of the plaintiffs. The first document was called a letter of authority which was really the contract between the plaintiffs and the defendant with regard to the sale of the house. In addition, the defendant signed a document called the vendor's agreement, whereby he agreed to sell the house to Mr. Sinho at the price of £2,160, subject to contract. On the same day there was signed by Mr. Sinho a purchaser's agreement whereby he agreed to purchase the premises for the sum of £2,160, again subject to contract.

This case turned on the construction of what is called the letter of authority, which forms the agreement between the plaintiffs and the defendant with regard to the selling of the house. This letter of authority is signed by the defendant and is addressed to the plaintiffs. It is a printed form, and it is headed: "Re 81, Ridgeway West, Sidcup, Kent." Clause 1 reads: "I instruct and authorise you to offer the above property for sale at the price of £2,250". Clause 2 and cl. 3 in the printed document are crossed out, and cl. 4, which is the relevant clause which falls to be construed in this case, runs as follows:

> "I agree to pay you commission at the rate laid down by the various professional institutes, viz., five per cent. on the first £500; 2½ per cent. on the next £4,500, and 1½ per cent. on the remainder of the purchase price if and when (a) a prospective purchaser signs your 'purchaser's agreement' and (b) I sign your 'vendor's agreement' (receipt of a copy of a form of each of the above agreements is hereby acknowledged)."

There are other provisions in that letter of authority which, at the moment, I do not propose to discuss, but the effect of the agreement is that the vendor contracts to pay to the plaintiffs the estate agents' commission, based on the purchase price at the rates which are set out in the letter, if two things happen: (i) if a prospective purchaser signs the plaintiffs' purchaser's agreement, that is to say, the purchaser's agreement which has been drawn up in a form settled by the plaintiffs, and (ii) if the vendor signs the plaintiffs' vendor's agreement—and that, it was submitted by the plaintiffs, is exactly what had happened in the present case. The defendant, the vendor, had signed the vendor's agreement, and the prospective purchaser, on the same day, had signed a purchaser's agreement in the form prescribed by the plaintiffs, the agreement in each case being that which was referred to in the letter of authority; and in those circumstances, it was submitted, the commission at the prescribed rate was payable on the sum of £2,160, which was the purchase price set out in the two agreements.

The agreements having been signed on Jan. 3, 1959, some discussion arose between the parties about the purchase of the freehold of the premises. It appears from the evidence that the defendant was at that time under the impression that the freehold could be purchased for a sum of, I think, £170. It appears later from the evidence that Mr. Sinho had found that the owner of the freehold was asking a larger sum, and it appears also that Mr. Sinho was not able to complete the purchase unless he had a mortgage on the premises, and that he was holding up the question of applying for a mortgage until he had been able to buy the freehold, or, alternatively, had ended the negotiations to attempt to buy the freehold. Be that as it may, on Jan. 12, nine days after the vendor's and purchaser's agreements had been signed, the defendant wrote to the plaintiffs telling them that, as no further progress had been made with the sale of the property to Mr. Sinho and as no further instructions had been received from his solicitors, he felt that it was in his own interests to make other arrangements, and he had accordingly disposed of the property to another person. That was the end of the matter so far as Mr. Sinho was concerned. The plaintiffs contended, and they still contend, that in those circumstances the commission became payable: the conditions laid down in the letter of authority had been complied with and the defendant was liable to pay the sum of £66 10s. to the plaintiffs for commission.

The matter came before the learned county court judge. There is little in the evidence which is controversial and which requires me to deal at any length with it. It is, I think, quite plain that Mr. Sinho wished to purchase the property and offered the sum of £2,160 for it, and that he was willing to go on with the purchase and would have gone on with it, had the matter not been put an end to on Jan. 12 by the letter from the defendant.

The short issue in the case is, I think, this. The plaintiffs, on the one hand, say that the conditions in the letter of authority have been complied with, and that, as soon as the two agreements were signed by the vendor and the prospective purchaser respectively, the commission became payable and there is no reason why it should not be paid. The defendant, on the other hand, says that that cannot be right, that that cannot be the proper construction of the letter of authority because there was nothing to satisfy the court that Mr. Sinho was, in fact, a prospective purchaser in the sense that he was a man who was ready, able and willing to complete the contract (if, in fact, a contract was entered into), and that, therefore, the whole of this case depends on the construction of the relevant paragraph of the letter of authority.

We are not helped very much in this case by the previous decisions on estate agents' agreements. The learned county court judge came to the conclusion, having given the matter very careful consideration and having considered the authorities which were cited to him (1), that this was a case where it was laid down in the contract, in clear and unequivocal terms, that commission was payable when events had happened which, in fact, did happen in this case, and that, in those circumstances, he could do no other than give judgment for the plaintiffs.

The passage which the learned county court judge, no doubt, had clearly in mind, and which has been cited to us, is the passage from the speech of LORD RUSSELL OF KILLOWEN in *Luxor (Eastbourne), Ltd.* v. *Cooper* (2), where he said:

> "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

(1) *Luxor (Eastbourne), Ltd.* v. *Cooper* ([1941] 1 All E.R. 33); *Graham & Scott (Southgate), Ltd.* v. *Oxlade* ([1950] 1 All E.R. 856); *McCallum* v. *Hicks* ([1950] 1 All E.R. 864); *Dennis Reed, Ltd.* v. *Goody* ([1950] 1 All E.R. 919); and *Ackroyd & Sons* v. *Hasan* ([1959] 2 All E.R. 370; *affd.* C.A., [1960] 2 All E.R. 254).

(2) [1941] 1 All E.R. at p. 47; [1941] A.C. at p. 129.

The submission of counsel for the defendant really comes to this: that in this case the language is not clear and unequivocal, that it is capable of more than one construction, and that, in those circumstances, the letter of authority cannot be regarded as an agreement which entitles the plaintiffs to their commission before an actual purchase has taken place. Counsel bases his argument on the fact that the words in the condition in cl. 4 (a) of the letter of authority are " a prospective purchaser signs your ' purchaser's agreement ' ", and he submits that " prospective purchaser " must mean more than that a person " signs your ' purchaser's agreement ' "; it must mean a man who is ready to purchase, who is willing to purchase, subject to contract, and who has the necessary financial means to carry the purchase into effect.

As far as I know, there is no authority on what is meant by " a prospective purchaser ". Had the word " prospective " not been put in before " purchaser ", it might very well be that, in view of the authorities, the plaintiffs might have been in some difficulty. It appears to me, however, that the word " prospective " does not connote necessarily either the term " ready " or " willing " or " able "; it means a man who has the question of buying this property in prospect or in contemplation and is prepared to make an offer with regard to it. This means that there must be a bona fide prospect. In the ordinary way it would be accepted that such an offer would be bona fide and it would be for the defendant to prove, if he sought to set it up, that the offer was not a bona fide offer.

I think that the learned county court judge put the matter clearly in his judgment when he said:

> " Returning to the letter of authority, it is to be noted that in cl. 4 (a) the word ' purchaser ' is qualified by the epithet ' prospective '. In *Dennis Reed, Ltd.* v. *Goody* (3) it was held that the word ' purchaser ', when used without any qualifying adjective, connotes one who completes the purchase, but as HODSON, J., said (4) '. . . the word may be qualified by other words used in connexion with it . . .' It seems to me that a ' prospective purchaser ' is essentially different from ' a purchaser '. A ' prospective purchaser ' is one who has purchase in prospect or contemplation and he may never advance to the stage of becoming a purchaser."

That, I think, sets out clearly the position of a prospective purchaser.

In the present case the evidence is not disputed that Mr. Sinho made an offer to purchase this property for £2,160; he signed an agreement to purchase for that sum, subject to contract; he stated in evidence that he was prepared to go on and would have gone on, had the defendant not put an end to negotiations by his letter of Jan. 12, and, indeed, he showed that he wished to be a purchaser of a house because a very short time later he bought another house for a sum rather more than the sum which he was prepared to pay for this house. It seems to me that, in the circumstances, it would be extremely difficult to describe Mr. Sinho as anything other than a prospective purchaser and, if in fact he was a prospective purchaser, I find it difficult to see how any different construction can be put on cl. 4 (a) of the letter of authority. The evidence was that the defendant, before he signed the letter of authority, read it, that he read also the vendor's agreement and he knew, therefore, that he was agreeing to sell the property for £2,160, subject to contract. The evidence of Mr. Lowman, which was not accepted by the learned county court judge, was that the defendant also saw and read the agreement which was signed later in the day by the purchaser. That was not accepted by the learned county court judge, but it is clear that the defendant had the opportunity of reading it had he so wished to do.

The question in this case is a short one: it is purely a question of construction

(3) [1950] 1 All E.R. 919; [1950] 2 K.B. 277.
(4) [1950] 1 All E.R. at p. 927; [1950] 2 K.B. at p. 292.

of cl. 4 of the letter of authority. As I see it, the clause does not admit of anything other than that, if two things happen—that is, if the vendor signs the vendor's agreement as put forward to him by the plaintiffs, and if a prospective purchaser signs their purchaser's agreement—the commission is payable. That happened in this case, and it appears to me that the appeal must be dismissed. It may very well be that it is undesirable that agreements of this kind should be signed by prospective vendors and it may be wise for a prospective vendor to examine with very great care an agreement which he signs in these circumstances. That is not a matter for this court. We have to consider the agreement which is put before us and consider what is the proper construction to be put on its terms.

WILLMER, L.J.: I agree, and there is nothing that I desire to add.

UPJOHN, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Kinch & Richardson*, agents for *T. G. Baynes & Sons*, Dartford (for the defendant); *E. Edwards, Son & Noice* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* DAVEY. R. *v.* DAVEY.

[COURT OF CRIMINAL APPEAL (Pilcher, Paull and Fenton Atkinson, JJ.), October 17, 1960.]

Criminal Law—Trial—Direction to jury—Unanimity in verdict.

Guidance given by a judge to a jury at a criminal trial on the need for unanimity in their verdict may rightly indicate that, in the process of reaching their verdict, jurors who dissent from the conclusion of a majority may be honestly and sincerely led in the course of discussion and argument to a view different from their initial view, and may return a verdict in accordance with the final conclusion to which they are so led; but a jury must not be so directed as to make it appear that jurors may concur, for the sake of conformity, in a verdict with which they disagree.

R. v. *Mills* ([1939] 2 All E.R. 299) followed.

Dictum of LORD GODDARD, C.J., in *R.* v. *Walhein* ((1952), 36 Cr. App. Rep. at p. 168) explained.

The appellants and others were tried on charges that included a charge of conspiracy extending over eleven years. The case was long and complicated. In the course of his summing-up, which extended over several days, the commissioner said " Sometimes in the past judges used to tell the juries that they have to be unanimous, but I always say—and it is true—you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs, on committees, you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached and no vote is taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what they are doing are united by a passion for the right verdict, a passion for stern or real justice, if you like, and the result I should think is that in ninety-nine cases out of one hundred there is not a disagreement at all, but solidarity and sense ". On appeal against conviction,

Held: if a jury were to be directed on the need for unanimity in their verdict, the direction must be clear and the guidance given should be such as was indicated at letter E above; but the direction in the present case was confusing, and might have led members of the jury to think that the need for unanimity in a verdict had been relaxed and was no longer of such importance

as in the past (see p. 537, letters D to F, and p. 539, letters H and I, post), and accordingly the convictions would be quashed. A

Appeals allowed.

Criminal Law—Conspiracy—Indictment—Several conspiracies included in the same count—Invalidity—Whether other specific charges vitiated.

Seven accused, including the two appellants, were indicted on a count, among others, of conspiracy to defraud creditors of many companies on various dates extending between June, 1947 and June, 1958. Some of the seven accused had nothing to do with the affairs of some of the companies, two of which were wound up in 1953. B

Held: the count of conspiracy was bad in that separate conspiracies were charged thereby as one conspiracy.

Per CURIAM: the inclusion of the count of conspiracy might also have introduced evidence which would not otherwise have been admissible on other specific charges, and thus might have vitiated also convictions on those charges (see p. 540, letters F and G, post). C

R. v. *Dawson* ([1960] 1 All E.R. 558) applied.

[As to the verdict of jurors generally and the requirement of unanimity, see 23 HALSBURY'S LAWS (3rd Edn.) 35, para. 69; and for cases on the subject, see 30 DIGEST (Repl.) 280, 281, *481-483*, *485*. D

As to conspiracy generally and joining of offences in an indictment in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 310-314, paras. 569-571 and Supplement; and for cases on the subject, see 14 DIGEST (Repl.) 121-124, *851-860*; 126, *878-881*; 131, *941*, *947*; 135, *980-982*; 256, 257, *2228-2244*; 335, *3251* and 3rd DIGEST Supp.] E

Cases referred to:

R. v. *Creasey*, (1953), 37 Cr. App. Rep. 179; 14 Digest (Repl.) 332, *3223*.

R. v. *Dawson*, [1960] 1 All E.R. 558; 124 J.P. 237; 44 Cr. App. Rep. 87; [1960] 1 W.L.R. 163.

R. v. *Klein*, (1932), 23 Cr. App. Rep. 173; 14 Digest (Repl.) 181, *1465*. F

R. v. *Mills*, [1939] 2 All E.R. 299; [1939] 2 K.B. 90; 108 L.J.K.B. 449; 160 L.T. 439; 103 J.P. 171; 27 Cr. App. Rep. 80; 14 Digest (Repl.) 370, *3586*.

R. v. *Walhein*, (1952), 36 Cr. App. Rep. 167; 14 Digest (Repl.) 367, *3563*.

R. v. *West*, *R.* v. *Northcott*, *R.* v. *Weitzman*, *R.* v. *White*, [1948] 1 All E.R. 718; [1948] 1 K.B. 709; [1948] L.J.R. 1377; 112 J.P. 222; 32 Cr. App. Rep. 152; 14 Digest (Repl.) 256, *2236*. G

Appeals.

The appellants, Owen Morris Davey and Edward Charles Davey, were arraigned with five other accused at the Central Criminal Court before JUDGE MAUDE, Q.C., and a jury, on Nov. 11, 1959, on an indictment containing nineteen counts. O. M. Davey was charged on all counts. E. C. Davey was charged on counts 1, 2, 7, 11 and 16. The first count charged the accused with conspiracy together with others between June 6, 1947, and June 30, 1958, to cheat and defraud the creditors of some fourteen companies*, and subsequent counts charged various H

* Count 1, as amended at the trial, reads as follows: That on divers days between June 6, 1947, and June 30, 1958, [the appellants and five others aforesaid,] conspired together to cheat and defraud the creditors of certain limited liability companies, that is to say, Cullens (London), Ltd. (later known as Cullens (Shopfitters), Ltd.), Cullens (Heating & Ventilating), Ltd. (later known as Cullens of Woking, Ltd.), Cullens (Structural Alterations), Ltd. (later known as O. M. Davey & Sons, Ltd.), Cullens (Properties), Ltd., Woking Shopfitting Co., Ltd. (later known as Butts Joinery Co., Ltd.), Allinton, Ltd., Dayvil Builders Co., Ltd. (later known as S. Ashmore (Bagshot), Ltd.), Woking Joinery and Shopfitting Co., Ltd., Woking Electrical Installations, Ltd., Allinton Joinery Manufacturers, Ltd. (later known as Woking Cabinet Works, Ltd.), Woking Joinery Works, Ltd., Woking Shopfitting Co., Ltd., Woking Electrical Wholesale Suppliers, Ltd., and Abbott Equipment, Ltd. I

A fraudulent offences, including four for false pretences, four for fraudulent conversion, one for causing a cheque to be delivered by virtue of a forged instrument and two for circulating false statements concerning the affairs of certain companies. All these subsequent charges related to matters within the period covered by the charge of conspiracy in count 1, and the circumstances to which counts 4 and 6 to 19 related lay largely or solely within the scope of the con-
B spiracy charge aforesaid. The trial lasted forty-two days and on Jan. 15, 1960, O. M. Davey was convicted of conspiracy under count 1, of false pretences under counts 2, 3 and 5, of circulating a false statement under count 6, of fraudulent conversion under counts 12 and 13, of false pretences under count 15, of circulating a false statement under count 16, of fraudulent conversion under counts 17 and 19 and of causing a cheque to be delivered under a forged certificate under
C count 18. He was sentenced to two years' imprisonment on counts 1 and 18, to two years' imprisonment on counts 2, 3, 5, 15 and 17, to two years' imprisonment on counts 6 and 16 and to one year on counts 12, 13 and 19. The sentences under the various groups were concurrent, but the sentences on the groups themselves were to run consecutively, making seven years' imprisonment in all. E. C. Davey was convicted on count 1 only and was sentenced to fifteen months'
D imprisonment. Two other accused received short sentences of imprisonment for convictions on count 1 and count 16 and the three others were acquitted.

The appellants appealed against conviction and sentence by leave of the court (CASSELS, DAVIES and SALMON, JJ.) on July 25, 1960, the application for leave to appeal against sentence in the case of E. C. Davey being by invitation of the court. The main grounds of appeal were (1) that there was a fatal direction
E in the summing-up as to the unanimity of the jury, and (2) that count 1 was bad because it charged several conspiracies.

Ground (1) is summarised at p. 536, letter B, post.

E. D. Sutcliffe, Q.C., and *E. Eyre* appeared for the appellant O. M. Davey.

W. A. Sime, Q.C., and *J. W. A. Sloss* appeared for the appellant E. C. Davey.

F *M. J. Morris, Q.C.*, and *S. H. Noakes* for the Crown.

PILCHER, J., gave the following judgment of the court: The appellants in this case, Owen Morris Davey and Edward Charles Davey, who are father and son, appeal by leave of this court against their convictions and sentences which were as follows—Owen Morris Davey was convicted before the commis-
G sioner, JUDGE MAUDE, Q.C., at the Central Criminal Court in January, 1960, on count 1 of an indictment which contained nineteen counts. Count 1 was a charge of conspiracy to defraud in terms which I will refer to briefly presently; he was also convicted on eleven other counts, four being in respect of false pretences, four in respect of fraudulent conversion, one for causing a cheque to be delivered by virtue of a forged instrument and two for circulating false
H statements in regard to the affairs of certain companies with which he was connected. He was sentenced by the commissioner to two years, two years, two years and one year consecutively, making a total sentence of seven years.

His son, Edward Charles Davey, was convicted on count 1 only, namely, the conspiracy charge and was sentenced to fifteen months' imprisonment on that count. Both appellants appeal by leave of this court, which was given in July,
I 1960, against their convictions and sentences.

Count 1, which was the conspiracy charge, as finally and formally amended, alleged a conspiracy between the two appellants and five other persons that, on divers days between June 6, 1947, and June 30, 1958, they conspired to cheat and defraud the creditors of some fourteen companies, the names of some of which were altered from time to time over the years. Besides the two appellants, a man named White was found guilty on this count and was sentenced to a term of imprisonment of nine months which he has now served, as he did not present any appeal either against his conviction or his sentence.

The case which the commissioner had to try was a long and very troublesome one, involving consideration by the jury of complicated facts extending over a long period. The hearing extended in all for more than two months, and the commissioner's summing-up extended over four days. Having been granted leave to appeal on Sept. 26, 1960, Owen Morris Davey presented certain grounds of appeal which were as follows:

" (1) The learned judge misdirected the jury in that he stated or implied that there was no need or no longer need for the jury to be unanimous in their verdict.

" (2) The learned judge failed to direct the jury on the evidence relevant to count 1.

" (3) Count 1 of the indictment was bad in law in that separate conspiracies were therein charged as one conspiracy.

" (4) The inclusion of the charge of conspiracy in the indictment was unfair to the accused in that it inordinately prolonged the trial and impeded the defence with prejudicial evidence that would otherwise have been inadmissible."

It will be seen that grounds (1) and (4) are comprehensive and, if established, would entitle this court to allow the appeal of both appellants on all counts. Grounds (2) and (3) are directed specifically to the conspiracy charge, ground (2) alleging misdirection by the commissioner, and ground (3) alleging that the count as framed was bad in law.

Now, it is clear from a perusal of the summing-up in this case and such of the evidence as we have seen, which has not been a great deal, that the case for the prosecution was that Owen Morris Davey was the prime mover in the conspiracy to defraud which lasted over a long period. He was a man who all his life had been interested in the shopfitting and building trades, and from time to time he dealt with all the various persons who were charged with him as conspirators under count 1. The case for the prosecution was that he was a completely unscrupulous man who, with the assistance of others who joined him from time to time in the conspiracy, some for longer periods and some for shorter periods, over a period of eleven years in all, had enriched himself primarily, and his family, by a number of extremely ingenious frauds involving the use, sometimes contemporaneously and sometimes successively, of over a dozen different limited liability companies, and some registered businesses, whereby the creditors and the shareholders of these companies and businesses had been defrauded. His son, Edward Charles Davey, had been working with him from the start, as a young man originally. He was, I think, a draughtsman and acted as secretary to a number of companies, and he was one of the persons charged as a conspirator with his father on the ground that he had been privy to most, if not all, of the offences of which his father was found guilty, and in respect of which his father was said to have conspired.

That is the background of this case, and the first ground of appeal, as I have said, was that the judge misdirected the jury on the question of unanimity. I read the judge's observations to the jury on that point which appear at p. 109 of volume 1 of the transcript which we have before us. Having dealt generally with what I may call the preliminaries, he says this:

" Sometimes in the past judges used to tell the juries that they have to be unanimous, but I always say—and it is true—you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs, on committees, you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached and no vote is taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what they are doing are united by a passion for the right verdict, a passion for stern or real

justice, if you like, and the result I should think is that in ninety-nine cases out of one hundred there is not a disagreement at all, but solidarity and sense."

Before I deal with that particular passage I may be allowed, on behalf of the court, to make one or two preliminary observations. It seems to us that the ordinary juror who reads the newspapers is probably aware before a verdict of guilty or not guilty can be reached that every member of the jury has to agree with his fellow jurors on the verdict which is the verdict of the jury as a whole. Each individual juror when empanelled and sworn takes a personal oath to render a true verdict according to the evidence. It sometimes happens that a judge assumes that the members of the jury are aware of this fundamental necessity and omits to mention in his summing-up that the verdict of the jury on the issue of guilt or innocence must be unanimous. More often, during the summing-up, having dealt with the question of the burden of proof, he simply reminds the jury that their verdict must be unanimous and that each of them must be satisfied on the evidence whether guilt has been established or not. On occasion juries, having deliberated for some time, ask for further guidance on some particular point on which they have difficulty in arriving at a unanimous conclusion, whereon the jury having returned to the jury box, the judge gives them such further guidance on the particular point raised as he can, and also deals with the necessity for unanimity in appropriate words. We have given very careful consideration to the passage which I have read from the summing-up of the learned judge on the necessity for unanimity. I am sorry to say we find it ill-expressed, in some respects contradictory and extremely difficult to understand. We think that the ordinary juryman listening attentively would also find it so and might be left with the impression that, whereas in the past judges had told juries, and told them correctly, that their verdict must be unanimous, the necessity for there to be unanimity of view had now been in some measure relaxed and was no longer of such importance as it used to be in the past. The jurors might also have thought that they were now entitled to regard themselves more as being in the position of committee men or members of a board of directors who, after discussing a particular point on which contradictory views were held, might eventually achieve unanimity in this fashion, namely, that the juror or jurors who held a view contrary to that held by the majority, or held a view on which he was unable to form a concluded opinion, was entitled, as is a member of a committee or a member of a board of directors, to sink his own view without amending it or calling for a vote, and to agree with the majority of his colleagues although he himself was still in a state of uncertainty. We need hardly add that this course is not permissible to a juror who has taken a personal oath to render a true verdict according to the evidence. There must, of course, be discussion when the jury retire to consider their verdict. A juror may retire to the jury room after a summing-up in a state of doubt, or indeed at that moment may hold a view which does not accord with what turns out to be the view of his colleagues. During the discussion his doubts may be resolved or he may be satisfied that the view which he originally held was wrong, in which case unanimity is achieved. A director or a member of a committee may continue to hold his own view, but may sink it in deference to a contrary view held by his colleagues and allow the majority decision to go through. He may also abstain from recording a vote if a vote is taken, in which case unanimity is not achieved.

We should like to refer to two cases which have been cited to us. The first is *R.* v. *Mills* (1). That case, as also was the next case to which I will refer, was one where the jury, having deliberated for some time, returned for guidance. In *R.* v. *Mills* (1) the recorder at the Central Criminal Court dealt with the

(1) (1939), 27 Cr. App. Rep. 80; [1939] 2 All E.R. 299.

question of unanimity in this fashion. Repeating the words used by FINLAY, J., in *R.* v. *Klein* (2), the recorder said (3):

> "... it is of the utmost importance that a jury should come to a conclusion one way or the other at the end of a trial, because it is burdensome upon all concerned, including the accused, because it only means this, that, unless you do, the matter has got to be tried all over again; therefore you see the importance and necessity of coming to a conclusion one way or the other. [The recorder went on to say that the judge had said this:] Where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others have got to say, come to the conclusion that they themselves might be wrong, and it would be consistent with the discharge of their duty and with their oaths under those circumstances, if they thought they were wrong, to accept the view of the majority and to come to the conclusion that the majority might be right, and in that way you come to a conclusion in which you all agree by the exchange of view, and perhaps a man in the minority might say: 'Well, I may be wrong'. That is quite consistent with the discharge of your duty."

In that case there was an appeal and it was contended that that direction by the learned recorder was incorrect, it was incorrect in substance because it was said that he had used the words that the jury themselves "might be wrong", and although he had also used the words "if they thought they were wrong", none the less the use of the word "might" vitiated the summing-up on this particular point. LORD HEWART, C.J., having dealt first with the point that had been made on behalf of the appellant that the observations of the recorder constituted a misdirection because he had said: "I cannot release you until you have come to a conclusion", and that might amount to putting pressure on the jury, whereas, of course, he could have released them even though they disagreed, said this (4):

> "The real difficulty, however, does not arise with regard to that matter. The difficulty is what may have been the effect on the minds of the jury of the following words: 'Where you have got one or two, a small minority in the jury, who are thinking perhaps differently from the others ...'"

he then read the passage which I have read and went on to say this (5):

> "That would be correct only if the minority had been honestly and sincerely led to come to a view different from the view which they had previously entertained.
>
> "The criticism which has been directed against that passage is that it may conceivably have led the jury or some members of the jury to coquette with the notion that, for the sake of mere conformity or convenience, it would be consistent with their oaths to make it appear that they accepted a view which in fact they did not accept. Such a conclusion as that would be quite subversive. A loose acquiescence by a minority in the view of the majority for the sake of conformity would not merely be most undesirable, but flagrantly wrong. It is fundamental that a jury should agree, and by 'agree' is meant honestly agree, not make a colourable appearance of agreeing."

LORD HEWART, C.J., then deals with the other points in that case, including the learned recorder's final words: "I cannot release you until you have come to a conclusion", and ends up with these words (6):

---

(2) Referred to in (1932), 23 Cr. App. Rep. at p. 185 by the Court of Criminal Appeal; see also [1939] 2 All E.R. at p. 300.
(3) (1939), 27 Cr. App. Rep. at p. 81; [1939] 2 All E.R. at p. 300.
(4) (1939), 27 Cr. App. Rep. at p. 83; [1939] 2 All E.R. at p. 300.
(5) (1939), 27 Cr. App. Rep. at p. 84; [1939] 2 All E.R. at p. 301.
(6) (1939), 27 Cr. App. Rep. at p. 85; [1939] 2 All E.R. at p. 301.

A "There can be no doubt what the recorder intended to convey to the jury in the present case, but he used one or two perilous phrases which may conceivably have caused some members of the jury to incline their minds to a wrong view."

That is the first of the cases to which we wish to refer, because it does set out the principle which should govern the question of unanimity where that arises.

B The second case is *R.* v. *Walhein* (7). That again was a case where a learned commissioner at the Central Criminal Court was called on to assist the jury who had returned saying they had found difficulty in arriving at a unanimous verdict, and the commissioner then addressed them as follows, in a passage which, I think, is well known to many of us (8):

C "You are a body of twelve men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it D makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."

In dealing with that matter, LORD GODDARD, C.J., said this (8):

E "In our opinion, that was a perfectly satisfactory direction. Jurors often have to be reminded that the case may be one in which some of them may start by taking one view and then, finding that the others are against them, may talk the matter over, subordinate their views to those of the majority and concur in the verdict. That is the only way in which juries can arrive at verdicts."

F If the word "subordinate" means sink their own views and adopt a view which is contrary to the view they really hold in order to achieve unanimity, it seems to me that that passage from the judgment of LORD GODDARD, C.J., runs contrary to previous decided cases, and in particular is in conflict with what was said in *R.* v. *Mills* (9). I can hardly feel that it would be permissible to attribute that view of the word in view of the decision in *R.* v. *Mills* (9) and in view of the fact G that *R.* v. *Mills* (9) was clearly referred to and was distinguished. Therefore, we think that the words "subordinate their view" must mean come to a different conclusion after proper discussion, and not sink their views in order to achieve unanimity.

The other case to which we were referred was *R.* v. *Creasey* (10) which, in our view, does not really take the matter any further, and I only mention it as H we were referred to it. It appears to us to support the principle laid down in *R.* v. *Mills* (9). Those are the only cases to which we would refer.

We have formed a clear view on the matter and it appears to us to be in conformity with the decided cases. If the jury are to be directed on the question of unanimity the direction must be clear. Taking the view which we do, that the judge's direction on this point was confusing and by implication inaccurate, I we think it is not only "conceivable", which was the adjective used in *R.* v. *Mills* (9) but also more than possible that the jury, after a very long trial, may have remembered the homely analogy in regard to members of a committee and members of a board of directors suggested to them by the judge in his summing-up, and have arrived at their verdict without a true appreciation of what their duty was as members of a jury, and may have regarded themselves

(7) (1952), 36 Cr. App. Rep. 167. (8) (1952), 36 Cr. App. Rep. at p. 168.
(9) (1939), 27 Cr. App. Rep. 80; [1939] 2 All E.R. 299.
(10) (1953), 37 Cr. App. Rep. 179.

more as being in the position of members of a committee or a board of directors. If they did form that view, or if they may have formed that view, that of course would entirely vitiate the whole trial.

It is not suggested here that if the first ground of appeal with which we have been dealing is entitled to succeed, that this is a case in which we could properly apply the proviso to s. 4 of the Criminal Appeal Act, 1907 (11). That means that that point is sufficient to deal with this appeal, but we should like to say a word on count 1, which is dealt with specifically in the third ground of appeal. It is said that count 1 was bad in law, in that separate conspiracies were therein charged as one conspiracy. We could say a good deal on this particular point, but we are quite satisfied that count 1 as it appears in the indictment before us is bad, in that it charges seven persons that on divers days over a period of eleven years they conspired together to cheat and defraud the creditors of a large number of companies, and bad for this reason, that some of the seven conspirators had nothing to do with the affairs of some of the companies and the first two companies which are mentioned, I think, were wound up in May and November, 1953, and certainly some of the alleged conspirators did not come into the picture until after that date. It is what one might call a " rolled-up " charge of conspiracy. It may well be that it would have been possible to allege a number of separate conspiracies between certain of the seven persons named, one of whom almost certainly would always have been Owen Morris Davey, and may refer in each of the conspiracies to the particular companies which were relevant to that conspiracy. On the other hand, it might have been possible to alter the words of the count, keeping some at any rate of the conspirators in it, if not all, and charge them with conspiring together to float companies with the object of defrauding the creditors of those companies when they were floated. But it seems to us to be quite impossible, and a bad count, to charge all the seven persons there named over a period of eleven years with conspiring to cheat and defraud the creditors of companies, some of which they had never heard of and some of which were not in existence at the time.

We need only mention the cases of *R.* v. *West* (12) and *R.* v. *Dawson* (13). It seems to us that it is perfectly clear from the decisions in both those cases, and perhaps particularly in *R.* v. *Dawson* (13) that a charge of conspiracy of this kind should not be " rolled up " in the fashion that this charge was. We only mention that matter because if the conspiracy charge was bad, it may well be that it introduced evidence on the specific charges against the appellants which otherwise would not have been admissible, and although the ground on which we think these two appeals against conviction should be allowed is the first ground, namely, the misdirection of the learned judge on the question of unanimity, we feel the conspiracy charge is also fatal to count 1 and possibly also, if further argument had been addressed to us, might have vitiated the convictions on the other charges.

That being so, these two appeals against conviction will be allowed.

Appeals allowed. Convictions quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(11) The proviso to s. 4 (1) reads: " Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

(12) [1948] 1 All E.R. 718; [1948] 1 K.B. 709.

(13) [1960] 1 All E.R. 558; 44 Cr. App. Rep. 87.

A

Re DONCASTER CO-OPERATIVE SOCIETY, LTD.'S AND RETFORD CO-OPERATIVE SOCIETY, LTD.'S AGREEMENT.

B [Restrictive Practices Court (Diplock, J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), October 4, 5, 6, 7, 10, 11, 31, 1960.]

Restrictive Trade Practices—Reference—Co-operative societies—Boundary agreement—Agreement by two societies not to canvass or solicit customers or deal in or supply goods or open any shop on other side of demarcation line—Whether removal of restrictions would deny to public substantial benefit—Agreement not to accept members on other side of demarcation line—Whether a restriction—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 6 (1), *s.* 21 (1) (*b*).

D The D. co-operative society and the R. co-operative society traded in contiguous areas. Each society had a departmental store in its eponymous town and branch shops in the surrounding urban districts and villages, and each operated mobile shops and provided regular delivery services which extended to those rural districts which it regarded as falling within its trading area. The goods which each society sold were comparable in kind and E quality. All but a trivial proportion of the sales of each society were to its own members. Each society carried on business in the way which was usual with co-operative societies. Each society was bound by its rules to be a member of the Co-operative Union, Ltd., and to accept its decisions. The traditional policy, which the union enforced by conciliation and arbitration, was to avoid overlapping. Each society was also a party to the F " National Membership Scheme " under which a member of one co-operative society purchasing goods from a co-operative society of which he was not a member was credited with a dividend at the rate paid to its own members by the society from whom the purchase was made. Membership figures indicated that probably each household in each area contained one G member of the society for that area. The two societies' respective areas adjoined in a sparsely populated rural district in which there were three fair-sized villages. In September, 1928, the two societies entered into an agreement delimiting the boundaries of their respective trading operations, whereby the D. society undertook that it would not at any time thereafter without the previous consent in writing of the R. society—(A) accept any H members residing at any point to the south of the agreed line, (B) canvass or solicit any customers or deal in or supply any goods to the south of the agreed line, or (C) open any shop south of or within half a mile to the north of the agreed line. The R. society entered into corresponding covenants with respect to the area north and within half a mile to the south of the agreed I line. The agreement was not expressed to be for any fixed period, and could be terminated by either party at any time on reasonable notice. In 1941 the original line of demarcation was, by agreement, varied slightly. It ran through the sparsely populated area. The provisions by which each society was a member of the Co-operative Union, Ltd. and bound to accept its decisions, and for arbitration, were not in issue on the reference next mentioned.

On a reference by the Registrar of Restrictive Trading Agreements under

s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the societies sought to support restrictions (B) and (C) (which they conceded were restrictions within s. 6 (1) (e) of the Act) under s. 21 (1) (b)† of the Act, but they contended that restriction (A) did not fall within s. 6 (1)‡ of the Act.

Held: (i) the territorial restrictions, (B) and (C), were deemed by s. 21 (1) of the Act of 1956 to be, and would be declared to be, contrary to the public interest and void, because it had not been shown (pursuant to s. 21 (1) (b)) that the removal of the restrictions would deny to the public as purchasers (assuming, without deciding, that denial to members of the societies would constitute denial to the public in the circumstances of this case) specific and substantial benefits or advantages, for the following reasons—

(a) in the absence of any boundary agreement such slight overlapping as might occur, having regard to the sparse population, would not have any appreciable effect on the pattern of trade of the two societies, the dividend paid by either of them, or the services available to the generality of their members (see p. 546, letter F, post),

(b) the abrogation of the boundary agreement would not have the effect of the withdrawal of the services provided in the sparsely populated areas and, even if it did have this effect, the proportion of the total membership of the two societies who would be denied any benefits or advantages by such withdrawal would be too small to be regarded as the " public " as purchasers of the societies' goods (see p. 546, letter I, post), and

(c) the right of members of the societies to conduct their purchasing organisation as they wished, and any right of the members as such to avoid, by the boundary agreement, risk of overlapping and any consequent increase in the " real price " of goods purchased were not rights enjoyed by the members as " purchasers " of the societies' goods, nor, even if they were so enjoyed, were such rights substantial (see p. 547, letters B and C, post).

---

*Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

" (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

†Section 21 (1), so far as relevant, provides: " For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom: . . ."

‡Section 6 (1) provides: " Subject to the provisions of the two next following sections, this Part of this Act applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods; (b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods; (c) the quantities or descriptions of goods to be produced, supplied or acquired; (d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or (e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied."

(ii) restriction (A) did not fall within s. 6 (1) of the Act of 1956 and was not registrable (see p. 547, letter G, post).

[**Editorial Note.** The arrangements, if they may be so described, whereby the policy of the Co-operative Congress to avoid overlapping was enforced through the Co-operative Union, Ltd. by conciliation and arbitration procedure were not registered, even if they were registrable, and thus were not affected by the Restrictive Trade Practices Act, 1956. Substantially the same result as that which obtained under the boundary agreement would be reached by reason of these arrangements, even if the boundary agreement ceased to exist, assuming that the societies remained members of the union (see p. 545, letters C and F, post).

For the Restrictive Trade Practices Act, 1956, s. 6 and s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 954.]

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the Doncaster Co-operative Society, Ltd. and the Retford Co-operative Society, Ltd., made under seal on Sept. 14, 1928. The facts are set out in the judgment of the court.

Sir Frank Soskice, Q.C., and *R. A. MacCrindle* for the Doncaster Co-operative Society, Ltd. and the Retford Co-operative Society, Ltd.

Neville Faulks, Q.C., and *J. F. Donaldson* for the Registrar.

Cur. adv. vult.

Oct. 31. **DIPLOCK, J.,** read the following judgment of the court: The respondents in this case, the Doncaster Co-operative Society, Ltd. and the Retford Co-operative Society, Ltd., are retail co-operative societies registered under the Industrial and Provident Societies Acts, 1893 to 1954, and trade in contiguous areas. Each society has a departmental store in its eponymous town and branch shops in the surrounding urban districts and villages, each operates mobile shops and provides regular delivery services for milk, bakery products and groceries which extend to those rural districts which it regards as falling within its trading area. The goods which each society sells are comparable in kind and quality, being in the main obtained from the same source, the Co-operative Wholesale Society, Ltd., of which each respondent is a member. Each carries on business in the way which is usual with co-operative societies. Membership, subject to a restriction which is referred to below, is, in practice, open to all persons who wish to purchase goods from the society, and who are prepared to take out at least one share of £1 in the capital of the society. They are admitted to membership on payment of 1s., and can subscribe the balance of the price of their share out of future " dividends." Goods are sold by the society at current market prices, and the balance of the trading profits, after payment of fixed interest at a low rate on share and loan capital, allocations to reserves and contributions to charitable, educational and political objects, etc., is divided half-yearly among the members in the form of a " dividend " proportionate to the amount of their respective purchases during the previous half year. The current rate of dividend paid by the Doncaster Society is 1s. 3d., and by the Retford Society 1s. 1d.

The rules of each respondent require it to be a member of the Co-operative Union, Ltd. As such, it is bound to abide by the rules of the union, to conform to its aims, and to accept the decisions of the central executive of the union as confirmed by the Co-operative Congress. Rule 10 of the Co-operative Union's rules includes the following provision:

" Any disagreement that may arise as to overlapping or any other matter which cannot be settled in consultation between the parties shall, in failure

of conciliation be submitted to persons appointed by the Co-operative Union, Ltd., as arbitrators and their decision shall be final and binding on all parties."

Each of the respondents is also a party to the " National Membership Scheme ", under which a member of one co-operative society purchasing goods from a co-operative society of which he is not a member is credited with a dividend at the rate paid to its own members by the society from whom the purchase is made. Thus, a member of the Retford Society purchasing goods at a shop of the Doncaster Society receives in due course the " dividend " on those purchases at the same rate as if he had been a member of the Doncaster Society.

The Doncaster Society has a membership of about sixty thousand, the Retford Society of about ten thousand. These figures indicate that at least one person in the majority of households in the area served by each respondent is a member of that society, but the figures of turnover suggest that the majority of households in which there is a member buy only a modest proportion of their requirements from the society, and obtain the remainder from private traders who compete with the co-operative societies. All but a trivial proportion of the sales of each respondent are to its own members.

Both Doncaster and Retford are natural shopping centres for the villages and country areas which surround them. Other co-operative societies centred on other towns operate similarly in the areas surrounding those served by the two respondents. The respondents' respective areas adjoin in a sparsely populated rural district lying between Bawtry in the north and Retford in the south, in which there are three fair-sized villages: Ranskill and Mattersey and Mattersey Thorpe.

In 1928, as a result of an unfounded rumour that the Doncaster Society proposed to open a shop at Ranskill where the Retford Society was already operating a delivery service, the respondents entered into an agreement delimiting the boundaries of their respective trading operations. By that agreement, dated Sept. 14, 1928, the Doncaster Society undertook that it would not at any time thereafter without the previous consent in writing of the Retford Society, (a) accept any members residing at any point to the south of the agreed line, (b) canvass or solicit any customers or deal in or supply any goods to the south of the agreed line, or (c) open any shop south of or within half a mile to the north of the agreed line. The Retford Society entered into corresponding covenants with respect to the area north and within half a mile to the south of the agreed line. The agreement was not expressed to be for any fixed period, and can be terminated by either party at any time on reasonable notice, which, it is conceded, would be six or, perhaps, twelve months. In 1941, mainly for technical reasons connected with food rationing, the original line of demarcation was varied by agreement so as to transfer to the Retford area the villages of Mattersey Thorpe and Mattersey, in the former of which the Retford Society opened a shop with the consent of the Doncaster Society, although this was within half a mile of the amended line of demarcation. In the same year, again with the consent of the Doncaster Society, the Retford Society opened a shop at Ranskill within a quarter mile to the south of the agreed line. The Doncaster Society's consent was given on terms that it should have a similar right to open a shop in the future at a point within one quarter mile to the north of the demarcation line.

The restrictions contained in this agreement of Sept. 14, 1928, as so amended in 1941 (which we will call " the boundary agreement "), have been referred by the Registrar to this court under s. 20 of the Restrictive Trade Practices Act, 1956. These are the only restrictions with which the court has to deal on this reference. We emphasise this fact because it became apparent at an early stage in the hearing that the evidence proposed to be adduced by the respondents was directed to a much wider question, namely, whether the general policy adopted by retail co-operative societies in relation to territorial overlapping services

provided by such societies was a desirable policy, and, in particular, whether it was contrary to the Restrictive Trade Practices Act, 1956.

The general policy adopted by retail co-operative societies which are members of the Co-operative Union, as both respondents are required to be by their constitution, is determined by the Co-operative Congress. For over sixty years, this policy has been to avoid so far as possible territorial overlapping of services provided by individual co-operative societies, and this policy has been, and still is, frequently enforced in disputes between members by means of the conciliation and arbitration procedure provided for in r. 10 of the Co-operative Union. Whether the provisions for the enforcement of this policy constitute an agreement to which Part 1 of the Act applies is a matter which, quite properly, has not been argued before us, and on which we express no view. What is clear, however, is that the passing of the Act of itself has no effect on the validity of the policy or its enforcement through the conciliation and arbitration procedure of the Co-operative Union. That question could arise only when the relevant provisions had been registered (if, indeed, they are registrable at all), had been referred by the Registrar to the court, and had been the subject of a declaration by the court. Nevertheless, the existence of this general policy and the procedure for its enforcement is a relevant factor in the present case. There may be differing views among co-operators whether the general policy of avoiding overlapping between the services provided by neighbouring retail co-operative societies is best secured by a written boundary agreement such as that which is before the court, or by tacit understandings, which are common, between neighbouring societies as to the territory in which they are respectively entitled to trade and to deliver goods. There may, indeed, be particular cases where overlapping may be thought to be desirable, or a lesser evil than rigid boundaries by individual societies or by the Co-operative Union itself; but, as respects societies such as Doncaster and Retford where the boundary line of their trading areas runs through a sparsely inhabited rural district, we see no likelihood that the general policy of the Co-operative Union in favour of avoiding overlapping of services provided by individual retail societies will change in the foreseeable future. If the boundary agreement ceased to exist, substantially the same result would be achieved as respects the trading operations of the two respondents so long as they remained members of the Co-operative Union, by the application and enforcement of the union's general policy on overlapping even if there were some economic or other inducement to either respondent to venture into the area in which the other has heretofore habitually traded.

The respondents concede that the territorial restrictions contained in the boundary agreement on the opening of shops and the delivery of goods are restrictions within s. 6 (1) (e) of the Act in respect of the areas or places in which goods are to be supplied. Even if considered to be harmless, they are, nevertheless, deemed to be contrary to the public interest unless the respondents can satisfy the court that one or other of the circumstances set out in para. (a) to para. (g) of s. 21 (1) of the Act exists. The respondents rely on para. (b), and contend that the removal of these restrictions would deny to the public, as purchasers of the goods sold by the respondents, specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such by virtue of the restrictions. We will assume in the respondents' favour that the respondents are entitled, as they contend, to select as the relevant goods for the purpose of this paragraph the goods sold by the two respondents. As the great proportion of these goods are sold to members of the two respondents, the respondents further contend that it is sufficient for them to show that the removal of the territorial restrictions contained in the boundary agreement would deny to the members of the two respondents as purchasers of such goods specific and substantial benefits or advantages, since the members of the two respondents constitute nearly all the public who are purchasers of the goods sold by the

respondents. We will again assume in the respondents' favour, without, however, deciding it, that this argument is sound. A

As originally pleaded, the respondents' case appeared to be that the removal of the territorial restrictions would result in the invasion of each respondent's area by the other respondent in the form of the establishment of competing shops and overlapping sales and delivery services, that these would be uneconomic, that the trading profits of each respondent would be reduced, that the dividends paid B to members in respect of their purchases would fall, and the " real price " of the goods (that is to say, the retail price paid less the dividend returned), would, accordingly, be greater, and that the members as purchasers would be denied the substantial and specific advantage of the lower " real prices " which they at present pay. This case was not made out by the evidence. Independently of the general policy of the Co-operative Union, any suggestion that, in the absence of C a boundary agreement, the Retford Society would establish shops in the area now served by the Doncaster Society, or that the Doncaster Society would establish shops in the area now served by the Retford Society seems to us to be quite unrealistic, in existing circumstances. Furthermore, if, in the future, circumstances were to change and either respondent were disposed so to act, the boundary agreement, which is terminable by either party on reasonable notice, D could only deter it from doing so for such period, say, six months or a year, as would be necessary to bring the agreement to an end. In the absence of the boundary agreement, there would exist, no doubt, the possibility of some overlapping of delivery services in the fringe areas, but the sparse population in these areas renders these services among the least profitable of those undertaken by the respondents, and makes it in our view highly unlikely that either respondent E would desire to extend or would make anything more than very minor adjustments in its present delivery area at their common boundary. Such slight overlapping as might occur could have but a minimal effect on the trading expenses of the respondents and consequently on the amount of the dividend paid to the members in general on their purchases. Even, therefore, if the respondents were not members of the Co-operative Union and thus compelled, quite apart F from the boundary agreement, to refer any disputes as to overlapping to arbitration under r. 10 of the Co-operative Union's rules, we do not think that the abrogation of the boundary agreement would have any appreciable effect on the pattern of the trade of the respondents, the " dividend " paid by either of them, or the services available to the generality of their members. A fortiori, is this the case so long as the two respondents remain (as we have no doubt they G will) members of the Co-operative Union, and that union continues to adopt, and enforce through its conciliation and arbitral procedure, its long-established policy of avoiding so far as possible overlapping in the services provided by individual retail co-operative societies.

By an amendment, the respondents put forward an alternative contention that, in the absence of the territorial restrictions contained in the boundary H agreement, the respondents would be unlikely to continue to provide in the sparsely populated areas in the vicinity of the boundary line the services by way of village shops, mobile shops and delivery services, which they now provide for members who reside in that sparsely populated area, since those services are relatively unprofitable and tend to reduce the dividend payable to members in general. The evidence wholly fails to satisfy us that the abrogation of the I boundary agreement would have any such effect on the services provided by these respondents in the area in question; but, even if it did, the only persons who would be denied any benefits or advantages by the withdrawal of such services would be but a very small proportion of the total membership of the two respondents—a proportion far too small to be regarded as the " public " as purchasers of the goods sold by the two respondents. Indeed, if there were any factual basis for the contention, which we do not think that there is, it would follow that the majority of members of the two respondents were being denied

A the benefit or advantage of a larger " dividend " by reason of the existence of the territorial restrictions.

Finally, as tabula in naufragio, it was argued on behalf of the respondents, although not pleaded, that, even if they have failed to establish any likelihood that if the boundary agreement were abrogated there would, in fact, be any appreciable overlapping or any reduction in the services provided in the vicinity B of the boundary line, nevertheless, the members would, by the abrogation of the boundary agreement, be denied the benefits or advantages: (i) of conducting their purchasing organisation, (a) as they wish to, or (b) as they reasonably wish to, and, (ii) of avoiding the risk, even though it be a slight one, of overlapping and a consequent increase in the " real price " of the goods purchased by members from the respondents. As regards the first alleged benefit or advan- C tage, it does not seem to us that the right of the two respondents to enter into a boundary agreement containing territorial restrictions on the areas in which they supply goods is one which is enjoyed by the members of the respondents as " purchasers " of the goods which the respondents sell; but, even if it were, the right to enter into an agreement which, in our view, has no appreciable effect on the pattern of trading of the two respondents or on the " real price " of the goods D they sell, if such right be a benefit or advantage at all, is not substantial. As regards the second alleged benefit or advantage, it is sufficient to say that the benefit or advantage of being able to take unnecessary steps to avoid what is, so far as the foreseeable future is concerned, a non-existent risk cannot be substantial. Furthermore, if circumstances were to change and the risk were to become a real one, the boundary agreement, which is terminable on reasonable E notice by either party, would not prevent overlapping.

It follows that the respondents have failed to satisfy us that the removal of the territorial restrictions contained in the boundary agreement on the opening of shops and the delivery of goods would deny to the public as purchasers, consumers or users of any goods, any specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the re- F strictions themselves or of any arrangements or operations resulting therefrom. Consequently, the restrictions must be deemed to be contrary to the public interest and void. The question whether their existence involves any detriment to the public or anyone else does not arise, and we express no view about it.

There remain to be considered the restrictions on the respondents accepting members to the south and north of the boundary line respectively. It does not G seem to us that these restrictions fall within s. 6 (1) of the Restrictive Trade Practices Act, 1956, at all. There is nothing in the boundary agreement which prevents members of one respondent purchasing goods from the other respondent, and, as both respondents are members of the National Membership Scheme, a member of one respondent purchasing goods from the other respondent receives the same " dividend " in respect of those purchases as if he were a member H of the respondent from which he purchased the goods. The only disadvantages which he suffers are that he has no voice in the management or right to invest in the share capital of the respondent of which he is not a member, but this has nothing to do with the terms or conditions on or subject to which the goods are to be supplied. This particular restriction is not, in our view, registrable under Part 1 of the Act, and we make no declaration with respect to it.

Declaration regarding the territorial restrictions accordingly.

Solicitors: *Crofton, Craven & Co.*, Manchester (for the Doncaster Co-operative Society, Ltd. and the Retford Co-operative Society, Ltd.); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re MORRIS'S WILL TRUSTS. PUBLIC TRUSTEE *v.* MORRIS.

[CHANCERY DIVISION (Cross, J.), October 6, 7, 20, 1960.]

Will—Capital or income—Tenant for life and remaindermen—Apportionment—Debenture—Scheme of arrangement—Cancellation of all unpaid interest on allotment of new securities and payment of cash—Apportionment of securities and cash—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 206.

A testator, who died in 1907, bequeathed a fund on trusts under which various persons were interested either in the income or in the capital. The fund included first mortgage debentures of P., Ltd. From 1933 until 1955, P., Ltd. entered into a series of arrangements with holders of its first mortgage debentures. The arrangement so made in 1933 provided that the half-yearly payments of interest on the debentures falling for payment between Jan. 1, 1933, and a date not earlier than Dec. 31, 1933, nor later than Dec. 31, 1935, should be paid to a limited extent only, and that all instalments of interest, if not paid on the due date, should carry interest at six per cent. per annum from that date until payment. The interest on unpaid interest was to be paid when and on and subject to the same terms and conditions as the instalment of interest in respect of which it was payable. Subsequent schemes extended the period of postponement of interest provided by the 1933 scheme. On June 30, 1955, the sums owing on the security of the debentures were £3,946,900 for principal, £1,361,681 for interest, and £1,434,965 for interest on interest. In December, 1955, P., Ltd. put forward a final scheme of arrangement which was that, against delivery of the debentures and unpaid interest coupons, P., Ltd. should procure the allotment and payment to the holders by P.T.C., Ltd., of (a) $100 six per cent. debenture stock of P.T.C., Ltd., (b) $70 five per cent. convertible debenture stock of P.T.C., Ltd., and (c) £40 sterling, in respect of each £100 of the debentures held. It was provided in the scheme (i) that on the scheme becoming operative, all obligations of P., Ltd. in respect of interest on the debentures and interest on unpaid interest should be cancelled, and also (ii) that the principal moneys secured by the debentures should be satisfied by the allotments and payments by P.T.C., Ltd. This scheme was approved by the court under the Companies Act, 1948, s. 206. At the date when the 1955 scheme became operative there was due to the trustee of the testator's will in respect of the debentures then held by him £4,300 in respect of principal, £1,526 10s., less tax, in respect of unpaid instalments of interest, and £1,733 0s. 8d., less tax, in respect of interest accrued on interest not paid on the due date. Pursuant to the scheme, there was allotted to the trustee of the will (a) £1,720 in cash and (b) $4,300 six per cent. debenture stock and $3,010 five per cent. convertible debenture stock of P.T.C., Ltd. The aggregate value of the two holdings of debenture stock in P.T.C., Ltd., so allotted was approximately £2,580, so that the total value of the assets so allotted to the trustee was about £4,300. The question arose whether the assets so allotted should be apportioned between capital and income (and if so in what manner), or the whole should be treated as capital, or how otherwise the assets should be dealt with.

Held: a fraction of the assets so paid and allotted to the trustee should be treated as income and that fraction should be one which bore the same proportion to the whole assets as the amount of the arrears of interest (and interest on interest) bore, at the time when the 1955 scheme was approved, to the total sum of principal, interest and interest on interest, then secured by the £4,300 debentures of P., Ltd., because the provisions of the scheme cancelling the obligations of P., Ltd., in respect of interest and interest on interest, though binding as between the trustee debenture-holder and P.,

Ltd. did not affect beneficial rights to income and capital as between tenant for life and remaindermen and did not exclude apportionment.

Re Atkinson ([1904] 2 Ch. 160) and *Smith* v. *Law Guarantee & Trust Society, Ltd.* ([1904] 2 Ch. 569) applied.

Re Pennington ([1914] 1 Ch. 203) explained and distinguished.

[As to adjustment of losses between tenant for life and remainderman, see 34 Halsbury's Laws (3rd Edn.) 647, 648, paras. 1121-1123; and for cases on the subject, see 40 Digest (Repl.) 761-763, *2462-2473.*]

Cases referred to:

Atkinson, Re, Barbers' Co. v. *Grose-Smith*, [1904] 2 Ch. 160; 73 L.J.Ch. 585; 90 L.T. 825; 40 Digest (Repl.) 761, *2466.*

Bates, Re, Mountain v. *Bates*, [1928] All E.R. Rep. 126; [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162; 40 Digest (Repl.) 719, *2117.*

Harrison's Will Trusts, Re, Harrison's Settlement, Re, Harrison v. *Milborne-Swinnerton-Pilkington*, [1949] Ch. 678; 40 Digest (Repl.) 720, *2123.*

Hill (R. A.) v. *Permanent Trustee Co. of New South Wales, Ltd.*, [1930] All E.R. Rep. 87; [1930] A.C. 720; 144 L.T. 65; sub nom. *Hill (Richard), Re, Hill* v. *Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191; 40 Digest (Repl.) 716, *2100.*

Moore, Re, Moore v. *Johnson*, (1885), 54 L.J.Ch. 432; 52 L.T. 510; 40 Digest (Repl.) 761, *2462.*

Pennington, Re, Pennington v. *Pennington*, [1914] 1 Ch. 203; 109 L.T. 814; 40 Digest (Repl.) 762, *2471.*

Rudd's Will Trusts, Re, Wort v. *Rudd*, [1952] 1 All E.R. 254; 40 Digest (Repl.) 721, *2128.*

Smith v. *Law Guarantee & Trust Society, Ltd.*, [1904] 2 Ch. 569; 73 L.J.Ch. 733; 94 L.T. 545; 10 Digest (Repl.) 846, *5580.*

Adjourned Summons.

The Public Trustee, as sole trustee of the will of the testator, Robert Morris, deceased, applied by originating summons dated Apr. 17, 1959, for it to be determined (1) whether the Public Trustee should treat the whole of the cash and securities which, under a scheme of arrangement approved by the court on Feb. 21, 1956, were received by the Public Trustee in respect of his holding of £4,300 first mortgage debentures of the Peruvian Corpn., Ltd., as capital of the testator's estate or whether he should treat some part thereof as income; (2) and if some part should be treated as income, whether such part should be (i) a fraction bearing the same proportion to the whole as the amount of the arrears of interest on the debentures when the scheme was approved bore to the total sum of principal, interest and interest on interest then secured by the debentures; or (ii) a fraction bearing the same proportion to the whole as the amount of such arrears of interest on the debentures and of the unpaid interest on such interest not paid on the due date bore to the total sum; or (iii) a fraction bearing the same proportion to the whole as the amount of such arrears of interest bore to the aggregate of principal and interest (but not interest on interest) then secured by the debentures; or (iv) a fraction bearing the same proportion to the whole as the amount of such arrears of interest and the unpaid interest on such interest not paid on the due date bore to the aggregate sum of principal and interest (but not interest on interest) then secured by the said debentures; or (v) some other and if so what fraction.

J. A. Wolfe for the Public Trustee, sole trustee of the testator's will.

L. H. L. Cohen for the defendants interested in income.

J. P. Brookes for the defendants interested in capital.

Cur. adv. vult.

Oct. 20. **CROSS, J.,** read the following judgment: The question at issue in this case is whether two sums of debenture stock of the Peruvian Transport

Corpn., Ltd., a company registered in Canada, and a sum of cash which were received by the Public Trustee as trustee of the will of Robert Morris under a scheme of arrangement approved by the court under the Companies Act, 1948, s. 206, between the Peruvian Corpn., Ltd., a company incorporated in this country, and its debenture-holders and stockholders, ought to be treated wholly as capital of the testator's estate, or ought to be apportioned between capital and income.

The testator, who died on Dec. 28, 1907, was the holder of £11,400 first mortgage debentures of the Peruvian Corpn., Ltd., which I will call " the company ". His will contained a clause enabling his trustees to allow any part of his estate to remain in its then state of investment, and under that clause his trustees retained the debentures. From time to time parts of the holding were sold, and by 1955 when the scheme of arrangement in question was put forward, only £4,300 of the debentures remained unsold.

The company had been for many years in financial difficulties. In 1932 it put forward a scheme of arrangement between itself and the holders of its first mortgage debentures which was approved by the court on Feb. 24, 1933. This scheme, which I will call " the 1933 scheme ", provided that the half-yearly instalments of interest on the debentures falling for payment between Jan. 1, 1933, and a date not earlier than Dec. 31, 1933, nor later than Dec. 31, 1935, to be prescribed by the committee thereby constituted, should be paid only to the extent thereby provided, and that all instalments of interest, if not paid on the due date, should carry interest at the rate of six per cent. per annum from that date until the date of payment. Such interest on interest was to be paid when and on and subject to the same terms and conditions and to stand secured in the same manner as the instalment of interest in respect of which it was payable, and was to be treated as forming part of such instalment for all purposes. The company subsequently put forward seven further schemes of arrangement between itself and the holders of its debentures, each of which was approved by orders of the court. Each of these schemes extended the period of postponement of interest provided for by the 1933 scheme, and by the last of them, which was dated Dec. 17, 1952, this period was extended to Dec. 31, 1955. On June 30, 1955, the sums owing on the security of the debentures were: for principal £3,946,900, for interest £1,361,681, and for interest on interest £1,434,965.

In December, 1955, the company put forward a final scheme of arrangement between itself, the holders of its first mortgage debentures, the holders of its preference stock, and the holders of its ordinary stock, which I will call " the 1955 scheme ". So far as material to be stated for present purposes, the 1955 scheme provided by cl. 6 (b) that against delivery of the debentures (including all unpaid interest coupons) the company should procure the allotment and payment to the holders thereof by the Peruvian Transport Corpn., Ltd., which had been formed in Canada for the purpose, in effect, of taking over the assets of the company, and which I will call " the Canadian company ", of (a) U.S. $100 six per cent. debenture stock of the Canadian company, (b) U.S. $70 five per cent. convertible debenture stock of the Canadian company, and (c) £40 sterling in respect of each £100 of the debentures held by them respectively. It was further provided by cl. 5 that on the scheme becoming operative (i) all the obligations of the company in respect of interest accrued on the debentures and interest accrued on the interest thereby secured and not paid on the due dates should be cancelled and that such interest should cease to accrue thereafter; and (ii) that the principal moneys secured by the debentures should be satisfied by the allotments and payments by the Canadian company hereinbefore referred to.

The 1955 scheme was approved by an order of this court under the Companies Act, 1948, s. 206, made on Feb. 21, 1956. In pursuance thereof there was paid and allotted to the Public Trustee, who was then the sole trustee of the will of the testator (a) £1,720 cash, (b) U.S. $4,300 six per cent. debenture stock and

U.S. $3,010 five per cent. convertible debenture stock of the Canadian company. At the date that the 1955 scheme became effective, there was due to the Public Trustee in respect of the debentures held by him as trustee of the will of the testator, £4,300 in respect of principal, £1,526 10s., less tax, in respect of unpaid instalments of interest for the period from Apr. 1, 1950, to Mar. 1, 1956, and £1,733 0s. 8d., less tax, in respect of interest accrued on interest not paid on the due date.

It appears from the explanatory statement in connexion with the 1955 scheme, circulated by the company under the provisions of the Companies Act, 1948, s. 207, that the aggregate value of the two holdings of debenture stock in the Canadian company allotted to the Public Trustee as aforesaid was approximately £2,580. If the £1,720 cash received by the Public Trustee be added to this sum, the total of £4,300 is the same as the nominal amount of the debentures held by the Public Trustee as trustee of the will of the testator. It is further to be observed that the sum of £1,720 cash bears roughly the same proportion to the total sum of £4,300 as the interest and interest on interest due under the debentures bore to the principal sum then due, viz., approximately forty per cent.

It is not necessary for me to set out the terms of the will of the testator since it is common ground between the parties that no provisions therein throw any light on the question which I have to answer. It is sufficient for me to say that the defendants, the Midland Bank Executor & Trustee Co., Ltd., and A. M. Fay, represent those interested in income, and the defendants, Frederick John Oliver Prescott and the Royal Exchange Assurance, represent those interested in capital.

Where trust funds are properly invested on a mortgage and the interest falls into arrear, if the security realises less than the principal and arrears of interest the proceeds are normally divisible between income and capital in shares bearing the same proportion to each other as the arrears of interest and the principal: see *Re Atkinson, Barbers' Co.* v. *Grose-Smith* (1). Where the mortgage makes no provision for payment of interest on arrears of interest, those interested in income cannot claim against those interested in capital to have the sum payable to them increased by allowing any interest on interest in the calculations: see *Re Moore, Moore* v. *Johnson* (2). But in this case the 1933 scheme provided that interest on interest should be payable and should be secured in the same manner as the interest in respect of which it became payable. If, therefore, the 1955 scheme had simply provided that the debenture stock and cash to be received from the Canadian company should be accepted in full satisfaction of everything owing by the company under its debentures in respect either of principal or interest or interest on interest, there would, I think, have been no doubt that the debenture stock and cash received by the Public Trustee would have been apportioned between capital and income in the proportions which the sum owing to him for principal bore to the sums due to him for interest and interest on interest. The 1955 scheme, however, expressly provided that all the obligations of the English company in respect of arrears of interest and of interest on interest should be cancelled, and that the debenture stock and cash provided by the Canadian company should be accepted in satisfaction of the principal owing under the debentures. The reason for the insertion of this provision was no doubt a wish to avoid payment of income tax on any part of what was to be provided by the Canadian company; but the question which I have to decide is whether this express term of the scheme precludes the application of the general principle of apportionment between income and capital established by *Re Atkinson* (1).

It was suggested in argument that some help in the solution of this question could be derived from the cases dealing with capital profits distributed by limited companies. In such cases the company often states in a circular letter to the shareholders that the payment which they are to receive is a distribution of capital (see, e.g., *Re Bates, Mountain* v. *Bates* (3)), and sometimes a provision

(1) [1904] 2 Ch. 160. (2) (1885), 54 L.J.Ch. 432.
(3) [1928] All E.R. Rep. 126; [1928] Ch. 682.

to that effect is contained in the articles (see, e.g., *Re Harrison's Will Trusts, Re Harrison's Settlement, Harrison* v. *Milborne-Swinnerton-Pilkington* (4)), but it is now well settled that the court will pay no attention to such statements when considering whether the payment is income or capital under the relevant trust instrument. Counsel for those interested in income in this case suggested that in the same way I ought to pay no attention to the provisions in cl. 5 of the 1955 scheme. But I think that counsel for those interested in capital was right in saying that there is really no analogy between the two cases. The reason why the court takes no notice of statements made by the company as to the nature of the payment to be received from it by the shareholders is that a limited company which is not in liquidation has no power to make any payment to its shareholders by way of return of capital otherwise than by way of a reduction of capital sanctioned by the court. Any other payment, even though made out of capital profits and not liable to income tax, must necessarily be a dividend. No statement by the company or provision in the articles can alter the legal position: see *R. A. Hill* v. *Permanent Trustee Co. of New South Wales* (5), per LORD RUSSELL of KILLOWEN. But there is nothing to prevent a mortgagee agreeing to accept a sum paid by the mortgagor, at all events if it does not exceed the amount owing in respect of principal, in discharge of the principal and to treat the arrears of interest as cancelled. Clause 5 of the 1955 scheme is undoubtedly binding as between the company and its debenture-holders. The question is whether, being so binding, it excludes the application of the principle in *Re Atkinson* (6) between the beneficiaries under trust instruments where the debenture-holders are trustees.

Before leaving the capital profits cases, I would observe that it has been suggested in some of them that the court may have jurisdiction to apportion some part of the dividend to capital in cases where the trustees in question have committed a breach of trust: see *Re Rudd's Will Trusts, Wort* v. *Rudd* (7). If, for example, the trust shareholding is large enough to control the situation, it could be argued that it was the duty of the trustees, in order to hold an even hand between capital and income, to see to it that the company, instead of distributing the whole of the capital profit by way of dividend, capitalised part of it and issued bonus shares which would be capital under the settlement. If they failed in their duty, the court, it might be said, should put the matter right. Here, however, there can be no case for exercising any jurisdiction founded on breach of trust. The trust holding was far too small to have influenced the voting at the meetings of debenture-holders which approved the scheme by the requisite majorities. The most that the Public Trustee could have done would have been to have asked the judge who approved the scheme for some modification of its terms in the interests of his income beneficiaries, and no argument based on his failure to take this course has been developed before me.

In those circumstances, counsel for those interested in capital submitted that the express terms of the scheme govern the position and exclude any apportionment. In support of this submission he referred me to *Re Pennington, Pennington* v. *Pennington* (8). The estate of the testator, who died on July 13, 1910, included debentures in several companies which were secured by trust deeds, of which the Law Guarantee Trust and Accident Society were trustees, and the society had guaranteed payment of both capital and interest by the mortgagor companies. The trust deeds, all of which were in the same form, contained in cl. 7 a power to the society to sell and convert the mortgaged property on the security becoming enforceable, and in cl. 12 provided (9):

"that the society were to hold the moneys to arise from any sale or

(4) [1949] Ch. 678. (5) [1930] All E.R. Rep. at p. 92; [1930] A.C. at p. 731.
(6) [1904] 2 Ch. 160. (7) [1952] 1 All E.R. 254.
(8) [1914] 1 Ch. 203; reported more fully in (1913), 109 L.T. 814.
(9) (1913), 109 L.T. at p. 816.

conversion under the primary trust for conversion upon trust, in the first place, to pay or retain all moneys owing to them for remuneration, premiums, and other expenses therein mentioned, and to apply the residue first in or towards payment to the debenture-holders pari passu in proportion to the amounts due to them respectively, and without any preference or priority whatever of all arrears of interest remaining unpaid on the debentures; secondly in or towards payment to the debenture-holders in like manner of all principal money due on the debentures, whether the same should or should not then be payable according to the tenour of the debentures; and, thirdly, to pay the surplus, if any, to the company."

All the companies made default in payment of principal and all but one made default in payment of interest. On Dec. 14, 1909, an order was made for the winding-up of the society under the supervision of the court, and on July 28, 1910, a scheme of arrangement in the winding-up of the society was made under s. 120 of the Companies (Consolidation) Act, 1908 (which was the predecessor of s. 206 of the Act of 1948) which was sanctioned by the court. The effect of the scheme, so far as it affected the rights of the debenture-holders against the society, was substantially (i) to postpone payment of principal until Dec. 31, 1918, (ii) to postpone payment of the full contractual interest until the same date and even then to place it behind the payment of principal, but (iii) to provide meanwhile for the payment, or where the companies concerned had paid some interest, for the making up of interest at three per cent. on the principal moneys secured by the debentures, credit being given for any interest so paid when the full contractual interest became payable. The trustees of the testator's will received various payments from time to time from the liquidator of the society, partly out of the proceeds of sale of properties belonging to the various companies which were charged by the debentures and which the liquidators had sold as trustees for the debenture-holders, and partly out of the assets of the society in respect of the three per cent. interest payable under the scheme down to Dec. 31, 1918. The trustees of the testator's will took out a summons asking how these various sums should be dealt with as between income and capital. At the date when the case came before the court, it was anticipated that the amount which would eventually be received, whether from the proceeds of the sale of the securities or by way of dividend in the liquidation of the society, would be insufficient to pay in full the total of the principal and interest secured by the debentures. Joyce, J., held that, in those circumstances, all the moneys received after the date of default by the company concerned, whether from proceeds of sale of the property charged or out of the assets of the society, ought to be apportioned under the principle laid down in *Re Atkinson* (10), but the Court of Appeal held that, while the proceeds of sale of the properties charged were apportionable between income and capital, the three per cent. interim interest payable under the scheme was payable to the tenant for life. The argument, so far as concerned the proceeds of sale of the properties charged, turned on the effect of cl. 12 of the debenture trust deeds under which such proceeds were stated to be applicable in the first place towards payment of interest. This provision was obviously inserted in the interests of the mortgagees. If on a partial realisation of a security the moneys received are not applied in discharge of arrears of interest before anything goes towards the reduction of principal, the mortgagor gains by having part of an interest-bearing debt extinguished while a debt not bearing interest remains unpaid. But such a clause ceases to have any real meaning when the mortgagor is insolvent and the proceeds of the whole security prove insufficient to discharge both principal and arrears of interest. Then it does not matter to the mortgagee how the money available is dealt with, and it would be unreasonable to hold that such a clause forced the mortgagee to apply the proceeds in payment of arrears of interest before anything went in

(10) [1904] 2 Ch. 160.

reduction of principal even though that might lead to the payment of more tax than would otherwise be payable. A

It is not, therefore, surprising that the Court of Appeal upheld the decision of JOYCE, J., that such a clause could not affect the rights of the mortgagees or the respective rights of the tenant for life and remaindermen under settlements made by the mortgagees when there was a deficiency. The same view of such a clause had already been taken by the court in *Smith* v. *Law Guarantee & Trust Society, Ltd.* (11), to which I shall refer later. But why did the Court of Appeal, having decided that the proceeds of sale of the securities were divisible between capital and income under the principles of *Re Atkinson* (12) notwithstanding cl. 12 of the trust deeds, go on to hold that the sums paid by the society by way of interest under the scheme sanctioned by the court were not so divisible, but went exclusively to the tenant for life? Counsel for those interested in capital in this case submitted that it was because the court treated the wording of the scheme as conclusive not only between mortgagor and mortgagee, but also between those claiming under the mortgagees, and as necessarily excluding the application of the principle generally applicable between capital and income in a case of deficiency. There are certainly some expressions in the judgment of COZENS HARDY, M.R. (13), which lend colour to this view, but taking the judgments as a whole, I think that the court treated the case as a very special one and did not intend to lay down any rule applicable to all schemes sanctioned by the court as such. It will be remembered that the scheme in *Re Pennington* (14) postponed the time for final realisation of the securities and distribution of the society's assets for a number of years after default had been made, and further provided that when distributed, they would be applied first in payment of capital. Capital would, therefore, gain if the delay in realisation enabled better prices to be obtained or intermediate profits to be accumulated, and so it was only fair that some intermediate interest should be payable to compensate income for the delay. SWINFEN EADY, L.J., pointed out (15) that the terms of this complicated scheme were themselves fair as between capital and income, and that, therefore, there was no reason for depriving the life tenants of some part of the interest payable under it by applying the rule in *Re Atkinson* (12). B C D E F

In the scheme before me, on the other hand, the provision cancelling all arrears of interest would, if conclusive, operate most unfairly as between capital and income. It was obviously inserted with tax considerations in mind and without any thought of the position as between the tenant for life and the remaindermen under settlements made by debenture-holders. In those circumstances, I see no reason why I should hold that the terms of this scheme exclude the rule in *Re Atkinson* (12), and I find support for this conclusion in the decision of the Court of Appeal in *Smith* v. *Law Guarantee & Trust Society, Ltd.* (11). There a debenture trust deed executed by a company contained a clause to the same effect as cl. 12 of the trust deeds in *Re Pennington* (14), viz., that the trustees should apply the proceeds of realisation of the securities first towards payment of arrears of interest and afterwards towards payment of principal. The company having made default and a debenture-holders' action having been brought, it appeared when the order on further consideration was made that the securities would prove insufficient to pay principal and arrears of interest in full. Thereafter, various orders were made from time to time directing payments to the debenture-holders on account generally of what was due for principal and interest. When the time came for the proceeds of the final realisation to be paid over, the Crown claimed, in reliance on the clause in the trust deed, that all the payments made ought to be attributed to interest, in the first place, and that the tax payable on that footing should be paid. The Court of Appeal, after holding that the clause in question G H I

(11) [1904] 2 Ch. 569. (12) [1904] 2 Ch. 160. (13) (1913), 109 L.T. at p. 819.
(14) [1914] 1 Ch. 203; 109 L.T. 814.
(15) [1914] 1 Ch. at p. 211; 109 L.T. at p. 819.

A did not apply after it had become clear that there was not enough to pay both principal and interest, directed that as it was clearly for the benefit of the debenture-holders for tax reasons that the payments made on account generally should be appropriated to capital, they should be so appropriated; but as the court had had its attention directed to the possibility that some debenture-holders might be trustees, the order expressly stated that it was without prejudice to the question B whether the payments or any parts thereof ought in the hands of the recipients to be treated as principal or interest.

If an order of the court directing that payments to be made to debenture-holders are to be appropriated to capital need not be conclusive as between tenant for life and remaindermen where the debenture-holder is a trustee, there can be no reason why a scheme sanctioned by the court under s. 206, C which contains a similar provision, should necessarily exclude the rule in *Re Atkinson* (16). It is true that the scheme in this case does not contain any proviso such as that which appeared in the order of the court in the *Law Guarantee* case (17), but I have no doubt that the court would have inserted such a provision on the authority of that case if its attention had been called to the point, and I am not prepared to hold that the omission of such a proviso precludes the D application of a well-established rule of equity which will do justice between the parties.

Counsel for those interested in capital submitted that if I went behind the 1955 scheme by applying the rule in *Re Atkinson* (16), I ought also to neglect the provisions of the 1933 scheme securing payment of interest on interest and that the apportionment ought to be on the basis that arrears of interest on interest E are left out of account; but I am not striking anything out of the 1955 scheme, I am simply holding that cl. 5, while binding as between mortgagor and mortgagee (18), does not affect the position as between tenant for life and remaindermen. I think, therefore, that the apportionment must be made having regard to the provisions of the 1933 scheme as to interest on interest.

I will, therefore, make a declaration in the terms of para. 2 (ii) of the originating F summons. I would add that this decision is entirely without prejudice to the question whether or not tax will be payable on the part of the sum received by the Public Trustee which is attributable to income. The Crown is not a party to this summons and I have heard no argument on this aspect of the matter.

Order accordingly.

Solicitors: *Clement G. Lawrence* (for the Public Trustee); *L. P. D. Small* (for the defendants interested in income); *Foyer, White & Prescott* (for the defendants interested in capital).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

---

(16) [1904] 2 Ch. 160. (17) [1904] 2 Ch. 569.

(18) For the provisions of cl. 5, see p. 550, letter I, ante.

NATIONAL PIG PROGENY TESTING BOARD *v.* GREENALL (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), October 13, 14, 19, 1960.]

Rates—Agricultural buildings—Used solely in connexion with "agricultural operations" thereon, viz., on "agricultural land"—Pig progeny testing station—Ploughing of land unconnected with buildings—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5 *c.* 44), *s.* 2 (2).

Rates—Lands Tribunal—Case Stated—Form—Title of case.

Rates—Lands Tribunal—Appeal by Case Stated from tribunal—Form of order of Court of Appeal—R.S.C., Ord. 58A, *r.* 3 (4), (5).

As part of its business of education, research and experiment intended to improve the production of pigs, the National Pig Progeny Testing Board occupied a pig progeny testing station comprising: (i) a building costing over £100,000 in which four hundred young pigs acquired by the board were reared under strictly controlled conditions on food carefully regulated and measured, until they reached a certain weight; (ii) 6.8 acres of land, which were a wilderness of weeds and rubble when taken over by the board. These 6.8 acres had been twice ploughed and harrowed in the previous year but the use to which they were to be put had not been decided at the relevant date, the alternatives then proposed being to grow corn or put the land to grass; if corn were grown the straw could be used for bedding in the building, and if grass were grown testing operations could be carried out on pigs kept out of doors.

Held: (i) the land was used as "arable, meadow or pasture ground only" and so was agricultural land within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928 (see p. 558, letter F, post).

(ii) the raising of pigs as carried out in the building was an agricultural operation (see p. 558, letter H, post).

(iii) nevertheless the building was not exempt from rates as an agricultural building within the meaning of s. 2 (2), since at the relevant date the use of the buildings had no connexion with agricultural operations actually carried on (as distinct from being intended) on the land (see p. 558, letter I, post), and thus did not come within the words "solely used in connexion with agricultural operations thereon" in s. 2 (2) where the word "thereon" meant on the land with which the building was occupied (*Thompson* v. *Milk Marketing Board*, [1952] 2 All E.R. 344, and *Perrins* v. *Draper*, [1953] 2 All E.R. 863, followed on the later point).

Per CURIAM: (a) when an appeal against a decision of the Lands Tribunal on a rating case is allowed by the Court of Appeal, the proper order of the court is that the hereditament shall stand entered in the valuation list with the assessment determined in accordance with the decision of the court (see p. 559, post).

(b) the title of a rating appeal in the Case Stated by the Lands Tribunal for the decision of the Court of Appeal should contain only the names of the parties and not such matters as "In re the Local Government Act, 1948" (see p. 560, post).

Appeal allowed.

[As to the exemption of agricultural land and agricultural buildings from liability for rates, see 32 HALSBURY'S LAWS (3rd Edn.) 47-49, para. 64; and for cases on the subject, see 38 DIGEST (Repl.) 529-531, *312-323*.

For the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

Perrins v. *Draper*, [1953] 2 All E.R. 863; 117 J.P. 470; [1953] 1 W.L.R. 1178; 38 Digest (Repl.) 530, *323*.

Thompson v. *Milk Marketing Board*, [1952] 2 All E.R. 344; [1952] 2 Q.B. 817; 116 J.P. 473; 38 Digest (Repl.) 530, *322*.

Case Stated.

The valuation officer appealed by way of Case Stated against a decision of the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) given on Oct. 26, 1959, and reported at (1960), 6 R.R.C. 43, in which a hereditament comprising a pig progeny testing station, Station Road, Hambleton, Yorkshire, assessed at £140 gross value, £113 net annual value, £90 rateable value, proposed to be increased to £3,300 gross value, £2,747 net annual value, £2,198 rateable value, in the valuation list for Selby Rural District, was held to be exempt from liability for rates as an agricultural hereditament within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928. The valuation officer contended inter alia that the hereditament was not an agricultural hereditament on the ground that the land comprised therein was not land used or used only as arable, meadow or pasture ground and so was not agricultural land within the meaning of the subsection; and the building comprised therein was not used solely in connexion with agricultural operations on the land and so was not an agricultural building within the meaning of the subsection.

Anthony Cripps, *Q.C.*, and *J. R. Phillips* for the valuation officer.

L. A. Blundell, *Q.C.*, and *J. T. Plume* for the ratepayers.

Cur. adv. vult.

Oct. 19. **LORD EVERSHED, M.R.:** The judgment which HARMAN, L.J., is about to deliver is the judgment of the court.

HARMAN, L.J.: The respondent ratepayers, the National Pig Progeny Testing Board, are a company limited by guarantee and privileged to dispense with the words " limited " by reason of the fact that they are forbidden to pay a dividend. They carry on a business of education, research and experiment intended to improve the production of pigs. Their main object is

> " in particular to carry on the progeny testing of pigs at progeny testing stations in Great Britain."

Their headquarters are at Letchworth and they have four or five litter testing stations, including that with which this appeal is concerned, which is at Hambleton in the West Riding of Yorkshire. Each of the ratepayers' litter testing stations carries out the same programme carefully laid down in a pamphlet which was before us. Four hundred young pigs are acquired and reared until they reach a certain weight under strictly controlled conditions on food carefully regulated and measured and exactly similar to those used at other testing stations. For this purpose a building is needed of which the cost is apparently over £100,000. The tests have been carried out hitherto wholly within doors and only a very small area of land surrounding the buildings is required. In the case of the other testing stations of the ratepayers, this land has merely been treated as what is called " amenity land ", but the Hambleton site is different because here the ratepayers acquired the property of a kindred company which extended to over nine acres. The result is that besides the buildings there is an area of some 6.8 acres which, when the ratepayers took over the property in 1957, was described as " a wilderness of weeds covered with builder's rubble."

During the winter of 1957 this area was twice ploughed and harrowed, but in March, 1958, when the valuation officer made his rating proposal, its further use was undecided and what is called " a working party " had been appointed to consider what use should be made of it. The alternative proposals were apparently either to grow corn with the object of using the straw for bedding

in the buildings and selling off the grain, or to lay the area down to grass and conduct on it or some part of it additional tests on pigs kept out of doors instead of under cover. So far as we have been able to understand, no conclusion had been reached on this subject two years later, so the working party, like the mills of God, is grinding slowly.

The valuation officer's proposal was to rate both buildings and land at £3,600 gross value, £2,398 rateable value. That proposal was accepted by the local valuation court in September, 1958, but an appeal to the Lands Tribunal (on which the assessment if held applicable was agreed at £3,300 gross value, £2,198 rateable value), heard in October, 1959, was successful and the land and buildings were held entitled to be de-rated as an agricultural hereditament. The valuation officer appeals to this court.

The answer depends on the true construction of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928. Under s. 67 (1) of the Local Government Act, 1929, agricultural land or agricultural buildings are entitled to exemption from rates. To identify these one must turn to s. 2 (2) of the Act of 1928, which is in these terms:

> " In this Act the following expressions have the meanings hereby respectively assigned to them—' Agricultural land ' means any land used as arable meadow or pasture ground only, land used for a plantation or a wood . . . ' Agricultural buildings ' means buildings (other than dwelling-houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connexion with agricultural operations thereon."

It seems to us clear that on this section agricultural land is distinct from agricultural buildings, though either is an agricultural hereditament. The ratepayers in order to succeed must therefore show that their land is agricultural land and that their buildings are agricultural buildings. The only words appropriate to the former are " land used as arable meadow or pasture ground only ". We agree with the member of the tribunal that this land passes this test. A decision had been made to put it to an agricultural use. It has been ploughed and harrowed, operations essential to that end, and the fact that at the moment of the proposal in March, 1958, the owners had not decided to which agricultural use it should be put does not seem to us fatal to their submission.

That the buildings should rank as agricultural buildings they must pass two tests: first, they must be " occupied together with agricultural land " and, second, they must be " used solely in connexion with agricultural operations thereon ". It is conceded that these buildings are occupied together with the land which we have held to be agricultural land. They therefore pass the first test. The use to which the buildings are put is clear. It is the raising of pigs. True, these are not raised in the normal commercial way and the object is not to make a profit by the sale of the carcasses but to collect statistical information for the help of farmers. Nevertheless, it seems to us clear that this is an agricultural operation. The crucial point is whether this use is connected solely with agricultural operations on the land. In our judgment the ratepayers' case breaks down at this point. The use of the buildings in March, 1958, appears to us to have had no connexion at all with any agricultural operations on the land. Those operations had not got beyond the stage of ploughing and it was quite uncertain what the future might bring. It was argued that, if it was decided to grow corn, the straw produced would provide the necessary connexion, while, if grass were laid down, the future experiments in open-air pig rearing would do the like. This may be left to be argued when it happens. The relevant date was the date of the proposal, viz., March, 1958, and at that time and when the Case was stated in January, 1960, the question was still undecided. The intention found to exist to use the land for one of these purposes is not the same thing as its user for them or one of them. We cannot agree that the use of the buildings had at

A the relevant time any connexion with the use of the land. The appeal therefore succeeds.

As to the cases cited to us, *Thompson* v. *Milk Marketing Board* (1) was quite a different one. The land there was at the relevant date being used for purposes very much connected with the use of the buildings. Both in that case and in the later case of *Perrins* v. *Draper* (2) the Court of Appeal held that the word "thereB on" at the end of the section meant "on the land" and not as counsel for the ratepayers would have us believe "on the holding". In our judgment we were bound to follow those expressions of opinion.

LORD EVERSHED, M.R.: What will be the form of order?

C *Anthony Cripps, Q.C.*: I ask for the order set out on p. 2 of the notice of motion, which reads:

> "That this case be remitted to the Lands Tribunal with directions that the said appeal from the decision of the West Riding of Yorkshire (North) Local Valuation Court should be dismissed, and that the said hereditament should stand entered in the said valuation list with gross value £3,300, net D annual value £2,747 and rateable value £2,198 as determined by the said local valuation court."

I ask for that order.

LORD EVERSHED, M.R.: I know that this is the form that is followed, E but why do we not allow the appeal and direct that the hereditament should stand entered in the valuation list at the gross value and rateable value there intimated. It is all so involved.

HARMAN, L.J.: The Lands Tribunal is not a court of record.

Anthony Cripps, Q.C.: The matter has come before your Lordships as a Case F Stated for the opinion of this court under R.S.C., Ord. 58A. Rule 3 (4) of that order reads:

> "On the hearing of the case the Court of Appeal may, if it thinks fit, amend the case or order it to be sent back to the tribunal for amendment, and shall have power to draw inferences of fact . . ."

G Then r. 3 (5) says:

> "The proper officer of the Court of Appeal shall notify the clerk or registrar of the tribunal of the decision of the Court of Appeal on the case and of any directions given by the court thereon."

H It would seem that your Lordships would not be acting in a different spirit from the rule if your Lordships did make that direction here.

LORD EVERSHED, M.R.: I would have thought so. This has arisen before and I have been puzzled. I should have thought the right order for this court would be that the hereditament should stand entered, etc., and the proper I officer of the court would so communicate. The order would not be to remit the Case.

HARMAN, L.J.: You are putting the Lands Tribunal or the Lands Tribunal is putting itself in the position of a court of record. It is like the House of Lords remitting a case to the Chancery Division.

Anthony Cripps, Q.C.: It is the form which has been used.

---

(1) [1952] 2 All E.R. 344; [1952] 2 Q.B. 817. (2) [1953] 2 All E.R. 863.

LORD EVERSHED, M.R.: I have raised the question before. Sometimes the order suggested is even more obscure—remitted to the Lands Tribunal to do something and it is impossible to tell from the order what the answer was. I suggest that the effective direction in the order is that the hereditament should stand entered in the list, etc. Let us do that; we will start something new. A

HARMAN, L.J.: Mr. Cripps, what has this case got to do with the Local Government Act, 1948, or the Rating and Valuation Acts, 1925 to 1957, which are mentioned in the title of the Case Stated (3)? Why could it not begin with "National Pig Progeny Testing Board *v.* Greenall"? B

Anthony Cripps, Q.C.: That is the way in which the Lands Tribunal, at any rate, traditionally does it. C

LORD EVERSHED, M.R.: At the moment we will state for the consideration of all concerned that the putting of all these headings serves no useful purpose and gives a false air of perplexity to the whole thing.

DONOVAN, L.J.: Would it be too much to ask also that those who are appellants in this court should not be shown as respondents? D

Anthony Cripps, Q.C.: If that is put forward with the authority of your Lordship's name behind it, it will be of help to all concerned.

LORD EVERSHED, M.R.: I should have thought it was quite unnecessary to put "appellants" and "respondents" in. Perhaps those concerned will lend their minds to these problems. E

[*The order, dated Oct. 19, 1960, made by the Court of Appeal included the following:—*

AND IT IS FURTHER ORDERED that the said hereditament should stand entered in the said Valuation List with gross value £3,300, net annual value £2,747, and rateable value £2,198.] F

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Ellis & Fairbairn* (for the ratepayers).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

---

(3) The Case Stated was entitled "In the Matter of the Local Government Act, 1948" and "In the Matter of the Rating and Valuation Acts, 1925 to 1957", and "In the Matter of an Appeal from the West Riding of Yorkshire (North) Local Valuation Court" and then continued "Between The National Pig Progeny Testing Board, Appellants" and "G. Greenall (Valuation Officer) and Selby Rural District Council, Respondents".

Re SUFFERT'S SETTLEMENT.
SUFFERT *v.* MARTYN-LINNINGTON AND OTHERS.

[CHANCERY DIVISION (Buckley, J.), October 14, 1960.]

Settlement—Variation of trusts by the court—Specified description or specified class—Next of kin entitled on death of applicant—Whether order of court binds existing potential next of kin—Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 *c.* 53), *s.* 1 (1) (*b*).

A trust fund was held on protective trusts for the applicant for life and after her death on trusts for any children of hers who should attain twenty-one. If no child attained a vested interest, the applicant had a general testamentary power of appointment over the fund and, subject thereto, the fund was held after her death on trust for her statutory next of kin, viz., the persons who would be then entitled thereto if she had died possessed thereof, intestate and without ever having married. The applicant was a spinster aged sixty-one. She applied by originating summons for the approval of the court to a proposed arrangement whereby the trustees should appropriate the sum of £500 out of the trust fund to hold the income on protective trusts for her during her life and, after her death, for any surviving husband of hers for life, and subject thereto as to both capital and income on trust for her statutory next of kin. Her statutory next of kin, if she had died at the date of the issue of the summons, were three cousins, of whom one was a respondent, who consented to the proposed arrangement, and the other two were sui juris, but were not parties to the summons and had not consented.

Held: on the true construction of s. 1 (1) (b)* of the Variation of Trusts Act, 1958, any order made by the court approving the proposed arrangement would not bind any person in existence who would be among the class of statutory next of kin of the applicant if she had died at the date of the issue of the summons, but would bind any person not then in existence who might become entitled in future on the applicant's death as then being one of her statutory next of kin; the order, therefore, which the court would make approving the proposed arrangement, would not bind the applicant's two cousins who had not consented to the arrangement.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

By originating summons dated Nov. 4, 1959, Elaine Rosamond Suffert, who was beneficially interested under the trusts of a settlement, applied for the approval of the court under the Variation of Trusts Act, 1958, of an arrangement varying the trusts of the settlement on behalf of all unborn or unascertained persons who might become interested under the existing trusts thereof. The respondents were the trustees of the settlement and one of the persons who was or might become beneficially entitled thereunder.

By the settlement dated May 15, 1935, the settlor, the applicant's mother, Mrs. Rosamond Suffert, declared certain trusts during her lifetime and provided that after her death the trustees should hold the income of the trust fund on protective trusts for the benefit of the applicant during her life and after the applicant's death they should hold the capital and income of the trust fund on trust for such of her issue as the applicant should appoint, and in default of and subject to any such appointment, on trust for any of her children who being male attained the age of twenty-one or being female attained that age or married in equal shares. It was further provided that if there should be no child of the

* The relevant terms of s. 1 (1) of the Variation of Trusts Act, 1958, are printed at p. 562, letter G, post.

applicant who attained a vested interest, then, subject to the preceding trusts and powers, the trust fund should be subject to a general testamentary power of appointment vested in the applicant; and in default of, and subject to, any such appointment, the trustees should hold the trust fund on trust for the persons who would under the Administration of Estates Act, 1925, become entitled thereto on the applicant's death, if she had died possessed thereof intestate without ever having been married, as tenants in common in the shares in which they would have taken under the Act. The applicant was a spinster aged sixty-one.

The arrangement proposed by the applicant was that the trustees should appropriate a sum of £500 or property of that value out of the property comprised in the settlement and should hold the income thereof on protective trusts for the applicant during her life, and after her death for any husband of hers who might survive her, for life; and subject thereto on trust as to capital and income for the persons who under the Administration of Estates Act, 1925, would become entitled thereto on the death of the applicant if she had died possessed thereof intestate without ever having been married, such persons if more than one to take as tenants in common in the shares in which they would have taken under the Act.

There was evidence that the applicant had made a will and codicil and did not intend to die intestate. If the applicant were to have died at once her statutory next of kin would have been her three first cousins, one of whom was a respondent to the summons, and the others of whom were sui juris and resident abroad. None of them had children.

J. A. Wolfe for the applicant.

J. E. Vinelott for the first, second and third respondents.

J. Bradburn for the fourth respondent.

BUCKLEY, J., after referring to the trusts of the settlement and the nature of the proposed arrangement, continued: The arrangement is one which, I think, it is proper to approve on behalf of any persons who may become entitled under the trusts of the settlement at the death of the applicant, whose interests I am able to bind under the Variation of Trusts Act, 1958.

The persons who would be her next of kin if she were to die today are the fourth respondent and two other cousins who are not parties but are sui juris; and the question which I have to decide is how s. 1 of the Act of 1958 is applicable to such case. Section 1 (1) provides:

> "Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of . . . (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons . . ."

Pausing there, the persons who would take in default of appointment under cl. 5 of the settlement, as being what I shall shortly call the statutory next of kin of the applicant are, I think, a specified class of persons. They are a specified class of persons who may become entitled to an interest under the trusts at a future date. It cannot be ascertained at present because, of course, it is not possible to ascertain anybody's statutory next of kin while that person is alive. Down to that point it seems to me that the terms of the section are appropriate to apply to them, subject to what I shall say about the argument of counsel for the applicant. Then the subsection goes on:

> "so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court."

The date of the application to the court must, I think, be the date on which the originating summons was issued. I should have thought at first glance, at any rate, that what the subsection required, in a case of this kind, was to treat the applicant as having died on the date of the issue of the summons, to find out who in that event would have been her statutory next of kin. Any persons (excluding infants, because they come under a different heading in the Act) who were within that class would be persons whose interests, so the section provides, the court cannot bind. Counsel for the applicant has submitted, however, that that interpretation of the subsection would give rise to difficulties; and he says that there is no such class of persons as the next of kin of a person who is still alive and that there is no future date or future event to which it is possible to relate the ascertaining of that class. I find it difficult to follow that argument. Of course it is impossible to say who are the statutory next of kin of somebody who is alive, but it is not impossible to say who are the persons who would fill that description on a hypothesis that the propositus is already dead. Here there is a class of persons who will take an interest on the death of the applicant as life tenant, and they are a class of persons who will be ascertained on the death, so that they will acquire their interest and be ascertained at one and the same date. I feel unable to conclude that they are not persons who may become entitled to an interest under the trusts as being at a future date (namely, the death of the applicant) persons falling within the class of her statutory next of kin. If that view is right then the section provides that I cannot bind the interest of anyone who is at present in existence who would be a member of that class if the applicant had died on the date of the issue of the summons.

The order that I am prepared to make in this case will not, in my judgment, bind either of the two absent potential next of kin; and the result of that will be that the trustees will not be free, except at their own risk, to treat the trusts as effectively varied until they have obtained the consent of those two persons who have got contingent interests in the fund. If the consents of these two persons are obtained by the trustees then they will be protected as regards those two persons. The trustees will be protected as regards the fourth respondent by his consent which he gives here today, and they will be protected by my order in relation to any other persons who may become entitled to participate who are not at the moment in existence.

Counsel for the applicant says that this interpretation of the section would give rise to peculiar difficulties in certain other circumstances; for instance, if there were a case where protective trusts were declared in favour of a woman and the protective life interest had already determined at the date of the application, so that discretionary trusts had come into operation. He says that there would be difficulties then regarding any man who might become a husband of the woman in the future. He also says that it is difficult to apply the section to a case, for instance, where there is a trust for the persons who would be the statutory next of kin of A. if A. were to die at some arbitrarily fixed date in the future, because it is impossible to begin to adapt that class by assuming death at some other date. I do not feel that it is open to me, by reference to instances of that kind, to constrain what I think is the natural interpretation of the section and its application to the case before me. Those are cases which will have to be considered if and when they arise. In the present case, my view is that my order will not bind the two ladies who are not parties but are potential statutory next of kin, but I am willing to make an order to bind anyone else who is unborn and unascertained who might become interested.

Order accordingly.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Dudley M. Paul & Co.*, Liphook, Hants (for all parties).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

Re PRENN'S SETTLEMENT. TRUVOX ENGINEERING CO., LTD. *v.* BOARD OF TRADE.

[CHANCERY DIVISION (Cross, J.), October 21, 1960.]

Company—Private company—Exempt private company—Loss of exemption—Person other than holder having interest in company's shares—Exception of shares held by trustees on the trusts of a family settlement disposing of the shares—Shares acquired by trustees by purchase after execution of settlement—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 129, *Sch.* 7, *para.* 3 (1) (*b*).

On Mar. 19, 1951, a settlor executed a settlement of £200, which he had paid to trustees, in favour of relatives of his, the settlement containing a wide power of investment. On the same day, T.E., Ltd., an exempt private company within s. 129 of the Companies Act, 1948, resolved to capitalise part of its profits and apply it in paying up in full a number of its unissued preference shares and ordinary shares, and to allot those shares to existing shareholders. Also on the same day, the settlor arranged for the allotment to the trustees of the settlement of some of the newly paid-up shares (which otherwise would have been allotted to him) in consideration of the payment to him by the trustees of £150, part of the £200. On the question whether the exception enacted by para. 3 (1) (b) of Sch. 7 to the Companies Act, 1948, then applied to the shares held by the trustees, or whether, as would be the consequence if it did not, the company ceased to be an exempt private company,

Held: the company lost its status as an exempt private company because the shares allotted to the trustees were not within the description "any shares . . . held by trustees on the trusts of a . . . family settlement disposing of the shares" in para. 3 (1) (b), since those shares were not disposed of by the settlement, but were acquired by the trustees by purchase after execution of the settlement (see particularly p. 567, letter H, post).

Sneddon v. *Lord Advocate* ([1954] 1 All E.R. 255) considered.

[As to an exempt private company and the basic conditions required to be satisfied and exceptions therefrom, see 6 HALSBURY'S LAWS (3rd Edn.) 357, para. 701.

For the Companies Act, 1948, s. 129 and Sch. 7, see 3 HALSBURY'S STATUTES (2nd Edn.) 559, 857.]

Case referred to:

Sneddon v. *Lord Advocate*, [1954] 1 All E.R. 255; [1954] A.C. 257; [1954] 2 W.L.R. 211; 3rd Digest Supp.

Adjourned Summons.

Truvox Engineering Co., Ltd. applied to the court by originating summons for (i) the determination of the question whether on the assumption that each of two settlements, dated Mar. 19, 1951, were family settlements as defined in the Companies Act, 1948, Sch. 7, para. 3 (2) (b), each of the settlements was such a settlement disposing of the shares in the company subject to the trusts thereof respectively within para. 3 (1) (b) of Sch. 7 to the Act, notwithstanding that such shares were not expressly settled by each settlement or either of them; and (ii) a declaration that each of the settlements was a settlement within the definition in para. 3 (1) (b) disposing of such shares, and that the company was not disentitled to the status of an exempt private company for the purpose of the Companies Act, 1948, s. 129.

By deed dated Mar. 19, 1951, the settlor, Daniel Dan Prenn, settled £200 for the benefit of "the specified class" which was defined as "the settlor's sisters and the settlor's issue and the issue and spouses of the above-mentioned persons (not including the settlor or the wife of the settlor)". The settlement recited that the settlor had immediately before execution paid £200 to the

A trustees, that the settlor was desirous of making provision for the specified class in the manner therein set out and with that object had irrevocably directed his trustees to hold the £200 on the trusts declared, and that the deed was executed in consideration of the settlor's natural love and affection for the specified class. Clause 1 provided that the trustees should from and after the date of the settlement stand possessed of the £200 on trust

B

> " to invest or to apply the same in any of the investments or for any of the purposes hereinafter authorised with power at any time and from time to time to vary any such investments or purposes for others of a like nature."

Clause 2 provided that the trustees should stand possessed of the cash and C investments and property for the time being representing the same, collectively referred to as " the trust fund ", on elaborate trusts in favour of the members of the specified class. Clause 6 was an investment clause in the widest possible terms enabling the trustees to invest the money " as if they were absolutely entitled thereto beneficially ". Clause 7 enabled the trustees to exercise the voting rights attached to any investments which might from time D to time form part of the trust fund " in as full free and absolute a manner as if they were absolute owners of such investments ", such voting rights could be exercised to secure the appointment of any one or more of them to be directors, secretaries or employees of any company in which any part of the trust fund was invested and it was provided that the trustees were to be entitled to retain any fees or salary for services to any company in which they held shares in their E fiduciary capacity and should not be accountable to any person interested in the settlement for such fees or salary. On the same day the settlor executed a second settlement (called " the wife's settlement ") in favour of " the settlor's wife, sisters and issue and spouses (other than the settlor) of any of the above-mentioned persons ". This settlement was not expressly dealt with in His Lordship's judgment, but the relevant provisions of both settlements were F in the same terms.

On the same day as the settlements were executed, viz., Mar. 19, 1951, Truvox Engineering Co., Ltd., an exempt private company within s. 129 of the Companies Act, 1948, of which the settlor was the chief shareholder, at an extraordinary general meeting passed special resolutions whereby (inter alia) £50,000, being part of the undivided profits of the company, was capitalised and applied in G paying up in full ten thousand first preference shares, ten thousand second preference shares and thirty thousand " B " ordinary shares and distributing them among the ordinary shareholders on Mar. 19, 1951, in the proportion of one first preference share and three " B " ordinary shares for each ordinary share then held. Under this resolution the settlor became entitled to have a large number of the preference and ordinary shares allotted to him.

H On the same day, immediately after the passing of the resolution, the settlor procured to be allotted to the trustees of the settlement ten thousand second preference shares in consideration of £150 paid to him, and to the trustees of the wife's settlement thirty thousand " B " ordinary shares similarly in consideration of £150 paid to him. These transactions were completed and the trustees of the settlements were registered as the holders of their respective shares.

I The company desired to retain the status of an exempt private company but the Board of Trade by letter dated June 3, 1960, informed the company that it could not grant a declaration of exemption in this case because the settlements were cash settlements and that there could be no settlement disposing of shares for the purpose of para. 3 (1) (b) of Sch. 7 to the Companies Act, 1948, if the settlor made no reference express or implied to those shares.

R. A. K. Wright for the company.
E. Blanshard Stamp for the Board of Trade.

CROSS, J. (having stated the facts), said: The question raised in this summons, which was taken out by the company against the Board of Trade, is whether the result of that transaction was to cause the company to lose its status as an exempt private company for the purposes of the Companies Act, 1948, s. 127. Under that section there are various requirements with which companies, generally speaking, have to comply: for example, they have to make a return of their balance sheet, and so on. Section 129 (1) of the Act provides:

> " A private company shall be excepted from the requirements imposed by s. 127 of this Act if, but only if,—(a) the conditions mentioned in the next following subsection are satisfied at the date of the return and have been satisfied at all times since the commencement of this Act . . ."

Section 129 (2) (a) provides:

> " that the conditions contained in Sch. 7 to this Act are satisfied as to the persons interested in the company's shares and debentures."

Paragraph 1 of Sch. 7 provides:

> " The basic conditions as to the shares or debentures of the company whose exemption is in question are—(a) that no body corporate is the holder of any of the shares or debentures; and (b) that no person other than the holder has any interest in any of the shares or debentures."

Nothing turns on para. 1 (a) of Sch. 7 in this case. If para. 1 (b) stood alone the existence of any trust holding would prevent a company being an exempted private company, but one finds in para. 3 what are described as " exceptions for cases of death and for family settlements." Paragraph 3 (1) provides:

> " The basic conditions shall be subject to exceptions for—(a) any shares or debentures forming part of the estate of a deceased holder thereof, so long as administration of his estate has not been completed."

Therefore, when a holder of shares dies, so long as the executors are administering the estate, although they are not beneficially entitled to the shares the exemption is not lost. I am not, however, concerned with para. 3 (1) (a) in this case, but with sub-para. (1) (b) which excepts

> " any shares or debentures held by trustees on the trusts of a will or family settlement disposing of the shares or debentures . . ."

These are the words which I have to construe in this case, viz., " a will or family settlement disposing of the shares or debentures."

To complete the picture I should refer to two other passages in Sch. 7 to the Companies Act, 1948, which have been relied on in the argument. Paragraph 3 (2) provides:

> " For the purposes of this paragraph—(a) shares or debentures held by trustees on trusts arising on an intestacy shall, if the shares or debentures or an interest therein formed part of the intestate's estate at the time of his death, be treated as if the trusts arose under a will disposing of the shares or debentures; (b) the expression ' family settlement ' means a settlement made either—(i) in consideration or contemplation of an intended marriage of the settlor . . .; or (ii) otherwise in favour of any of the following persons, that is to say the settlor, his parents and grandparents, and any other individual who at the date of the settlement is a member of the company or, in the case of a settlement of debentures, a member or debenture-holder

A of the company, and the wife or husband and issue, and the wife or husband of any of the issue, of the settlor, his parents, or any such other individual, and persons taking in the event of a failure of the issue or any class of the issue of any person taking under the settlement."

B It is to be observed that, though there is no limitation as to the nature of the beneficiaries under the trusts of a will, the beneficiaries under a family settlement must be members of a comparatively limited class of person closely connected with the settlor.

The question is whether the words " the trusts of a . . . family settlement disposing of the shares " mean that the shares must have been owned by the C settlor at the date of the settlement and settled by him, or whether the words are satisfied by a settlement such as this which was a settlement in cash and where the shares came to form part of the trust fund subsequently by a purchase.

Counsel for the company admitted that there is no point to be taken on the fact that in this case £150 of the £200 was immediately applied in the purchase of the shares on the same day as the settlement was executed. If his argument D is right, the result would be just the same if the shares were bought many years after the execution of the settlement on the occasion of some change of investment. What is argued on behalf of the company is that if one gives the construction to those words which has been argued for by the Board of Trade, viz., that they refer only to settlements of shares settled by the settlement, incon- E veniences may arise which the legislature can hardly be thought to have contemplated. It is pointed out, for example, that if a settlor settled some shares in a private company by a family settlement, and then subsequently the company made a bonus issue of further shares, it might be argued on the construction put forward by counsel for the Board of Trade that those bonus shares were not shares disposed of by the settlement, and that therefore the exemption would be lost. F It is not for me to say whether, in that particular case, the bonus shares could be held to be included in the original shares. Granted, however, that there may be certain cases which would lead to inconvenience, I am clearly of opinion that as a matter of construction of para. 3 (1) (b) of Sch. 7 to the Companies Act, 1948, the argument of counsel for the Board of Trade is right. To begin with, I think that on the construction urged by counsel for the company the words " disposing G of the shares " really add nothing to the words " shares held on the trusts of a will or family settlement ". So far as I can see the words " disposing of the shares " might just as well have been left out. Again, quite apart from the fact that words would be otiose on the other construction, I think that the words " the trusts of a will or family settlement disposing of the shares " prima facie H mean the trusts of a will or settlement where the shares form part of the estate of the testator or were settled by the settlement and would not naturally include cases where the shares came to form part of the will fund or the settlement fund by a change of investment.

Other parts of Sch. 7 support that construction. First, in para. 3 (2) (a) it is made clear that the shares in question have to form part of the intestate's I estate at the time of his death. In that case they are to be treated as if the trusts arose under a will disposing of the shares. It is clear that if the administrator under an intestacy, where there were trusts arising, acquired shares in a private company by an investment of trust money, they would not fall within para. 3 (2) (a), and the exemption of the company would be lost. So far as I can see, there cannot be the remotest reason for drawing a distinction between the case of an intestacy and the case of a will or settlement in this respect. So, in my judgment, para. 3 (2) (a) very much supports the view that I would have

formed on para. 3 (1) (b) alone as to the meaning of the words " a will or settlement disposing of the shares ". The matter seems to me to be made even plainer by the definition of " family settlement " in para. 3 (2) (b). If the intention were that the trustees of a settlement made by a settlor who did not own the shares at the time when he made the settlement should be able to acquire shares in a private company under a wide investment clause without causing the company to lose its exemption, I cannot see any reason why such a settlement should have to be a settlement made on the family of the settlor. On the other hand, if the requirement is, as counsel for the Board of Trade argues, that the settlor must own the shares at the time when he makes the settlement, then it is quite natural that in considering what sort of trust disposition by a holder of shares is permitted, it should be limited to a settlement on his immediate family as opposed to a settlement on other persons.

I am confirmed in the view which I take as to the meaning of the words " disposing of the shares or debentures " by the decision of the House of Lords in *Sneddon* v. *Lord Advocate* (1), to which counsel for the Board of Trade called my attention. The words there construed were those in the Customs and Inland Revenue Act, 1881, s. 38 (2) (a): "... any property taken ... under a ... disposition, made by ... the deceased ..." In that case there had been a settlement of a sum in cash, and the cash had been applied in the purchase of investments. The question was whether the investments which constituted the trust fund when the settlor died were property taken under the disposition made by him. The House of Lords said that they were not, but that the property taken under the disposition was the sum of cash. Although the words of the Act of 1881 were different, that view of their meaning supports the conclusion at which I have arrived in this case.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the company); *Solicitor, Board of Trade.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(1) [1954] 1 All E.R. 255; [1954] A.C. 257.

CRACKNELL *v.* SMITH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 28, 1960.]

Affiliation—Evidence—Corroboration—Evidence of opportunity not corroboration—Defendant's not giving evidence not corroboration—Affiliation Proceedings Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 55), *s.* 4.

A complaint was preferred on Oct. 27, 1959, by the respondent against the appellant that she had been delivered of a male bastard child on Dec. 26, 1958, of which child she alleged the appellant to be the father. At the hearing of the complaint the respondent and her mother gave evidence. The appellant gave no evidence, but called his brother as a witness whose evidence was such that the justices regarded him as a liar and his evidence as being of no account. On the question whether there was corroboration of the respondent's evidence in some material particular as required by s. 4 (2) of the Affiliation Proceedings Act, 1957,

Held: (i) the evidence of the respondent's mother, being merely evidence of opportunity, could not, of itself, afford corroboration.

Moore v. *Hewitt* ([1947] 2 All E.R. 270) and *Harvey* v. *Anning* ((1902), 87 L.T. 687) distinguished.

(ii) the fact that the appellant failed to give evidence, but called his brother who gave untrue evidence, did not amount to corroboration.

Appeal allowed.

[As to corroboration of the mother's evidence, see 3 HALSBURY'S LAWS (3rd Edn.) 120, para. 184; and for cases on the subject, see 3 DIGEST 394, *313* et seq.

For the Affiliation Proceedings Act, 1957, s. 4 (2), see 37 HALSBURY'S STATUTES (2nd Edn.) 40.]

Cases referred to:

Harvey v. *Anning*, (1902), 87 L.T. 687; 67 J.P. 73; 3 Digest 397, *320*.

Mash v. *Darley*, [1914] 3 K.B. 1226; 83 L.J.K.B. 1740; 111 L.T. 744; 79 J.P. 33; 3 Digest 397, *322*.

Moore v. *Hewitt*, [1947] 2 All E.R. 270; [1947] K.B. 831; [1947] L.J.R. 1276; 177 L.T. 576; 111 J.P. 483; 2nd Digest Supp.

Case Stated.

This was an appeal by Colin Cracknell by way of Case Stated by the justices for the county of Middlesex, sitting at Brentford, before whom a complaint was preferred by the respondent, Gwendoline May Smith, on Oct. 27, 1959, against the appellant, that she had been delivered of a male bastard child on Dec. 26, 1958, of which she alleged the appellant to be the father. The justices adjudged the appellant to be the putative father of the child and made an order against him for the weekly payment of £1 5s. until the child should attain the age of sixteen.

The following summarises the evidence given before the justices. The respondent testified that she met the appellant in December, 1957, and thereafter went out with him frequently in the evenings and had sexual intercourse with him on four occasions in January and February and once in March and that neither of them had used contraceptives on these occasions. In March, 1958, she had reason to believe that she was pregnant and in April and in May she told the appellant of this; he refused to believe her. The child was born in December, 1958, and the appellant was the father. She wrote to the appellant about the child, and received no reply and when she asked him personally what he was going to do about the child he replied that she had been out with somebody else recently. The respondent knew the appellant's brother, Byron Cracknell and had had sexual intercourse with him on two occasions, the second occasion being Feb. 14, 1958, and that her following menstrual period was normal. She had

had sexual intercourse once with another man twelve months before she met the appellant or his brother. She had not had sexual intercourse in or after March, 1958, with Byron Cracknell and had been out with him only twice. She knew Tony Cracknell but had never had sexual intercourse with him and had never told Byron Cracknell that she had done so. She identified Neville Dean as the man she knew as Byron Cracknell.

Mrs. Millicent Smith testified that she was the mother of the respondent and that she knew the appellant who had visited her home where the respondent also lived, on three occasions and had seen the respondent there, in January and February, 1958, and that the respondent and the appellant had been out together from time to time and sometimes the respondent had met the appellant at the corner of the street.

The appellant gave no evidence.

Neville Dean testified that he was the appellant's brother and used to be known as Byron Cracknell and had another brother called Tony Cracknell. He first met the respondent in May, 1958, but not at Christmas, 1957, and had sexual intercourse eight or more times with her and had not used contraceptives. The respondent had told him that she had been out with Tony Cracknell many times and had had sexual intercourse with him. He further stated that he had made a mistake in dates and had first had sexual intercourse with the respondent in March, 1958, but not in December, 1957, and February, 1958. The respondent had never told him that she had had sexual intercourse with the appellant or that she was pregnant and he knew nothing about the child.

It was contended on behalf of the appellant that the evidence of the respondent was not corroborated in a material particular as required by s. 4 (2) of the Affiliation Proceedings Act, 1957, that Neville Dean's evidence should be accepted to the effect that he had had sexual intercourse with the respondent in March, 1958, and might therefore be the father of the child and that in consequence the respondent's case was not proved. It was contended on behalf of the respondent that the evidence of Millicent Smith was sufficient corroboration and that the silence of the appellant was a corroborative factor.

The justices were of opinion that the respondent's evidence was sufficiently corroborated and that her evidence was to be preferred to that of Neville Dean and that the appellant was the father of the child. The justices therefore adjudged the appellant to be the putative father of the respondent's child and made an order against him for the weekly payment of £1 5s. until the child attained the age of sixteen years.

The question for the court was whether the justices came to a correct decision in law on the evidence.

M. D. Sherrard for the appellant.

Quentin Edwards for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the county of Middlesex sitting at Brentford, before whom a complaint, preferred by the respondent against the appellant that she, the respondent,

> " had been delivered of a male bastard child on Dec. 26, 1958, and that the appellant was alleged to be the father of the child ",

was heard on Dec. 8, 1959. The justices made an order against the appellant for the payment of the weekly sum of £1 5s. until the child should attain the age of sixteen years.

Quite shortly, the evidence was as follows. The respondent met the appellant in December, 1957, so that the witnesses were speaking of dates which were a year and three-quarters to two years ago. According to the respondent she met the appellant, as I have said, in December, 1957, and she had sexual intercourse with him on four occasions in January and February, and on a further occasion in March. Without going into details, her case is that this child was conceived on the further occasion in March, 1958. She admitted, however,

that she knew the appellant's brother Byron, and she had sexual intercourse with him on two occasions. She purported to remember the dates, and said that the latter occasion was on Feb. 14, 1958, her case being that her period in February was normal and that, as I have said, the child was conceived in March when she had not had intercourse with Byron but only with the appellant. The respondent's mother gave evidence that she knew the appellant, that the appellant on three occasions visited her house, where the respondent also lived, in about January and February, 1958, and saw the respondent there; that in January and February, 1958, the respondent and the appellant went out together from time to time; that sometimes the respondent would go to meet the appellant at the corner of the street. The appellant gave no evidence and he in fact called as a witness his brother Byron. It is enough to say that Byron's evidence was thoroughly unsatisfactory. He spoke of frequent sexual intercourse with the respondent, and he particularly spoke of intercourse in March, but he was clearly a very unsatisfactory witness and, as I understand it, the justices thought that he was a liar and that his evidence was of no account. The question immediately arises, in those circumstances, whether there was any sufficient corroboration within the Affiliation Proceedings Act, 1957, s. 4 (2). Two matters were said to amount to corroboration: first, that the mother's evidence was sufficient corroboration; secondly, that the silence of the appellant was a corroborative factor, the silence referred to being that he had not gone into the witness-box. The justices found that the respondent's evidence was sufficiently corroborated without saying by what. For my part, I am perfectly satisfied that the evidence of the mother was not sufficient corroboration or, perhaps more accurately, any corroboration; because the weight to be attached to the evidence is a matter for the justices. Quite apart from the fact that she was only speaking as to January and February, 1958, and not as to March, I am quite clear that her evidence was mere evidence of opportunity. Mere evidence of opportunity and nothing more can be no evidence of corroboration. There are cases, of which *Moore* v. *Hewitt* (1) is an example, and also *Harvey* v. *Anning* (2), in both of which there was something more than mere opportunity. In both cases there was evidence, unlike the present case, that the respondent was not being intimate with or associating with anybody else. Secondly, in *Harvey* v. *Anning* (2) there was, as an additional factor, the great difference in the social position of the parties, and in both cases there was real evidence of courtship and association together and not the very vague association spoken of by the mother.

It was then said, and this has been put forward as the main ground in this court, that the failure of the appellant to go into the witness-box, coupled with the fact that he called as a witness his brother who, as it turned out, was thought to be a liar, was of itself corroboration. For my part, I am perfectly clear that a respondent to a complaint of this sort is fully entitled not to go into the witness-box. If there is evidence against him, and some corroborative evidence, it may be that the justices are entitled to take into consideration the fact that he gave no evidence in considering the weight to be attached to the corroboration. But here, if I am right, there was no corroboration at all, and, in those circumstances, I am quite clear that the failure of the appellant to go into the witness-box cannot of itself afford corroboration. Nor, in my view, does the fact that he called his brother to give untrue evidence that this girl had been carrying on with him, the brother, and, indeed, with yet another brother at the material time. I do not think that that, again, can possibly amount to corroboration.

The court was referred to *Mash* v. *Darley* (3). It is enough to say that the facts there were very different. It has always been looked on rather as the high-water mark of what can amount to corroboration and, for my part, I am quite satisfied

(1) [1947] 2 All E.R. 270; [1947] K.B. 831. (2) (1902), 87 L.T. 687.
(3) [1914] 3 K.B. 1226.

that in the present case, nothing in the conduct of the appellant, whether or not it be strictly evidence within the Affiliation Proceedings Act, 1957, not being spoken to by anybody in the witness-box, can in this case amount to corroboration. Accordingly, I would allow this appeal.

ASHWORTH, J.: I agree.

ELWES, J.: I agree.

Appeal allowed.

Solicitors: *L. O. Glenister & Sons* (for the appellant); *Wilfrid Firth, Johnston & Co.*, Brentford (for the respondent).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

R. *v.* STAINCROSS JUSTICES, *Ex parte* TEASDALE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 20, 1960.]

Poison—Sale by retail—Sale by or under supervision of registered pharmacist—Exemption with respect to medicines—Failure to comply with conditions of exemption—Whether in itself an offence—Meaning of "medicine"—Pharmacy and Poisons Act, 1933 (23 & 24 *Geo.* 5 *c.* 25), *s.* 18, *s.* 19, *s.* 24.

Statute—Construction—Criminal and penal statutes—Failure to comply with any of the provisions of a Part of an Act—One section in that Part an exempting provision—Failure to comply with requirement of exempting enactment—Whether an offence—Pharmacy and Poisons Act, 1933 (23 & 24 *Geo.* 5 *c.* 25), *s.* 18, *s.* 19, *s.* 24.

An employee of an authorised seller of poisons, without his instructions and without the supervision of a registered pharmacist, sold urolucosil tablets. The authorised seller of poisons was charged with, and convicted of, unlawfully dispensing medicines contrary to s. 19 (5)* and s. 24† of the Pharmacy and Poisons Act, 1933. Section 24 (1) of that Act made liable to a fine any person who "fails to comply with any of the provisions of Part 2", viz., s. 15 to s. 22. Part 2 of the Act related to poisons and s. 18‡ imposed substantive prohibitions with respect to the sale of poisons. Section 19 was an exempting provision, which applied to medicines and began with the words "Nothing in the last foregoing section shall apply" to a medicine; and sub-s. (5) provided, so far as relevant, that the dispensing of a medicine "must be effected by or under the direct and personal supervision of a registered pharmacist". On application for certiorari,

Held: the conviction must be quashed because a failure to comply with s. 19 of the Pharmacy and Poisons Act, 1933, which was an exempting section, could not create an offence under s. 24, wherein the words "fails to comply" meant failure to comply with some substantive provision of Part 2 of the Act of 1933.

Per CURIAM: "medicine" in s. 19 of the Act of 1933 means medicine which contains a poison (see p. 574, letter D, post).

[As to medicines exempted from restrictions on sale of poisons, see 26 HALSBURY'S LAWS (3rd Edn.) 237-239, paras. 524, 525.

As to the construction of criminal and penal statutes generally, see 31 HALSBURY'S STATUTES (2nd Edn.) 536, para. 704; and for cases on the subject, see 42 DIGEST 726-733, *1455-1565*.

* The relevant part of s. 19, as amended, is printed at p. 573, letter I, post.
† The relevant part of s. 24 is printed at p. 574, letter A, post.
‡ The relevant part of s. 18 is printed at p. 573, letter E, post.

A For the Pharmacy and Poisons Act, 1933, s. 18 (1), s. 19 (as amended), s. 24, see 15 HALSBURY'S STATUTES (2nd Edn.) 276, 278, 283.]

Application for certiorari.

Cyril Teasdale applied for an order of certiorari to bring up and quash his conviction "that he on Oct. 1, 1959 . . . being an authorised seller of poisons, unlawfully did dispense a medicine, viz., urolucosil tablets otherwise than under B the direct and personal supervision of a registered pharmacist, contrary to s. 19 (5) and s. 24 of the Pharmacy and Poisons Act, 1933, as amended by the Veterinary Surgeons Act, 1948, s. 23 and Sch. 2". On conviction the applicant was fined £50. The facts are stated in the judgment of LORD PARKER, C.J.

R. I. S. Bax for the applicant.

C *R. A. R. Stroyan* for the respondent, the prosecutor.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of one Cyril Teasdale, a pharmaceutical chemist, for an order of certiorari to bring up and quash a conviction of the applicant by justices for the petty sessional division of Staincross, dated Nov. 30, 1959, for an offence contrary to s. 19 (5) and s. 24 of the Pharmacy and Poisons Act, 1933, as amended by the Veterinary D Surgeons Act, 1948, s. 23 and Sch. 2.

The short point here, and it is a highly technical one, is whether this applicant was properly charged. The applicant, in fact, acting on advice, pleaded guilty. He has since received other advice, and if that later advice is right, the justices had no jurisdiction in the matter because the charge was wrongly laid.

The provisions of the Act which are relevant to this matter are to be found in E Part 2 of the Pharmacy and Poisons Act, 1933. So far as it is material, s. 18 (1) provides:

> "Subject to the provisions of this Part of this Act, it shall not be lawful—(a) for a person to sell any poison included in Part I of the Poisons List, unless—(i) he is an authorised seller of poisons; and (ii) the sale is effected on premises duly registered under Part 1 of this Act; and (iii) the sale is F effected by, or under the supervision of, a registered pharmacist."

Pausing there, the justices found that the applicant was an authorised seller of poisons, but that an employee for whose actions he was responsible had without his instructions and without the supervision of a registered pharmacist sold some urolucosil tablets. Section 19, which has the sidenote "Exemption G with respect to medicines", begins in this way:

> "(1) Nothing in the last foregoing section shall apply [amongst other things] (b) to a medicine which is dispensed by an authorised seller of poisons on premises duly registered under Part 1 of this Act; or (c) to a poison forming part of the ingredients of a medicine which is supplied by an authorised seller of poisons on premises duly registered under Part 1 H of this Act, if the requirements contained in the following provisions of this section are satisfied in relation thereto."

Then there follow a number of requirements, for instance "(2) The medicine must be distinctly labelled with the name and address of the person by whom it is supplied or dispensed", and that entries be made of "(3) . . . (a) the date on which the medicine was supplied or dispensed; (b) the ingredients of the I medicine and the quantity thereof supplied", and matters of that sort. Section 19 (5) provides:

> "In the case of a medicine which is supplied or dispensed by a person who is an authorised seller of poisons, the supplying or dispensing of the medicine must be effected by or under the direct and personal supervision of a registered pharmacist."

Lastly, it is to be observed that by s. 24, which is dealing with penalties, it is provided by sub-s. (1):

" A person who acts in contravention of or fails to comply with any of the provisions of Part 2 of this Act (other than s. 21 (8) of this Act), or any rules made under this Part of this Act shall, on summary conviction, be liable . . ." A

What is said here on behalf of the applicant is that the only section which provides a substantive offence is s. 18, and that accordingly he was wrongly charged. Section 18 prohibits the sale of any poison except in certain circumstances, and counsel for the applicant contends that s. 19 is not in itself creating any substantive offence, but is, as the sidenote says, merely an exemption; that accordingly it is a defence if somebody can say: Notwithstanding that I appear to have committed an offence under s. 18, I am not guilty because I come within s. 19 and I have complied with the provisions there set out. It is said, on the other hand, that s. 19 is dealing with quite a separate matter, namely, medicines, whether containing poisons or not, and is setting out a code dealing with the supply and dispensing of medicines, and that failure to comply with the provisions of that code is a failure to comply with one of the provisions of Part 2 of the Act within s. 24, the penalty clause. I am satisfied that s. 19 is an exemption from s. 18, and that when medicine is referred to in s. 19 it is medicine which contains a poison. That, I think, must be so. It is in a group of sections in Part 2 dealing with poisons. If s. 19 was intended to provide a separate code dealing with medicines whether poisonous or not, it is to my mind extraordinary that it should begin with the opening words: " Nothing in the last foregoing section shall apply ". It seems to me that s. 19 is an exemption clause, and an exemption which only operates if certain things are fulfilled. Then it is said that even so those things are matters which have to be complied with, and that therefore there is a failure to comply within s. 24, and an offence is created. I feel that a failure to comply with the provisions in s. 19 cannot create an offence under s. 24. The words " fails to comply with any of the provisions of Part 2 of this Act " in s. 24 (1) must mean a failure to comply with some substantive provision of Part 2 and do not apply, as was argued in this case, to something which is a requirement if exemption is to be obtained. It is stretching the words to say that provisions which afford an exemption are provisions which have to be complied with. For those reasons I have come to the conclusion that this applicant was wrongly charged. He should have been charged under s. 18. Under s. 18 he would, as I conceive it, have had no defence because he would not have been able to bring himself within s. 19, not having complied with the provisions of s. 19. This is a highly technical matter; there are no merits so far as I can see in the application but, for the reasons that I have endeavoured to state, I think this man was wrongly charged and that his conviction must be quashed. B C D E F G

ASHWORTH, J.: I agree.

ELWES, J.: I agree.

Order of certiorari: conviction quashed.

Solicitors: *Lamartine Yates & Lacey* (for the applicant); *County Prosecuting Solicitor*, Wakefield (for the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

MOORE *v.* GOODERHAM.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 21, 1960.]

Firearms—Airgun—Sale to person under the age of seventeen—Whether airgun "lethal weapon"—Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 c. 12), *s.* 19 (1), *s.* 32 (1).

The respondent sold an airgun to a purchaser who was, and whom the respondent had reasonable ground for believing to be, under seventeen years of age. The airgun was capable of causing some injury, but was unlikely to cause more than trivial injury to a human being at a range of more than a few feet, though it might cause injury from which death might result if, e.g., it were discharged at another person's eye at extremely close range. The respondent was charged with selling a firearm contrary to s. 19 of the Act of 1937. By s. 32 (1) of the Firearms Act, 1937, a firearm means any lethal barrelled weapon from which a shot, bullet or other missile can be discharged. On appeal from the respondent's acquittal on the ground that the airgun was not a lethal weapon within s. 32 (1),

Held: the airgun, if misused, was capable of causing injury from which death might result and therefore was a lethal weapon; accordingly the offence had been made out.

Read v. *Donovan* ([1947] 1 All E.R. 37) considered.

Appeal allowed.

[As to prohibition of purchase and possession of firearms by young persons, see 10 HALSBURY'S LAWS (3rd Edn.) 599, para. 1115.

For the Firearms Act, 1937, s. 19, s. 32 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 1109, 1115.]

Case referred to:

Read v. *Donovan*, [1947] 1 All E.R. 37; [1947] K.B. 326; [1947] L.J.R. 849; 176 L.T. 124; 111 J.P. 46; 15 Digest (Repl.) 804, *7645*.

Case Stated.

This was an appeal by William Alexander Moore, by way of Case Stated by the justices for the borough of Lowestoft, from the dismissal of an information which he had preferred on Nov. 9, 1959, that on Aug. 31, 1959, the respondent, Stanley John French Gooderham, sold a firearm, namely, a "Diana" airgun to Michael Alan Holmes, a person whom he knew or had reasonable ground for believing to be under the age of seventeen years, contrary to s. 19 of the Firearms Act, 1937. The following facts were found. On Aug. 31, 1959, at Lowestoft, the respondent sold a "Diana" airgun to Michael Alan Holmes, who was then under the age of seventeen and at the time of sale the respondent knew or had reasonable grounds for believing that he was under that age. The airgun had a barrel from which missiles could be discharged such as cup-shaped plastic, or metal, pellets, or small pointed darts. Discharge was effected by air being forced into the barrel behind the pellet or dart by releasing a compressed spring. In para. 2 (e) of the Case Stated the justices found that the airgun was of a type which was the least powerful which could be obtained. It was offered for sale in a carton with instructions which said that it was suitable for indoor use. The power of the airgun was such that it was capable of causing some injury but it was not capable of causing death to a human being or of causing more than trivial injury except probably to the eye if fired at close range. It was unlikely to cause even trivial injury at a range of more than a few feet. In para. 2 (f) of the Case Stated the justices found that the power of the airgun was such that when it was discharged at a range of a few inches at the surface of a piece of plywood five thirty-seconds of an inch in thickness, lying on a hard floor, a metal pellet became embedded in the plywood to such an extent as to be visible

from the remote side, and the remote side was penetrated by the point of a dart, the body of which failed to penetrate the nearer surface. A

It was contended by the appellant that the airgun was a firearm for the purpose of s. 19 of the Firearms Act, 1937. The respondent, who was not represented, did not offer any contention apart from giving evidence about the power of the airgun.

The facts stated in para. 2 (f) of the Case, which were included at the appellant's request, were established by cross-examination of the respondent by the appellant and did not form part of the prosecution's case. To render them relevant to the issue, the justices considered that there should also have been evidence concerning the relative resistance to penetration of plywood and human flesh. In the absence thereof they were uncertain whether pellets, discharged at the same close distance at an unprotected human body, would have broken the skin or would have caused a bruise without breaking the skin or would have merely stung without bruising. They thought that the point of a dart, but not its body, would have penetrated the skin, and that ordinary clothing, thick enough to cover the point of a dart, would be complete protection against any injury. B C

The justices were of opinion that the airgun was not a lethal weapon and therefore was not a firearm for the purpose of s. 19 of the Firearms Act, 1937. D

The question for the opinion of the court was whether the justices came to a correct determination of the law.

L. K. E. Boreham for the appellant.

The respondent did not appear and was not represented. E

LORD PARKER, C.J.: Section 19 (1) of the Firearms Act, 1937, is in these terms:

> " No person under the age of seventeen years shall purchase or hire any firearm or ammunition, and no person shall sell or let on hire any firearm or ammunition to any other person whom he knows or has reasonable ground for believing to be under the age of seventeen years." F

By s. 32 (1), " firearm ", so far as it is relevant to this case, is defined in these words:

> " ' firearm ', except where otherwise expressly provided, means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged . . ." G

The facts are as follows. On Aug. 31 the respondent sold this " Diana " airgun to Michael Alan Holmes. Michael Alan Holmes was under the age of seventeen years, and the respondent at the time knew or had reasonable ground for believing that Holmes was under the age of seventeen years. Accordingly, the sole question was whether this " Diana " airgun was a firearm within the statute and within s. 19 (1). The justices held that it was not, and they came to that conclusion really on these grounds: that, having regard to the definition in s. 32 (1) and, in particular the word " lethal ", the weapon in question must be one likely to cause injury of the sort which might result in death. They rejected a contention that a lethal weapon was one which was merely capable of causing injury though not injury of the sort likely to cause death. In saying that, I understand that they were giving effect to the word " lethal " in this sense: that the weapon must be of a sort which causes injury of a type from which death would in the ordinary way result. For my part, I think that they were fully entitled to give effect to the word " lethal " in the sense that the injury must be of a kind which may cause death. That is the ordinary meaning of the word, but it is to be observed that in this connexion one is not considering whether a firearm is designed or intended to cause injury from which death results, but rather whether it is a weapon which, however misused, may cause injury from which death may result. I may put it in this way. Section 19 is to H I

prevent, amongst other things, a weapon getting into the hands of a very small child who may misuse it by firing it point blank, and point blank, say, at an eye or an ear, or some particularly vulnerable part; and if it is capable of causing more than trifling and trivial injury even when misused, then it is a weapon which is capable of causing injury from which death may result. It seems to me that the justices were really looking at the weapon and saying: is it the sort of weapon which in the ordinary way if properly handled will cause death?

That being the approach to the matter, what were the facts? This was a barrelled weapon from which a missile could be discharged, the missile being either plastic or metal pellets or small darts. In para. 2 (e) of the Case Stated the justices say that it was the least powerful type of airgun which was obtainable. The power of the gun was such

> " that it was capable of causing some injury but it was incapable of causing death to a human being, and incapable of causing more than trivial injury."

Pausing there, if there were nothing more in the case, I think for my part that the justices would have been justified in coming to the decision that they did reach; but they go on to qualify that by saying—

> " except probably to the eye at extremely close range, and unlikely to cause even trivial injury at a range of more than a few feet."

Then in para. 2 (f) they go further and say:

> " The power of the said airgun was such that when it was discharged at a range of a few inches at the surface of a piece of plywood five thirty-seconds of an inch in thickness, lying on a hard floor a metal pellet became embedded in the plywood to such an extent as to be visible from the remote side and the remote surface was penetrated by the point of a dart, the body of which failed to penetrate the nearer surface."

It is true, as the justices point out, that they did not have evidence before them comparing the resistance of the human skin with the resistance of a piece of plywood but I find it quite impossible on that finding to say that this was not a weapon which, when misused, was capable of causing injury from which death might result.

I should only add that reference has been made to *Read* v. *Donovan* (1), where, in the course of his judgment, LORD GODDARD, C.J., said this (2):

> " A lethal weapon means a weapon capable of causing injury, and if [the weapon] is barrelled, and if ' a shot, bullet, or other missile can be discharged ' from it, it is a firearm."

Again, at the end of his judgment, he said (3): ". . . the question simply is whether the weapon is capable of inflicting harm." That was a case in which the weapon in question if misused was clearly a lethal weapon and, in those circumstances, I do not feel that too much attention can be attached to the definition given in that judgment. I am far from saying, however, that it is wrong if one once considers that all that it is necessary to find is a weapon capable of doing something more than trivial harm because, in those circumstances, death might well result if it were fired at a particularly vulnerable point. I

(1) [1947] 1 All E.R. 37; [1947] K.B. 326. (2) [1947] 1 All E.R. at p. 37.
(3) [1947] K.B. at p. 328.

think that the justices were wrong in this case and that on their findings there is only one conclusion, namely, that the offence was made out. In those circumstances I would send the case back to the justices with such a direction.

ASHWORTH, J.: I agree.

ELWES, J.: I agree.

Appeal allowed.

Solicitors: *Lee, Ockerby, Johnson & Co.*, agents for *R. W. Gash*, Ipswich (for the appellant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

JACOBS *v.* JACOBS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), October 6, 1960].

Divorce—Practice—Pleading—Answer—Answer by respondent containing cross-prayer for divorce—Supplemental petition by petitioner—Answer by respondent to supplemental petition containing cross-petition for divorce—Respondent's cross-prayer and cross-petition on file at hearing—Withdrawal of cross-prayer and cross-petition—Service of new petition on petitioner in court—Registrar's certificate dispensed with and suits consolidated—Decree nisi—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (2).

In December, 1958, the wife presented a petition for divorce on the ground of the husband's cruelty and the husband by his answer dated Feb. 23, 1959, denied the cruelty and himself cross-prayed for a decree, in the exercise of the court's discretion, on the ground of the wife's cruelty. In March, 1959, the wife filed a reply denying cruelty. In September, 1959, the wife filed a supplemental petition on the ground of the husband's adultery. In his answer, dated Dec. 10, 1959, to that supplemental petition the husband admitted adultery but by way of cross-petition prayed for divorce, in the exercise of the court's discretion, on the ground of the wife's desertion for the three years immediately preceding the date of presentation of that answer, i.e., Dec. 10, 1959. In January, 1960, the wife filed a reply admitting that she had withdrawn from cohabitation on Nov. 2, 1956, but alleged just cause for so doing. In April, 1960, the Court of Appeal held that by virtue of the Matrimonial Causes Rules, 1957, r. 3 (2), a respondent who had filed an answer containing a cross-prayer for divorce could not present a cross-petition for divorce unless and until the cross-prayer in his answer had been disposed of. When the present suit came on for hearing in October, 1960, the husband applied for leave to amend his answers dated Feb. 23, 1959, and Dec. 10, 1959, by deleting the cross-prayer and the cross-petition respectively, for leave to serve on the wife in court a new petition alleging desertion and praying for the same relief as before, and for an order abridging the time for the entry of appearance by the wife, for dispensing with the registrar's certificate and for an order consolidating the wife's suit and the husband's suit.

Held: leave would be granted as sought, there being in the present case no improper acceleration of the trial of the husband's suit.

Observations of WILLMER, L.J., in *Blacker* v. *Blacker* ([1960] 2 All E.R. at pp. 295, 296) applied.

[As to the restriction on presenting a petition when there is another undisposed of petition by the same petitioner, see 12 HALSBURY'S LAWS (3rd Edn.) 314, 315, para. 630, note (e).

As to cross-petitions in answer, see ibid., 341, para. 713, note (e); and for cases on the subject, see 27 DIGEST (Repl.) 482, *4199* and SUPPLEMENT.]

Cases referred to:

Blacker v. *Blacker*, [1960] 2 All E.R. 291; [1960] 2 W.L.R. 800.

Swiszczowski v. *Swiszczowski & Jewasinski*, [1959] 1 All E.R. 495; [1959] 1 W.L.R. 187; 3rd Digest Supp.

Thatcher v. *Thatcher & Gill* (*Wheeler intervening*), [1959] 2 All E.R. 649; [1959] 1 W.L.R. 730; 3rd Digest Supp.

Application.

This was an application by the husband to amend his pleadings in a divorce suit.

The parties were married in 1950 and there was one child. The wife presented a petition for divorce on Dec. 11, 1958, on the ground of the husband's cruelty. By his answer dated Feb. 23, 1959, the husband denied the alleged cruelty and alleged that the wife had treated him with cruelty and concluded:

> " The [husband] therefore humbly prays that the court will be pleased to reject the [wife's] prayer with costs, exercise its discretion to grant a decree nisi notwithstanding the adultery of the [husband] during the said marriage and decree that the marriage may be dissolved, that the [wife] may be condemned in the costs of the suit . . ."

By her reply dated Mar. 16, 1959, the wife denied the alleged cruelty. By a supplemental petition dated Sept. 15, 1959, the wife alleged that the husband had committed adultery. The husband in his answer to the supplemental petition, dated Dec. 10, 1959, admitted the general allegation of adultery and by way of cross-petition alleged that the wife had deserted him for the three years immediately preceding the presentation of that answer [i.e., Dec. 10, 1959] and concluded with a prayer in substantially the same terms as in his answer dated Feb. 23, 1959. The wife in her reply dated Jan. 6, 1960, admitted that she had withdrawn from cohabitation on Nov. 2, 1956, but pleaded that she had just cause for so doing and relied on the facts set out in her petition and her supplemental petition.

The suit came before KARMINSKI, J., on Oct. 6, 1960, when counsel for the husband sought leave to amend the answer dated Feb. 23, 1959, by deleting the cross-prayer (save for the prayer to reject the wife's prayer in her petition), to amend the answer to the supplemental petition, dated Dec. 10, 1959, by deleting the cross-petition and the prayer of the cross-petition (save for the prayer to reject the wife's prayer in her supplemental petition), and to file a new petition alleging desertion by the wife and containing the same prayer for relief; for an order abridging the time for entry of appearance by the wife and for dispensing with the registrar's certificate and for an order consolidating the wife's suit and the husband's suit.

W. D. Collard for the wife.

R. F. G. Ormrod, Q.C., and *Leonard Halpern* for the husband.

KARMINSKI, J.: I have no doubt as to the course which I ought to pursue here. The present application to amend the husband's pleadings comes as a result of an answer being filed on his behalf on Dec. 10, 1959, at a time when practitioners were probably following two decisions of my own, namely, *Swiszczowski* v. *Swiszczowski & Jewasinski* (1) and *Thatcher* v. *Thatcher & Gill* (*Wheeler intervening*) (2). These decisions were held by the Court of Appeal in *Blacker* v. *Blacker* (3) to have been wrongly decided.

---

(1) [1959] 1 All E.R. 495. (2) [1959] 2 All E.R. 649. (3) [1960] 2 All E.R. 291.

The difficulty, however, in the present case is that the learned draftsman who settled the answer to the supplemental petition in December, 1959, was misled by my now admitted errors, and alleged by way of cross-petition desertion for the three years immediately preceding the presentation of that answer, namely, Dec. 10, 1959. Counsel for the husband, now realising his difficulties, seeks leave to strike out the prayer of his answer and the supplemental answer, except in so far as such answers merely ask for the wife's prayer to be rejected, with the usual consequences as to costs; he also asks for leave to file here and now a new petition by the husband as a petitioner in which the same allegations will be made and which will contain a prayer in substantially the same form as the prayers contained in the original and supplemental answer. He also asks that when that has been done the two suits shall be consolidated.

He founds that suggestion on the decision of *Blacker* v. *Blacker* (4), and in particular on some observations of WILLMER, L.J. (5), in which he said that the objection taken in *Blacker* v. *Blacker* (4) possibly would not have been taken if in that case the commissioner had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer, before leave was asked to amend the answer by adding a cross-petition and the reply by adding an answer to the cross-petition. WILLMER, L.J., suggested (6) that had that course been followed

> " . . . and had the parties then asked leave to institute their fresh proceedings by adding a cross-petition and an answer thereto, it may be that the learned commissioner could properly have acceded to the request, and with the consent of the parties could then have given the necessary directions for abridgement of time, dispensing with the registrar's certificate, and so forth, so as to enable him to dispose of the issue of desertion while he was yet seised of the case, and thus avoid the necessity for the parties to incur the additional costs of a fresh trial before another judge."

Counsel for the wife said that in the present case it was not right to follow that line, although he at once agreed that I have power, having regard to the decision of *Blacker* v. *Blacker* (4) to make the order suggested by counsel for the husband. Counsel for the wife rightly emphasised the fact that all three lords justices in *Blacker* v. *Blacker* (4) had warned of the danger of the form used in the pleading of this case as being merely a device to expedite the hearing of a suit. I am very conscious that such a danger may arise in certain cases, but I do not think that it had arisen, or is likely to arise, here. This suit was originally started in December, 1958. The supplemental petition was filed in 1959. The husband's answer to the supplemental petition is dated Dec. 10, 1959, and the wife replied to that on Jan. 6, 1960. There was apparently some delay in getting the renewal of the registrar's certificate, and this was not obtained until June, 1960. In the result, therefore, it seems to me that so far from any improper acceleration of the trial of this suit having been obtained, it has, on the contrary, slipped back rather a long way in the queue of cases awaiting trial. While I pay full attention to the danger of improper acceleration, I do not think that it is a matter which arises in the present case.

Counsel for the wife also said that an application of this kind could have been made some months ago, and that I think is, up to a point, a justifiable criticism. The law reports dealing with *Blacker* v. *Blacker* (4) were published in May, 1960, but it does not seem to have occurred to either side in the present case to get the pleadings into order until today. It was open, of course, to counsel for the husband to make an application at the registry to correct the position some months ago. Equally it was open to counsel for the wife to move to strike out the offending parts of the husband's pleadings if he thought it desirable. It may be, perhaps, because the matter was not appreciated until recently, that

(4) [1960] 2 All E.R. 291. (5) [1960] 2 All E.R. at p. 295.
(6) [1960] 2 All E.R. at p. 296.

nothing was done and that the application was made today at the beginning of the trial.

I cannot help feeling that in matters of this kind it is always desirable to make the necessary application to correct or to strike out pleadings at the earliest possible moment. I have to deal with the situation as it is before me today and I think that I must accede, in the exercise of the discretion which I have in this matter, to the application of counsel for the husband.

[HIS LORDSHIP accordingly gave leave to the husband to amend the answers as prayed, and to serve a new petition on the wife in court. HIS LORDSHIP also ordered that the time for appearance by the wife be abridged to 2 p.m. on the same day, i.e., Oct. 6, 1960, that the registrar's certificate be dispensed with, that the husband's suit be consolidated with the wife's suit, and that the wife's suit be the leading suit. The wife did not proceed with her suit or take any further part in the proceedings, and her petition was dismissed. HIS LORDSHIP found on the evidence for the husband that the wife had deserted him and, in the exercise of the court's discretion, granted him a decree.]

Decree nisi.

Solicitors: *Alexander Fine & Co.* (for the wife); *Julius Simpson* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

EAKETTS *v.* EAKETTS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J., in chambers), October 20, 1960.]

Divorce—Maintenance—Application—Leave of judge—Claim not included in petition but made twelve and a half years after decree absolute—At date of petition maintenance could not be claimed in petition—At date of notice of application for maintenance leave of judge required if no claim for maintenance in petition—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (3), *s.* 29—*Matrimonial Causes* (*Property and Maintenance*) *Act*, 1958 (6 *&* 7 *Eliz.* 2 *c.* 35), *s.* 1—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3), *proviso* (ii).

In 1946 the wife presented a petition for divorce on the ground of the husband's adultery. She was granted a decree which was made absolute on Sept. 3, 1946. The operative rules at that time were the Matrimonial Causes Rules, 1944, r. 4 of which related to the contents of the petition. That rule did not provide for the inclusion in the petition of any claim for maintenance; but r. 44 (1) provided that a claim for maintenance could be made by the petitioner at any time after the time for entering an appearance had expired, but not later than one month after final decree except by leave of the judge. Thus the wife's petition did not contain and could not have contained any claim for maintenance.

On Mar. 4, 1959, the wife first gave notice of an application for maintenance relying on s. 1 (1) of the Matrimonial Causes (Property and Maintenance) Act, 1958, which gave the court power to make an order for maintenance not only, as theretofore, on pronouncing a decree but also at any time thereafter. By r. 3 (3) of the Matrimonial Causes Rules, 1957, which were operative at the date of the wife's notice, every application for maintenance was required to be made in the petition but proviso (ii) gave a judge power to grant leave for an application for maintenance to be made subsequently.

Affidavits having been sworn by both the wife and the husband, the wife applied to the registrar for an order for the oral examination of the husband as to his means and for an order for discovery of documents. At the hearing of these applications by the registrar on Sept. 19, 1960, the husband objected to the court's jurisdiction on the ground that, there being no claim for maintenance in her petition, the wife was required by r. 3 (3), proviso (ii), of the Rules of 1957, to obtain the leave of a judge before applying for maintenance. The registrar referred the matter to the judge.

Held: the court had jurisdiction to entertain the wife's application for maintenance by virtue of s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, and leave of the judge under r. 3 (3), proviso (ii), of the Rules of 1957 was not required since no claim for maintenance could have been contained in the petition and, therefore, that rule was not applicable.

Pachner v. *Parker* (*formerly Pachner*) ([1960] 1 All E.R. 159) applied.

[As to the time for making an application for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 432, para. 972; and for cases on the subject, see 27 DIGEST (Repl.) 631, *5919-5921.*

For the Matrimonial Causes Act, 1950, s. 19 (3), s. 29, see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 415.

For the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule, see 38 HALSBURY'S STATUTES (2nd Edn.) 441, 453.

For the Matrimonial Causes Rules, 1957, r. 3 (3), proviso (ii), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 218; and for the amendments effected by the Matrimonial Causes (Amendment) Rules, 1958, see SUPPLEMENT.]

Case referred to:

Pachner v. *Parker* (*formerly Pachner*), [1960] 1 All E.R. 159; [1960] 1 W.L.R. 486.

Summons.

In this case, the wife, having given notice of application for maintenance, applied to the Gloucester District Registrar for an order for the husband to attend for oral examination as to his means and for an order for discovery of documents. The husband contended that the court had no jurisdiction to entertain the wife's application for maintenance. The registrar referred the matter to the judge in chambers.

R. V. Cusack, Q.C., and *R. L. C. Hartley* for the wife.

D. A. Fairweather for the husband.

Marshall, J., having heard argument in chambers, made a decision as recorded above and authorised the publication of this report.

Solicitors: *Watterson, Moore & Co.*, Cheltenham (for the wife); *Langhams & Letts*, agents for *Philip Baker & Co.*, Birmingham (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

MORGAN AND ANOTHER *v.* JONES AND ANOTHER.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), October 6, 1960.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Answer—Failure of landlord to state, in his answer to tenants' originating application, his objection to terms proposed by tenants—Whether court required to hear evidence as to reasonableness of terms—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 29 (1), *s.* 33, *s.* 34, *s.* 69 (2)—*County Court Rules*, 1936 (*as amended*), *Ord.* 40, *r.* 8 (2), *Form* 336.

A landlord having served on the tenants of business premises a notice to terminate the tenancy under s. 25 of the Landlord and Tenant Act, 1954, the tenants applied to the county court, by originating application under the County Court Rules, 1936 (as amended), Ord. 40, r. 8 (1)*, for the grant of a new tenancy under the Act of 1954, the terms proposed by the tenants being set out in the application. By Ord. 40, r. 8 (2)*, the landlord was required to file his answer in Form 336 of the County Court Forms. In his answer, in accordance with para. (1) of Form 336, the landlord stated that he opposed the grant of a new tenancy and set out the ground of his opposition, but he did not go on to state, as required by one of the alternatives in para. (2)† of the form, that, if a new tenancy was granted, he objected to its being granted on the terms proposed by the tenants. At the hearing of the application, counsel then appearing for the landlord submitted that, although the landlord had not specifically stated in his answer that he opposed the proposed terms, such opposition was implied and he was entitled to call evidence to show that the proposed terms were not reasonable. The county court judge held that a new tenancy should be granted. In regard to the terms of the tenancy, the judge ruled that the case must proceed on the pleadings as they stood, and that, therefore, evidence as to valuation could not be called; and he held that, as the only terms proposed on the pleadings were those contained in the tenants' application, the new tenancy should be granted on those terms. The landlord appealed from the order of the county court judge in regard to the terms of the tenancy.

Held: in making an order for the grant of a new tenancy under s. 29‡ of the Act of 1954, it was the duty of the judge under s. 33 and s. 34§ of the Act, in default of an agreement in writing between the parties, to determine whether the terms of the tenancy were reasonable in all the circumstances, and his judicial discretion on these matters could only be exercised on evidence; therefore, the case would be remitted to the judge to determine whether the terms proposed by the tenants were reasonable, and, if on the evidence they were not reasonable, to grant a new tenancy on such terms as would accord with s. 33 and s. 34.

Per UPJOHN, L.J.: it was wrong to regard the documents required in these applications as pleadings in the strict sense (p. 586, letter G, post).

Appeal allowed.

[As to the duration of a new tenancy granted by order of the court, and as to the rent payable under the tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 898, 899, paras. 1724, 1725.

For the Landlord and Tenant Act, 1954, s. 29, s. 33, s. 34 and s. 69 (2), see 34 HALSBURY'S STATUTES (2nd Edn.) 413, 417, 418 and 443.

---

* By the County Court Rules, Ord. 40, r. 8: "(1) An application for a new tenancy under s. 24 of the Act of 1954 shall be made by originating application in Form 335.

"(2) The respondent shall, within eight days of the service of the application on him . . . file in the court office an answer in Form 336 . . ."

† The paragraph is printed at p. 585, letter B, post.

‡ The terms of s. 29 (1) are printed at p. 586, letter A, post.

§ The terms of s. 33 and the relevant terms of s. 34 are printed at p. 586, letters B to D, post.

For the County Court Rules, 1936 (as amended), Ord. 40, r. 8, and Form 336, see the COUNTY COURT PRACTICE, 1960, pp. 1593, 1602.] A

Appeal.

The respondents, Thomas Arden Jones and Cyril Ayre, appealed from part of an order made by His Honour JUDGE TREVOR MORGAN at Ammanford County Court on Feb. 5, 1960, on an application, under Part 2 of the Landlord and Tenant Act, 1954, for the grant of a new tenancy of a plot of land adjacent to the Castle Garage, Ammanford. The applicants were David Rees Morgan and Thomas Lewis Morgan. B

In 1926 the first respondent, Thomas Arden Jones, was granted a lease of the plot of land for a period of ninety-nine years by the late Lord Dynevor. By a verbal agreement in 1954 between the first respondent and the applicants, the applicants became the tenants of the plot of land and used it for the purposes of their business. On Aug. 1, 1959, under s. 25 of the Act of 1954, the first respondent served a notice on the applicants terminating their tenancy on Feb. 3, 1960, and stating, pursuant to s. 25 (6), the ground on which he would oppose an application for a new tenancy. The ground on which he relied was based on that set out in s. 30 (1) (b) of the Act, namely, that the applicants had throughout the tenancy persistently delayed in paying the weekly rent when it became due. In reply, the applicants' solicitors notified the first respondent that the applicants would not be willing to give up possession. By an originating application, filed on Nov. 10, 1959, the applicants applied to the county court for the grant of a new tenancy, the application being on Form 335 of the County Court Forms, pursuant to the County Court Rules, 1936 (as amended), Ord. 40, r. 8 (1), and containing the applicants' proposals as to the terms of the new tenancy. Only the first respondent was made a respondent to the originating application. By his answer, dated Nov. 30, 1959*, the first respondent stated that he opposed the grant of a new tenancy on the ground stated in his notice under s. 25 of the Act, and set out the ground. He went on to say that his immediate landlord was Cyril Ayre, and that he had entered into a contract to sell the land to Cyril Ayre, who required it for his own use and occupation. The applicants then obtained leave to add Cyril Ayre as a respondent. C D E F

The county court judge held that, on the evidence, this was not a case in which he ought to refuse the application for the grant of a new tenancy on the ground of persistent delay in the payment of rent which had become due. He further held (on a point taken by the respondents and on which there was no appeal), that the tenancy of the applicants was to be treated for the purposes of s. 23 of the Act of 1954 as occupation for the purposes of a business carried on by the tenants. Accordingly, the county court judge held that a new tenancy should be granted and that, as the first respondent in his answer had not specifically opposed the terms of the new tenancy proposed by the applicants, the respondents could not now be allowed to call evidence as to whether the terms were reasonable. The respondents appealed from the decision of the county court judge on this point. G H

D. H. Sullivan for the respondents.

B. M. Rees for the applicants.

UPJOHN, L.J., delivering the first judgment at the request of ORMEROD, L.J., said: The applicants, who are respondents in this court and are hereinafter called " the tenants ", were weekly tenants of the first respondent, Thomas Arden Jones (hereinafter called " the landlord ") (who is the first appellant in this court), at a rent of £1 a week: that was a tenancy of business premises. The landlord gave a notice under s. 25 of the Landlord and Tenant Act, 1954, to terminate the tenancy and, accordingly, the tenants applied for a new tenancy I

* The answer was filed out of time. The point that it was out of time was formally taken by counsel for the applicants but was not pressed, and leave was given to the first respondent to rely on the answer.

A in accordance with the Act. The terms which they proposed, and which they set out in their originating application, were for a ten-year tenancy at a rent of £52 a year. The landlord put in an answer which was on the lines of the form prescribed by the County Court Rules (1), namely, Form 336, and he stated that he opposed the grant of a new tenancy on certain grounds, which he set out in his answer. He did not, however, incorporate in that answer anything on the B lines of para. (2) of Form 336. That paragraph reads:

> " If a new tenancy is granted, I do not object to its being granted on the terms proposed by the applicant *or* [this is the alternative] I object to its being granted on the following terms proposed by the applicant, namely . . ."

The matter came before the learned county court judge on Jan. 22, 1960, C when counsel for the tenants took the point that, on the pleadings as they stood, the only matter to be decided was whether or not a new tenancy should be granted. The learned judge dealt with the matter at the beginning of his judgment in this way:

> " [Counsel for the tenants] took the point that on the formal pleadings as they stood when the case came on for hearing, the only matter to be decided D was whether or not a new tenancy ought to be granted in view of the alleged persistent delay in paying the rent and that if the respondents failed to establish that ground then a new tenancy must be granted on the terms set out in the application and that no question of valuation arose. In answer to this point [counsel then appearing for the respondents] argued that even though it had not been specifically stated in the reply that the re- E spondents opposed the terms of the proposed new tenancy, they were still entitled to call evidence at the proper time to establish that the proposed terms were not fair or reasonable and that the tenancy was worth far more than the [tenants] proposed. He argued that as it had been pleaded that the respondents opposed any grant of a new tenancy such opposition implied a right to oppose and question the terms proposed by the [tenants]. No F application was made for leave to amend the respondent's answer. I ruled that the case must proceed on the pleadings as they stood and that although evidence as to valuation was available it could not be called. It followed that apart from any submission on the construction of s. 23 the only point for argument and decision was the question of the alleged persistent delay in the payment of rent."

G The learned judge then went on to deal with the question whether or not a new tenancy should be granted. He came to the conclusion that a new tenancy should be granted, and there is no appeal from that part of his decision; nor is this court concerned with s. 23. He concluded his judgment in these terms:

> " It therefore follows that the [tenants] are entitled to the grant of a new H tenancy and as the only terms proposed on the pleadings are those contained in the [tenant's] originating application, I am bound to grant the [tenants] a new tenancy on the terms which are set out in their application. I think it right to add, however, that if I had a discretion in the matter I doubt if I should have granted it for so long a term without the option of a break or at so low a figure for the rent."

I The learned judge, therefore, came to the conclusion that, the pleadings, as he called them, being in the state in which they were, he had no right to try the question whether or not the terms proposed by the tenants were reasonable. The question whether he was right in that must depend, of course, on the terms of the Act giving the court jurisdiction to grant new tenancies.

The relevant sections are s. 29, s. 33 and s. 34 of the Landlord and Tenant Act, 1954. Section 29 (1) is in these terms:

(1) County Court Rules, 1936 (as amended), Ord. 40, r. 8 (2).

" Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

That takes one to s. 33, which is in these terms:

" Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy."

Section 34 reads:

" The rent payable under a tenancy granted by order of the court under this Part of this Act (2) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor . . ."

That is the task of the learned judge, and it seems to me clear that, that being his duty, he can only determine whether the terms of the tenancy are reasonable in all the circumstances, or whether the rent is one which might reasonably be expected to be obtained by a willing lessor, if he hears evidence on that matter. In my judgment, mere proposals put forward by applicants for a new tenancy are quite insufficient to enable the judge, on those proposals alone, to come to any conclusion on the matter at all. There must be evidence before him to support the reasonableness of those proposals. If a landlord using Form 336 likes to state in his answer that he does not object to a tenancy being granted on the terms proposed by the applicant, that, coming from the landlord himself, is the best possible evidence that the terms proposed by the tenant are in fact reasonable. But in the absence of agreement, or in the absence of such a statement, it seems to me that the judge must exercise his judicial discretion, and that can only be exercised on evidence. It is, in my judgment, wrong to regard the documents required in these applications as pleadings in the strict sense. If the respondent does not put in an answer or appear, the judge is still bound to exercise his discretion under the Act which he can only do on evidence; he cannot regard the matter as concluded by the tenant's proposals. It is clear in this case that there was no evidence of any sort. The learned judge himself expressly pointed out that he was not exercising any judicial discretion in the matter, and he seems to have thought that in some respects the terms proposed might be considered to be unreasonable.

Counsel for the tenants, however, sought to submit that there was in fact, on the true inference to be drawn from the facts of this case, an agreement which would satisfy the provisions of s. 33 and s. 34 of the Act. An agreement, to satisfy those provisions, must be an agreement in writing: that is plain from s. 69 (2) of the Act. Counsel for the tenants submits that the true inference to be drawn from the fact that the landlord did not state in his answer whether he objected, or whether he did not object, to the grant of a tenancy in the terms proposed must lead to the inference that he agreed to the terms proposed. For my part, I am quite unable to accept that submission. Paragraph (2) of Form 336 is optional in its terms and, if the landlord—although in breach, no doubt, of his duty under the rules—fails to state one way or the other whether he does or does not object to the terms proposed, it does not seem to me that this

(2) Part 2, which is headed " Security of tenure for business, professional and other tenants," and consists of s. 23 to s. 46, inclusive.

court can draw any inference from that omission on the part of the landlord. In the present case the submission becomes quite unreal because in fact counsel appeared before the learned judge and said that he did desire to oppose the terms proposed by the tenants.

In my judgment, therefore, on this short point, the judgment of the learned judge on this part of the case cannot be supported and the case must be remitted to him to consider the terms proposed by the tenants and to determine whether those terms are reasonable in all the circumstances and whether the rent is one which could be reasonably expected to be obtained by a willing lessor: if, on the evidence, the terms are not reasonable, then it is his duty to grant a new tenancy on such terms as will accord with s. 33 and s. 34.

In this court, during the course of argument, counsel for the respondents asked that he formally be allowed to amend the landlord's answer so as to bring him into a compliance with the rules: that must be granted and, indeed, it was not strenuously opposed by counsel for the tenants. Accordingly, the matter must go back to the learned judge, the answer being amended to permit the point to be raised, and then he will determine the whole matter on the evidence which will, no doubt, be adduced before him by both parties.

With regard to costs, the position is this. In the court below the matter was determined against the respondents solely on the question of a new tenancy, and the learned county court judge, exercising his discretion, ordered them to pay the costs in that court. As that part of his judgment is not sought to be disturbed, that order as to costs must stand. In this court the matter is a little more difficult. On the one hand, the learned judge was led into error by a submission made on behalf of the tenants, namely, that the matter was concluded on the pleadings. To that extent it seems that the tenants ought not to have any costs of this appeal. On the other hand, the landlord was plainly in breach of the rules in failing to state whether or not he objected to the terms of the proposed tenancy. Secondly, counsel then appearing for the respondents failed to ask for leave to amend his answer when he found that the learned judge was taking the view which he did take, that the pleadings concluded the matter. That was a most unfortunate omission for, as counsel for the tenants admitted, he could hardly have resisted such an amendment, subject possibly to an adjournment. In all the circumstances of this case, the proper order, in my judgment, would be that there should be no order as to costs of this appeal.

ORMEROD, L.J.: I agree and, although we are differing from the learned judge on this part of the case, there is nothing that I wish to add. In my view, the case should be sent back for determination by the learned county court judge on the lines indicated by UPJOHN, L.J.

WILLMER, L.J.: I also agree.

ORMEROD, L.J.: Then there will be an order that the answer be amended in the terms of counsel's application, and the case will be remitted to the learned county court judge to determine the reasonableness of the terms of the tenancy proposed by the tenants. There will be no order for costs.

Appeal allowed.

Solicitors: *Walker, Charlesworth & Jefferson*, agents for *G. Tracy Phillips*, Ammanford (for the respondents); *Samuel Griffith & Co.*, Ammanford (for the applicants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PEARL AND ANOTHER *v.* LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), October 6, 7, 10, 26, 1960.]

Highway—Street—Widening—Michael Angelo Taylor's Act—Compensation—Local authority not owner at relevant date—Yearly tenant of kiosk—Tenancy determinable by six months' notice at any time—Six months' notice to quit given by local authority under statute—Loss of security under Landlord and Tenant Act, 1954—*Whether compensation payable—Metropolitan Paving Act,* 1817 (57 *Geo.* 3 *c.* xxix), *s.* 90.

The tenants occupied a kiosk in the foreground of Charing Cross Station, London, on a yearly tenancy terminable by six months' notice expiring at any time, the tenancy being subject to the Landlord and Tenant Act, 1954. In contemplation of the widening of the Strand and in purported exercise of powers conferred on them by s. 90 of the Metropolitan Paving Act, 1817, in respect of such premises as "shall be purchased" London County Council served on the tenants in October, 1956, six months' notice to quit as required by the Act, but subsequently gave them two extensions of time amounting in all to over a year, and on July 3, 1958, the tenants gave up possession. The county council had not, at the time of the hearing, yet purchased the property from the landlords.

Held: the tenants were not entitled to compensation under s. 90 of the Act because—

(i) the section applied only to premises of which there had been either a completed conveyance or a binding contract of sale to the acquiring authority at the time of the exercise of the powers and the purported notice was therefore a nullity and no claim for compensation under the section lay (see p. 591, letters C and F, post).

(ii) even if the notice were valid, however, the tenancy would not have been terminated thereby "before the expiration of" the tenants' term within the meaning of s. 90 since the notice would not have ended the tenancy at a date earlier than that on which the landlords could have brought it to an end (see p. 592, letter I, post; *R.* v. *London & Southampton Ry. Co.*, (1839), 10 Ad. & El. 3, applied) and

(iii) the loss of an opportunity of obtaining a new tenancy under the Landlord and Tenant Act, 1954, was not a subject of compensation under s. 90 of the Act of 1817, which made allowable compensation for loss of existing tenancies.

Appeal dismissed.

[As to acquisitions under Michael Angelo Taylor's Act, see 25 HALSBURY'S LAWS (3rd Edn.) 59, para. 114, and 19 HALSBURY'S LAWS (3rd Edn.) 486, para. 773; and for cases on the subject of compensation, see 11 DIGEST (Repl.) 293, 294, *1985-1999*.

For the Metropolitan Paving Act, 1817 (Michael Angelo Taylor's Act), s. 90, see 15 HALSBURY'S STATUTES (2nd Edn.) 520.

For the Landlord and Tenant Act, 1954, s. 64 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 441.]

Case referred to:

R. v. *London & Southampton Ry. Co.*, (1839), 10 Ad. & El. 3; 1 Ry. & Can. Cas. 717; 8 L.J.Q.B. 220; 113 E.R. 1; 11 Digest (Repl.) 294, *1995*.

Case Stated.

The claimants appealed by way of Case Stated against a decision of the Lands Tribunal (SIR WILLIAM FITZGERALD, Q.C., President), given on Sept. 21, 1959, on a reference by the claimants in respect of the compensation payable by the acquiring authority, London County Council, on the compulsory acquisition of

premises known as West Lodge, Charing Cross Station, Strand, London, under s. 90 of the Metropolitan Paving Act, 1817. The tribunal held that the claimants had no right in law to claim compensation in respect of the premises and, therefore, did not deal with the second question raised in the reference, whether the right to compensation was limited to compensation for such loss, if any, as the claimants might have suffered by reason of insecurity of tenure after the expiry of the period specified in the notice or notices served on them by the acquiring authority. The claimants' grounds of appeal were, inter alia: (i) that at the date of the notice served on them by the acquiring authority on Oct. 17, 1956, and at all other material times up to the date of giving possession thereunder, they were persons entitled to the benefit of s. 90 of the Metropolitan Paving Act, 1817, and of the Landlord and Tenant Act, 1954, that they were, therefore, compelled by the notice to quit the premises before the expiration of their term in such premises and that, accordingly, they were entitled to have made to them by the acquiring authority compensation for the loss or damage sustained on that account; and (ii) that no good ground existed for limiting the compensation in the manner indicated.

C. E. Scholefield, Q.C., and *D. G. H. Frank* for the claimants.
K. F. Goodfellow for the acquiring authority.

Cur. adv. vult.

Oct. 26. **LORD EVERSHED, M.R.,** read the following judgment of the court: This is an appeal by way of Case Stated from a decision of the Lands Tribunal on a preliminary point of law arising out of a claim made by the appellant claimants for compensation under s. 90 of the Metropolitan Paving Act, 1817. The facts are set out in the tribunal's decision and may be summarised as follows: On Oct. 17, 1956, London County Council, the acquiring authority, in contemplation of the widening of the Strand, served a notice on the claimants in purported exercise of the powers granted by s. 90 of the Act of 1817. Other powers under the Act include the right to adjudge that an existing building will obstruct the proposed street widening and to serve a notice on the owner to treat for its compulsory purchase so that the acquiring authority can remove the obstruction (see s. 80 of the Act).

Section 90 then enacts, inter alia, that every tenant at will or lessee for a year or from year to year of such premises as " shall be purchased by virtue and for the purposes of this Act " shall deliver up possession of the premises to the acquiring authority after having six months' notice to quit. The same section proceeds to enact that " in case any such tenant should be compelled to quit before the expiration of his or her term in any such premises " then the acquiring authority shall " make satisfaction and compensation for the loss or damage which he or she shall or may sustain thereby . . ." The notice which the acquiring authority served on the claimants under this section required them to quit premises, being a kiosk in the foreground of Charing Cross Station, where the claimants had for a number of years carried on a retail trade of selling fancy goods, including watches, clocks, badges and brooches.

The premises were held by the claimants under an agreement with the Southern Railway Co. dated Nov. 21, 1946. The railway company's interest as landlords later became vested in the British Transport Commission. In consideration of a rent of £500 per annum payable quarterly, the railway company let the premises (known as West Lodge, Charing Cross Station, Strand) to the claimants for three years from Dec. 25, 1946, subject to a right in the railway company in certain circumstances to determine the tenancy by six months' notice during the said three years, and with a right in the company and in the claimants to determine the tenancy after the expiration of the said three years by giving six months' notice to expire at any time of the year. The result was that after Dec. 25, 1949, the claimants became tenants from year to year of the premises but were liable to have this tenancy determined by such a six months' notice expiring at any time,

After serving on the claimants on Oct. 17, 1956, the notice to quit purporting to be under s. 90 of the Act of 1817, the acquiring authority gave the claimants two extensions of time within which to leave, and as a result the claimants did not in fact give up possession of the premises until July 3, 1958. Thereafter they preferred their claim for compensation under s. 90, contending that within the meaning of that section they had been compelled to quit " before the expiration of their term ". The claim being resisted by the acquiring authority, the matter was referred to the Lands Tribunal.

Before that tribunal the claimants proved or it was conceded, inter alia: (a) That at no time had any notice to determine the tenancy created by the said agreement been given thereunder either by the Southern Railway Co. or by its successors and that such landlords had no intention of taking any action to dispossess the claimants. No notice to determine the said tenancy has been given by the claimants. No other action had been taken by any of the above bodies to determine the said agreement or tenancy. (b) That at the time of the making of the request for possession and of the giving up of possession by the claimants both parties had agreed in writing that the Landlord and Tenant Act, 1954, applied to the claimants' tenancy and that but for the acquiring authority's action under their statutory powers the claimants' possession would have continued indefinitely unless their landlords for the time being could have satisfied the requirements of the Act of 1954. They were further under the impression and had agreed in writing that the landlords could have determined the tenancy (if a case for doing so existed under the Act) by Dec. 25, 1957.

Two preliminary questions of law were put to the Lands Tribunal. They were these: (i) Whether on the agreed facts the claimants had any right to claim compensation. (ii) If the answer was in the affirmative, whether the claim was limited to compensation for loss suffered by insecurity of tenure after the expiry of the six months' notice given as aforesaid by the acquiring authority. This second question does not really arise and no more need be said about it. The tribunal answered the first question in the negative, taking the view that the claimants had not been compelled to quit before the expiration of their term in the tenancy.

Counsel for the claimants argued before us that this decision is wrong; and the basis of his argument was this. The claimants' tenancy was admittedly a tenancy of business premises to which the Landlord and Tenant Act, 1954, applies: and the effect of the Act of 1954 was to extend the " term " of the tenancy until such time as the claimants' position under that Act vis-à-vis the landlord should be determined, e.g., by a new tenancy being granted or refused. In other words, if the question had been asked, before the acquiring authority served their notice under s. 90, " When does the claimants' term in these premises expire? ", the answer would have been: " When, following a valid notice to quit given by the landlords and a claim for a new tenancy or for compensation being made by the claimants under the Act of 1954, the issues arising under that Act are settled ". In this connexion reference was made to s. 23, s. 24, s. 25, s. 57 and s. 64 of the Act of 1954.

Counsel for the respondent acquiring authority, on the other hand, answers the same question by saying that the claimants' term expired on the earliest date that the landlords could have determined it by notice under the tenancy agreement at the time when the acquiring authority had served their notice under s. 90: and this would admittedly have been before the claimants actually quitted the premises on July 3, 1958. So, he argued, they were not obliged to quit before their term had expired and are therefore entitled to no compensation.

Returning to s. 90, it will be observed that it relates and relates only to tenants at will and tenants for a year or from year to year " of such premises as shall be purchased by virtue and for the purposes of this Act ". It emerged during the hearing of the case that these particular premises have so far not been purchased. Indeed the building itself, being a kiosk, no longer exists, having been demolished

by the acquiring authority in order to widen the Strand. Counsel for the claimants informed the court that his clients had paid their rent to the British Transport Commission right up to the time when they left the premises: and counsel for the acquiring authority said his clients had not so far purchased the premises or otherwise acquired the interest of the British Transport Commission therein. What is the precise situation at the present time is not clear, but it seems that the acquiring authority were at any rate given tacit permission by the British Transport Commission to demolish the kiosk. Counsel for the claimants sought to avoid the obvious difficulty that these facts created by contending that the words " shall be purchased " could properly be taken to refer to a purchase which the acquiring authority intended to make at the time when they served their notice under s. 90. In our view this is not the true construction. The Act of 1817 was contemplating purchases which at the time it was passed were certainly in futuro: but in the idiom of the day the expression " which shall be purchased ", etc., was apt to describe purchases which should take place in the future but which, at the time when the powers under s. 90 came to be exercised, would be in existence either in the form of a completed conveyance or at least a binding contract for sale. It is to be noted that in the London and Southampton Railway Act, 1834 (4 & 5 Wm. 4 c. lxxxviii), s. 47, Parliament when dealing with lands which an acquiring authority—there the railway company—merely intended to purchase, used the expression " lands which shall be intended to be taken or used for the purposes of this Act ". The words in s. 90 of the Act of 1817 are quite different.

Furthermore, if s. 90 is construed as giving enabling powers to an authority who have become the landlords of the premises, difficulties which might otherwise arise in the construction of the language disappear. The new landlords could get rid of minor subsisting tenancies by six months' notice. If this means, for example, that a tenant for a year or from year to year has to quit before the expiry of his term, he is compensated. A tenant at will would, no doubt, be generously treated if he also were given the same notice, but, although the reason for the mention of tenants at will in the section is not at this distance of time altogether clear, this circumstance raises no inference sufficiently strong to justify some construction of the section which its words would not otherwise bear.

The result, therefore, is that in our view s. 90 was never validly operated in this case and the purported notice under it given by the acquiring authority was in truth a nullity. It follows that the claimants have never been in a position to claim compensation under the section.

Since, however, the parties have hitherto proceeded on the view that the notice was a valid notice and the case was fully argued before us whether on that footing compensation would be payable, we think it right to express an opinion on the point. It is also adverse to the claimants' contention. For, if, contrary to the view we have formed, the words " shall be purchased " ought to be expanded so as to include " shall be intended to be purchased " or so as otherwise to comprehend premises in respect of which the acquiring authority has adjudged that the buildings must make way for contemplated street works, still we think that the claimants' claim must fail. For, if the words be so construed, then the language of s. 90 of the Act of 1817 becomes strictly analogous to that of the London and Southampton Railway Act: and, if that hypothesis be accepted, *R.* v. *London & Southampton Ry. Co.* (1) is authority for the view that the later language in the section " expiration of his term " must be construed as referring to the earliest point of time at which the landlord could validly, according to the terms of the contract of tenancy, have terminated the tenancy from year to year. In that case the tenants were at the relevant dates tenants from year to year of the premises in suit. They had in fact been in possession of the premises as such tenants for a long period of years; and they proved (like the claimants

(1) (1839), 10 Ad. & El. 3.

in the present case) that in the natural course of events their landlord would not have been in the least likely to give notice terminating the tenancy in the immediately foreseeable future. The railway company, having determined to acquire the tenants' premises for the purposes of their railway, served a six months' notice to quit on the tenants in January, 1837. This notice they later extended so as to expire at Michaelmas, being under the impression that the tenants' yearly tenancy ran from Michaelmas to Michaelmas. At the time of the service of the notice and of its extension, the railway company had not acquired the reversion of the property. It appears, however, from the judgment in the case that the railway company did acquire the reversion before the month of July, when, having discovered that the tenancy ran in fact from Christmas to Christmas, they notified the tenants that they would not be required to deliver possession until Christmas; the railway company did not, however, serve any fresh notice after they had acquired the reversion. The tenants quitted the premises at or shortly after Christmas, 1837.

In this state of facts the Court of Queen's Bench rejected the tenants' claim to be paid any compensation under s. 48 of the Act on the ground that they had been required to deliver up possession " before the expiration of their term or interest " including compensation based on the suggestion that their occupation had been uncertain or hazardous from the date of the service of the notice. The judgment of the court, delivered by LORD DENMAN, C.J., contains the following sentences (2):

> " We cannot think that the Act of Parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the company might either give the ordinary landlord's notice ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the Act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up. If, as in this case, the company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession. It makes no difference that the company were not landlords when they gave the notice in January; that notice was undoubtedly meant to operate under the Act, and would have done so but for the subsequent conduct of the parties. Under these circumstances, we are of opinion that this rule must be discharged."

It is in our judgment clear that the reasoning of the Court of Queen's Bench in the case cited proceeded on the basis that, where the statutory power extended to the giving of a notice to quit to tenants of premises " which shall be intended to be taken or used for the purposes of this Act ", then it was not necessary for the acquiring authority to show that a valid notice to quit by the landlord had in fact been given. It sufficed, in order to avoid liability to pay compensation, if the statutory notice did not require possession to be given at a date earlier than the date at which, under the tenancy contract, the landlord could have demanded possession at the date of the statutory notice. In the present case, apart from the Landlord and Tenant Act, 1954, the British Transport Commission could have terminated the claimants' tenancy at any time by six calendar months' notice. It follows, therefore, according to the case which we have cited, that the notice of Oct. 17, 1956, did not cause or would not have caused the claimants' tenancy to have come to an end at a date earlier than that at which the British Transport Commission could then have brought it to an end.

(2) (1839), 10 Ad. & El. at p. 10.

Counsel for the claimants invoked the Landlord and Tenant Act, 1954. The effect of the relevant provisions of this Act is to give to a business tenant (such as are the claimants) the right, or at least the opportunity, if his existing tenancy were determined, to obtain by order of the court a new tenancy. In our view the compensation for which s. 90 of the Act of 1817 made provision is for the premature determination of an existing tenancy and cannot extend fairly to cover injury suffered through the loss of a new tenancy or the opportunity of obtaining it. It is true that, by virtue particularly of s. 64 (1) of the Act of 1954, where a landlord gives notice to determine an existing tenancy, the term of that tenancy is extended for an indefinite period sufficient to cover the determination of any proceedings which may be instituted under the Act and three months thereafter. In the present case, however, as earlier stated, the claimants were not in fact required to go out of possession until July 3, 1958, a period not far short of two years after service of the notice by the acquiring authority. Counsel for the claimants has not pressed any argument before us that this period of nearly two years was less than the period for which, by virtue of s. 64 of the Act of 1954, the claimants' tenancy would sensibly have been extended had the Act of 1954 operated in regard to it. It follows, therefore, in our view that on the footing that the acquiring authority's notice of Oct. 17, 1956, was a valid exercise of the power under s. 90 of the Act of 1817, still the claimants would not have been entitled to compensation. In the result the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Sidney Pearlman* (for the claimants); *J. G. Barr*, Solicitor to London County Council (for the acquiring authority).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Design —Practice and procedure—Motions—Registered Designs Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 88)—*R.S.C., Ord.* 53F.

Patent—Practice and procedure—Motions—Patents Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 87)— *R.S.C., Ord.* 53A.

The following Practice Direction has been issued by LLOYD-JACOB, J., in substitution for the Direction* issued on Jan. 20, 1950:

Motions in actions and matters relating to patents and registered designs will be made to LLOYD-JACOB, J., and not to the non-witness judge of the Group to which the case is assigned.

The solicitors for the party moving must apply to HIS LORDSHIP'S clerk for a date, and, on being notified when the motion will be in the list for hearing, must give notice to the respondent's solicitors and lodge with the cause clerk (room 136) the stamped notice of motion and a copy thereof.

The Practice Direction issued on Jan. 20, 1950, is hereby cancelled.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

Nov. 10, 1960.

---

* The Direction of Jan. 20, 1950, is printed in the ANNUAL PRACTICE, 1960, p. 1291, in a footnote to R.S.C., Ord. 53A, r. 2.

BROWN *v.* NATIONAL COAL BOARD.

[COURT OF APPEAL (Lord Morris of Borth-y-Gest, Pearce, L.J., and Pilcher, J.), October 10, 11, 12, 13, 14, 1960.]

Coal Mining—Statutory duty—Breach—Security of road and working place—Electrician removing electric light fitting from partly fallen girder before receiving actual instructions to do so and without knowledge of overman—Fall of stone from roof—Whether breach of statutory duty—Mines and Quarries Act, 1954 (2 & 3 *Eliz.* 2 c. 70), *s.* 48 (1), (2).

Section 48 (1)* of the Mines and Quarries Act, 1954, imposes on a mine manager an absolute personal duty to take such steps as may be necessary to keep a road or working place secure, but it does not impose on him such a duty to ensure that the road or working place is in fact at all times kept secure (see p. 605, letter I, to p. 606, letter A, p. 607, letter G, p. 606, letter G, p. 611, letter I, post); and the question whether steps were necessary must be determined in the light of facts which were, or ought to have been, known to the manager at the time when the decision to take those steps fell to be made and when it was still possible to take them, but not (LORD MORRIS OF BORTH-Y-GEST contra) in the light of subsequent knowledge (see p. 609, letter C, and p. 611, letter G, post; cf., p. 605, letters B to H, post).

The plaintiff was employed by the defendants as an electrician in one of their coal mines. On Apr. 8, 1958, when the plaintiff had finished what he was required to do on that shift and was on his way to the shaft, a tub coming up from a drift in the mine knocked away a concrete prop holding up a girder, the girder fell down at that end, and at the same time a piece of stone fell from the roof. An electric light fitting was attached to the centre of the girder by a bracket, and, as it would be difficult to insert a prop to support the girder unless the light fitting was removed, the overman in charge of that part of the mine sent a message to recall the plaintiff in order that he would be available in due course to remove the light fitting. After sending for props and warning the other men to stand clear, the overman then went under that part of the roof where the fall had taken place; he did not know that the plaintiff had returned and was near the fallen girder. The plaintiff, knowing what he was required to do, had started on the work, without waiting for instructions, when another stone fell, injuring him. The plaintiff claimed damages against the defendants on the ground (among other grounds) that the defendants were in breach of their statutory duty under s. 48 (1)* of the Mines and Quarries Act, 1954. For the purposes of the case it was assumed that the road was secure before the girder was displaced, and it was not suggested that the displacement was due to negligence.

Held: between the time when the roof of the road had been rendered insecure by the girder being displaced and the time of the second fall, which injured the plaintiff, there had been no breach of the duty (stated at letter C, above) imposed by s. 48 (1) of the Mines and Quarries Act, 1954, and accordingly the defendants were not liable in damages (see p. 606, letter B, p. 609, letter H, and p. 612, letter B, post).

Per PEARCE, L.J., and PILCHER, J.: an immediate notional failure to take steps could not be imputed to the mine manager at the moment of an unforeseen occurrence without giving him any space of time in which steps to remedy the occurrence could physically be carried out (see p. 609, letter D, and p. 611, letter I, post).

Decision of THESIGER, J. ([1960] 1 All E.R. 108) affirmed.

[Editorial Note. The divergence between the views of LORD MORRIS, on the one hand, and PEARCE, L.J., and PILCHER, J., on the other hand, over the construction of s. 48 (1) of the Mines and Quarries Act, 1954, rested on the meaning

* The terms of s. 48 (1) are printed at p. 600, letter I, post.

that should be given to the words " as may be *necessary* " in the requirement of s. 48 (1) that a mine manager should take " such steps as may be necessary for keeping " the road or working place secure. There seem to have been three variants of meaning to which members of the court inclined: (i) the view of LORD MORRIS that the necessity should be determined objectively in the light of prior and subsequent knowledge (see p. 604, letter E, p. 605, letter B, post), (ii) the view of PILCHER, J., that the necessity should be determined subjectively on the basis of things known, or which ought to have been known, to the manager at the time when his decision was taken (see p. 611, letter G, post, " such steps *as appeared to him* to be necessary "), and (iii) the view that the necessity should be determined by the court (and thus, it seems, objectively) on the basis of things known or which ought to have been known to the manager at the time of his decision, this being, it is thought, the view expressed by PEARCE, L.J. (see p. 609, letter B, post), with whose reasoning PILCHER, J., also agreed. It may also be observed that the burden of proof that there was no failure to take necessary steps, if insecurity were established, lay on the manager (see p. 608, letter H, post).

As to breach of statutory duty on the part of a mine owner and as to the defences open to the owner, see 26 HALSBURY'S LAWS (3rd Edn.) 566, 568, paras. 1136, 1138.

For the Mines and Quarries Act, 1954, s. 48 and s. 157, see 34 HALSBURY'S STATUTES (2nd Edn.) 555, 627.]

Cases referred to:

Edwards v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

Gough v. *National Coal Board*, [1959] 2 All E.R. 164; [1959] A.C. 698; [1959] 2 W.L.R. 658; 3rd Digest Supp.

Marshall v. *Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; [1954] 2 W.L.R. 812; 3rd Digest Supp.

Peacock v. *Dorman Long (Steel), Ltd.*, (York Assizes, June 13, 1960), unreported.

Winkler v. *National Coal Board*, (Leeds Assizes, May 4, 1960), unreported.

Wright v. *Jenkins*, (1958), 43 Cr. App. Rep. 17; 3rd Digest Supp.

Appeal.

The plaintiff, Frank Hall Brown, appealed from a judgment of THESIGER, J., at Newcastle-upon-Tyne Assizes, dated Oct. 30, 1959, and reported [1960] 1 All E.R. 108, dismissing the plaintiff's action against the National Coal Board for damages for personal injuries.

The plaintiff was employed by the defendants as an electrician at Crofton Mill Colliery, Blyth, Northumberland. On Apr. 8, 1958, four tubs were derailed while proceeding along one of the two sets of rails in the Beaumont Drift, which was a " road " within the meaning of the Mines and Quarries Act, 1954. One of the tubs which was damaged was put back on the rails and was sent up the drift, to be out of the way. As the tub was coming up the drift, it again left the rails and knocked the concrete support holding up one of the roof girders, the girder fell down at that end, and a piece of stone at once fell from the roof. In the centre of the girder, and attached to it by a bracket, was an electric light fitting. The overman in charge of that part of the mine, James Simpson, wished to insert a prop to support the leaning girder, and, as it would be difficult to insert the prop unless the light fitting was removed, he sent a messenger to recall the plaintiff, who was then proceeding outbye along the main haulage road in the Beaumont Seam, having finished what he had to do on that shift just before the fall. After the plaintiff arrived near the leaning girder, he put down his tool bag and was looking for a spanner to remove the bracket of the light fitting when another stone fell down and injured him.

What happened immediately before the accident to the plaintiff was in dispute. The plaintiff alleged in the statement of claim that, when he arrived near the leaning girder, the overman instructed him to remove the light fitting so that

the girder could be moved. By their defence the defendants alleged that the plaintiff had been called back so that he could in due course be instructed to remove the light fitting, and they denied that he had been instructed to remove the fitting at any time prior to his accident. According to the evidence on behalf of the defendants, the overman did not know of the plaintiff's arrival, as the overman was then under that part of the roof where the fall had been, having previously sent for the necessary props and told the men to stand back.

By para. 3 of the statement of claim the plaintiff alleged that his injuries

> "... were caused by the breach of statutory duty, negligence and/or breach of duty of the defendants and their servants.
>
> "*Particulars.*
>
> "(a) In breach of s. 48 (1) of the Mines and Quarries Act, 1954, the defendants failed to take such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the plaintiff's working place as were necessary for keeping the said working place secure."

Paragraph 3 (b), para. 3 (c), and para. 3 (d) dealt, respectively, with the allegation of breach of s. 51 (3) of the Act of 1954, s. 53 of the Act, and reg. 12 of the Coal and Other Mines (Support) Regulations, 1956*. Paragraph 3 (e) dealt with the allegation of negligence at common law, and its concluding sentence was

> "The plaintiff will further rely upon the second fall of roof ... as being of itself sufficient evidence of the defendants' negligence."

The defendants, by their defence, denied any liability for the plaintiff's accident, and pleaded that, if they were in breach of any statutory duties, it was impracticable to avoid or prevent their contravention. They further alleged that the accident was caused, or materially contributed to, by the negligence of the plaintiff.

THESIGER, J., found (a) that the plaintiff had not at any time been instructed to remove the light fitting from the girder but had been called back by a messenger (a boy) sent to call the plaintiff back in order that he should be available in due course to remove it; (b) that the overman did not know that the plaintiff had arrived near the fallen girder; (c) that the plaintiff was not present when the overman directed the men to stand back; and (d) that the plaintiff, knowing from the message sent to him why he was wanted, proceeded on the work of his own accord. HIS LORDSHIP held (i) that the allegation of contributory negligence on the part of the plaintiff had not been established; (ii) that, on the facts, the plaintiff could not succeed at common law; and (iii) that the defendants were not liable in damages to the plaintiff for breach of statutory duty. In regard to the alleged breach of statutory duty under s. 48 (1) of the Act, the learned judge held that, if there had been a breach, the contravention was one which it was impracticable to avoid or prevent, within the meaning of s. 157. The grounds of the plaintiff's appeal were that the learned judge was wrong in holding (a) that there was no contravention of s. 48 of the Act of 1954, and (b) that it was impracticable to avoid or prevent any such contravention. The defendants served a notice under R.S.C., Ord. 58, r. 6, that, at the hearing of the appeal, they desired to contend that the decision of the learned judge be confirmed on the grounds stated by the judge, and, further, on the ground that the plaintiff was injured solely as a result of his own negligence.

G. S. Waller, Q.C., J. A. Baldwin and *P. Kennedy* for the plaintiff.

Geoffrey Veale, Q.C., and *D. B. B. Fenwick* for the defendants.

Cur. adv. vult.

Oct. 14. **LORD MORRIS OF BORTH-Y-GEST:** This is an appeal from the judgment of THESIGER, J., dismissing the claim which the plaintiff,

* The regulations are contained in Sch. 1 to the Coal and Other Mines (Support) Order, 1956 (S.I. 1956 No. 1763); 14 HALSBURY'S STATUTORY INSTRUMENTS (First Re-Issue) 57.

A Frank Hall Brown, made against the National Coal Board, the defendants. The plaintiff was injured on Apr. 8, 1958, while employed by the defendants. He was an electrician, and on the day in question he was working underground at the Crofton Mill Colliery at Blyth. A piece of stone fell from the roof of a haulage road. It struck the plaintiff and caused him physical injuries. If, in the result, he is entitled to recover damages from the defendants, the amount of such B damages has been assessed by the learned judge at the sum of £1,137 11s. 7d.

A location plan used in the litigation shows a road leading to and from the shaft bottom. That road has been styled " the Road in Low Main ". Leading out of that road is another which is styled " the Drift to Beaumont ". The Beaumont seam is at a lower level than the Low Main seam, and, as a result, the Beaumont Drift has for some of its length, a gradient down towards the Beau- C mont coal face. The Beaumont Drift is undoubtedly a " road " within the meaning of that word as it is used in the Mines and Quarries Act, 1954. That road has two parallel sets of rails, along which tubs can proceed. The progress of the tubs results from their being attached to an endless wire rope which passes around drums, whose revolutions are electrically operated. In ordinary operation, tubs filled with coal move along the left-hand set of rails leading away from the coal D face, and empty tubs move along the other set of rails running towards the face. The roof is held by a series of girders resting under the roof at right-angles to the direction of the road. The girders are supported at each end by two concrete posts. Under the system that was specified for this mine, the posts should have been at intervals of four feet. In fact, the distances separating some of the girders near to the place where the plaintiff was injured were not quite placed at E the specified distances, but, for the purposes of this appeal, it has been disclaimed that there is any relevance in this circumstance.

On Apr. 8, 1958, the plaintiff, with a mate, had been working underground near to the Beaumont face. Having completed his assigned work, he set off to walk to the shaft bottom. His course was along the Beaumont Drift and then along the road in Low Main. He was nearly at the end of his time in the shift. F When he got to the bottom of the Beaumont Drift, haulage was not taking place. In pit terminology, the haulage was standing. Had that not been so, he would not have been able to proceed. As it was, he was able to walk up the drift. The reason why the haulage was standing was that four tubs had been derailed. The plaintiff saw one tub which was off the rails and which had been, as he put it, bashed or concertinaed or widened. The plaintiff proceeded on. He went up the G Beaumont Drift, got into the road in Low Main and began to walk towards the shaft bottom. He was then overtaken by a boy named Richardson. Richardson had been sent by Mr. Simpson who was an overman employed at the Crofton Mill pit. Richardson was sent to recall the plaintiff. The reason for his recall was that, after the plaintiff had proceeded up the Beaumont Drift, there had been another incident. The tub which the plaintiff had seen was put on the rails and H was attached to the haulage wire and was then sent up the Beaumont Drift. It was being sent away because it had been damaged. But before it reached the junction of the Beaumont Drift and the road in Low Main, it went off the rails again. The result that time was that, after leaving the rails, the tub, being still attached to the moving endless wire rope, hit against the concrete support holding one of the roof girders. Being deprived of support at one end, the girder I came partly down at that end, and a thin panel of stone fell down from the roof. In the centre of that girder there was an electric light fitting. Some other girders in the vicinity had similar fittings. Because something had fallen on to the bell wires, the haulage stopped. This would be known to all who were near, and Mr. Simpson, the overman, who had been at the point of the first derailment, went up to the scene of this new occurrence. Mr. Simpson saw the situation and he saw the displaced girder. It was resting on rubble by the side of the wall. What he then decided to do can best be described by referring to his own words, for his testimony was accepted by THESIGER, J.:

" Q.—How were you proposing to cope with this situation? A.—Well, I had the lads from the top of the bank, three, they came down on to the scene at the high side, there were four lads from the loader side came on to the scene on the low side and I sent the lads both sides to get long timber.

" Q.—Why did you want long timber? A.—I realised it needed temporary support on either side of the girder before you have got to lift it to make it safe.

" Q.—Did you send any message? A.—I realised there was the lamp fitting still alight on the girder, and when I looked at the ground you couldn't possibly put a middle prop in to secure the girder without taking the lamp off because there was the bell wires running down at one side and there was the water pipe to the big pump at the shaft on the other.

" Q.—You decided you wanted the light fitting off? A.—Yes.

" Q.—What did you do? A.—I asked anybody if they had seen the electrician and the lads from the top of the bank said, ' Yes, he's on his road to the shaft '.

" Q.—You sent for him? A.—Yes.

" Q.—Do you remember how you sent for the electrician? A.—Yes, I sent a boy called Richardson to go for the electrician and tell him I want the lamp removed before he went to bank, because I realised, if he got to bank and got the cage, there was no more coal to come out of that district because I could not get another electrician."

As a result of the message, the plaintiff did, in fact, retrace his steps. As to what happened thereafter, there was a conflict of evidence. There was a difference between what the plaintiff said and what Mr. Simpson said. The plaintiff said that he spoke to Mr. Simpson and received an instruction from Mr. Simpson to remove the fitting. Mr. Simpson said that he did not know that the plaintiff had arrived and never gave him any instruction, and that the plaintiff did not ask him (Mr. Simpson) what was needed. That conflict was resolved by the learned judge in favour of Mr. Simpson. The stone which had fallen when the girder was displaced was being dealt with by one of the men who arrived on the spot. What the plaintiff said, as I have indicated, was that, after proceeding to the place where the girder was partly down, he received a direct instruction to deal with the electric light fitting. He said, in his evidence:

" When I got there I saw the girder and stone and some men breaking the stone on this girder, one end was down and there was the stone and men breaking the stone off."

He said that Mr. Simpson asked him to loosen the light fitting in order to get the girder moved, and that, when he got the orders from Mr. Simpson, he started to loosen the light fitting. Then he was asked:

" Q.—What did you do? A.—I continued with doing my job, what he told me to do, take the fitting off the girder, and I put my bag of tools on the bottom, took the spanner out, looked at the fitting first to see what spanner I wanted, and I took it out of my bag and I was busy with that when the stone came down."

That was a further fall of stone, and it is beyond question that a stone some four feet six inches to five feet long, being nine inches in thickness at one end and tapering to a point, did in fact fall and did cause injury to the plaintiff.

Mr. Simpson's evidence, as I have indicated, was that he did not know that the plaintiff was there and that he gave no instructions. What Mr. Simpson was doing can again be best described in his own words:

" Q.—What did you do? A.—I stepped into the area and I took a steel tape out of my pocket. I was going to take the measurement of the roof and the next thing I knew I was banged on to the bottom and I tossed myself back and I found myself about ten yards in the side down the bank."

So Mr. Simpson was himself also under the stone that fell.

"Q.—Were you taking measurements? A.—Yes.

"Q.—For what? A.—The temporary props I was going to put in on either side of the girder.

"Q.—When you were taking the measurements, had the lads brought any timber back? A.—No.

"Q.—While you were measuring, the stone fell and hit you? A.—Yes.

"Q.—At that time did you know the plaintiff had got to the scene? A.—No.

"Q.—He said that he asked you what you wanted and you ordered him to remove the fitting? A.—No.

"Q.—Had you occasion to say anything to any of the men there? A.—Yes, I had to tell them to stand back.

"Q.—Did they, when you said so? A.—Yes.

"Q.—So far as you knew, was there anyone in the danger area except yourself when the second stone fell? A.—Not until after the accident."

In those circumstances, the plaintiff brought an action against the defendants and by his statement of claim he alleged that his injuries were caused by breach of statutory duty, negligence, and/or breach of duty of the defendants and their servants. There were several particulars under that general allegation. In the first place, a breach of s. 48 (1) of the Mines and Quarries Act, 1954, was pleaded. Then there was an allegation of a breach of s. 51 (3); then an allegation of a breach of s. 53, and an allegation of a breach of reg. 12 of the Coal and Other Mines (Support) Regulations, 1956. Then there was this general plea of negligence:

"The defendants and their servants were negligent and the defendants were in breach of their duty to the plaintiff to provide a safe place of work in that the plaintiff's working place was not properly supported as aforesaid, and no steps were taken to set a temporary prop or temporary props for safety before the plaintiff was instructed to go into the danger area to remove the said electric light fitting. The overman instructed the plaintiff to go into an area which he well knew was dangerous, he failed to prevent the plaintiff from going there, and he took no or no proper steps to ensure that the plaintiff was not exposed to danger after there had been a fall of roof in the main roadway. The plaintiff will further rely upon the second fall of roof in the circumstances described as being of itself sufficient evidence of the defendants' negligence."

Among other matters it was pleaded in the defence that the plaintiff was himself guilty of negligence.

The learned judge decided the issue of fact as between the plaintiff and Mr. Simpson in favour of the defendants. I shall read a few sentences of the learned judge's judgment:

"My conclusion is that Mr. Simpson is right: that he did not know the plaintiff had turned up; that the plaintiff knew from the message why he was wanted and went forward to the girder and the fitting 'out of his own common sense', like the man who started breaking the stone, and because, like everyone else, he was anxious to get the coal moving and the clearance job done. I hold that Mr. Simpson is right, and the plaintiff is wrong; that no question was asked and no answer given, and that Mr. Simpson did not know that the plaintiff had arrived back. On these findings of fact I have to deal with the plaintiff's claim. I think, on my finding of fact, it must be approached as if for the words in para. 2 of the statement of claim, 'The plaintiff was instructed to remove,' I substituted the words 'the plaintiff was so called back in order that he would be available in due course to remove'."

On that finding of fact, the learned judge proceeded to deal with all the issues

raised and—leaving aside for the moment the allegation in reference to s. 48 of the Mines and Quarries Act, 1954—the learned judge found in favour of the defendants in regard to all the other matters. Counsel for the plaintiff, at the trial, suggested that what Mr. Simpson, the overman, was trying to do, and was setting out to do, was to take down the girder that was hanging down in order to get it out of the way, so that coal could be got moving. He suggested that that was a wrong procedure. It is manifest that that submission and that line of approach did not in any way succeed. Therefore all the allegations under s. 51 (3) and s. 53 of the Mines and Quarries Act, 1954, and under reg. 12 of the Coal and Other Mines (Support) Regulations, 1956, failed.

In regard to s. 48 of the Mines and Quarries Act, 1954, it is, I think, difficult to summarise what was the learned judge's conclusion and I must, therefore, read the sentences of his judgment (1) dealing with that section:

> "Now s. 48 places a duty on the manager of the mine. That duty is to deal with controlling the movement of the strata in the mine. The duty is imposed in relation to roadways and working places. All this points to somewhat long-term strategic planning as opposed to short-term tactical measures of repair. The latter measures might have to be taken by the men on the spot immediately on the occurrence of an emergency; the emergency might be due to the knocking away of an effective support by a third party. It is a defence to prove that it was impracticable for the manager to avoid or prevent a contravention of that long-term though continuing duty. I do not believe that Parliament intended that the fall of a stone in the circumstances of this case should be held to prove a contravention of the duty imposed by s. 48 and that s. 157 should then be practically useless by way of defence in such circumstances. In other words, I do not believe that Parliament intended to impose liability on a manager to pay damages for injury caused almost immediately after the knocking away of a support, by the fall of a stone from the roof of a temporarily blocked roadway, on someone who (without the knowledge of anyone on the spot who mattered) went under the roof while such steps as were necessary were being taken to keep the roof secure. One may hold either, in those circumstances, that the fall of the stone was not sufficient evidence of a contravention of his duty by the absent manager, or that it was impracticable for him to avoid or prevent any contravention of the statutory duty that could fairly be inferred from that fall. When the roadway that had been effectively supported was deprived of its support, I think that one must ask oneself what step the manager then failed to take that was practicable for him to take and that was necessary to make the roof secure in the sense of preventing the fall of the stone that hit the plaintiff. I cannot see on the evidence that the manager omitted any step that was practicable. It was, indeed, impracticable for him to act to avoid the fall. The plaintiff went into a place where the roadway was blocked, and I reject the evidence that he was specifically set to work at that place. At the time when he was injured, the defendants, by their servants or agents, were taking such steps as were necessary for keeping the roof secure. The plaintiff was injured because he, unknown to the defendants, tried to assist in that work."

The claim of the plaintiff, therefore, wholly failed, and appeal is now brought to this court. The first ground of appeal is that the learned judge was wrong in holding that there was no contravention of s. 48 of the Mines and Quarries Act, 1954. Section 48 (1) is in these terms:

> "It shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine and supporting the roof and

(1) [1960] 1 All E.R. at p. 116.

A sides of the road or working place as may be necessary for keeping the road or working place secure . . ."

I do not, for present purposes, read the proviso.

Section 48 (2) is:

> " It shall be the duty of the manager of every mine to take such steps as
B may be necessary for securing that he is at all material times in possession of all information relevant for determining the nature and extent of any steps which it is requisite for him to take in order to discharge efficiently the duty imposed on him by the foregoing subsection."

It is necessary to remember the presence of s. 49. Section 49 (1) begins with the words:

C " Subject to the provisions of this section, in every mine of coal, shale or fireclay there shall be provided and maintained systematic support for the roof and sides of . . ."

Then follow four categories of place, the first being "(a) every place where any mineral is worked " and the last being "(d) every length of road in which persons
D work otherwise than occasionally or for short periods ". Section 49 (5) is:

> " For the purposes of this section references to provision and maintenance of systematic support shall, as respects any mine, be construed as references to provision and maintenance of support in accordance with a system specified in rules to be made by the manager of the mine, being a system consistent with the proper control of movement of the strata in the mine."

E Section 157 is in these terms:

> " It shall be a defence in any legal proceedings to recover damages and in any prosecution, in so far as the proceedings or prosecution are or is based on an allegation of a contravention, in relation to a mine or quarry . . . to prove that it was impracticable to avoid or prevent the contravention."

F The word " contravention " is defined in the Act (2). Section 152 is the section dealing with offences.

It is to be observed that s. 48 imposes a duty on the manager of a mine. The pleading in this case did not, in terms, refer to the manager, but no point arises in regard to that and I need not pause to read s. 159, though it has relevance in this connexion. The plaintiff did not give any particulars of the breach of s. 48,
G of the failure to take steps, save that the concluding words of para. 3 (e) of the statement of claim (3) show that the plaintiff was relying on the second fall of roof as being of itself evidence of negligence.

Before considering the construction of s. 48, on which reliance is placed by the plaintiff, certain other matters can be stated. Though it is said that there was a breach of s. 48, it is not now contended, in view of the findings of the
H learned judge, that the defendants were negligent. It is not suggested that the road known as the Beaumont Drift was other than secure before the errant tub displaced the support. If it has not been expressly conceded that the road was secure, it has at least been assumed for the purposes of the case that it was secure. It is not suggested that there was negligence in respect of the displacement of support. Nor is it suggested that it was negligent to have sent the
I damaged tub up the drift. Furthermore, it is not suggested that there was any negligence, in the ordinary sense, on the part of the manager. All that is said is that there was a breach of s. 48.

We have had most careful and helpful submissions from both learned counsel. Counsel for the plaintiff says that there was a breach of s. 48, and that the breach occurred when, following on the displacement of support, the road became insecure. He goes on to say that it was not impracticable to have avoided the

---

(2) In s. 182 (1); 34 Halsbury's Statutes (2nd Edn.) 641.

(3) See p. 596, letter D, ante.

contravention; for he says, as I follow it, that the tub need not have been sent up at all, though he is not saying that it was negligent to have sent it up; he says that it need not have been sent up at all and that, if it had not been sent up, there would have been no displacement. The evidence appears, however, to be against that part of counsel's contention. In this connexion I must read two or three questions and answers in the evidence of Mr. Simpson:

" Q.—When you came to this particular girder that was down, that had been knocked down in all probability by the broken tub going past? A.—No.

" Q.—What brought it down? A.—The broken tub getting off the rails.

" Q.—It had been put on the rails and came off again? A.—It had run about 120 to 130 yards up the bank and it came off the rails and bumped the front prop.

" Q.—The reason for the prop coming out was the movement of the broken tub past it? A.—Yes.

" Q.—Was it wise to send the broken tub up? A.—That is all you can do.

" Q.—Was it probable that the prop would be knocked out? A.—No, that was one of the widest parts between the rail and the prop. Further down the bank there were large girders very much nearer to the rail and it got past those."

It seems to me that that evidence shows that the support was displaced only after the tub had gone off the rails. The tub had gone 120 or 130 yards up the drift and the displacement of the support was not caused merely by the circumstance that the tub had been damaged and flattened out. It does not seem to me to be shown that the displacement of the support occurred other than after the tub, for the second time, went off the rails. Furthermore, Mr. Simpson's evidence was that to have sent the broken tub up was all that could have been done.

In those circumstances counsel for the plaintiff rests his case on s. 48 of the Act and submits that there was a contravention of it. It, therefore, becomes necessary to consider the meaning of that section. We have had a very careful analysis of the sections of the new Act and a comparison between those sections and the sections in the old Act, the Coal Mines Act, 1911. Counsel for the plaintiff pointed out that the old Act was the subject of certain judicial interpretations, and he submitted that it was very unlikely that Parliament would have intended by the new Act to impose obligations of less force than those previously imposed. The process of speculation why changes of language have been made is one that, in my judgment, should not be pressed too far. It is dangerous, I think, to construe the new words by considering what the old words meant, and then debating whether Parliament would be likely or not likely to make any, or any serious, changes. Parliament has legislated in the terms of this new Act, and our task, as I conceive it, is to construe the words of the new Act in their context, deriving help in interpretation if it is shown that phrases which have in the past received authoritative interpretation have again been used in the new Act.

Section 49 of the Act of 1911 read:

" The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

In reference to that Act we have in mind the decision in *Edwards* v. *National Coal Board* (4). The important passages, to which reference has often been made, are in the judgment of TUCKER, L.J. (5). Counsel for the plaintiff submits that s. 48 of the Act of 1954 creates what he calls an absolute liability. He says that the words in the section mean that the manager shall ensure that the road or working place shall be kept secure. He submits that, as soon as there is

(4) [1949] 1 All E.R. 743; [1949] 1 K.B. 704.
(5) [1949] 1 All E.R. at pp. 745, 746; [1949] 1 K.B. at pp. 708-710.

A insecurity, then the road or place is no longer being kept secure, and that prima facie there is a liability if any injury is caused. Therefore, in this case, he submits that, when the support of the girder was knocked away, there was then a breach of statutory duty. He says that there was then a contravention of s. 48 and that the manager, or the defendants, the manager's employers, could avoid liability to pay damages in respect of the personal injuries occurring after that contra-
B vention only if he or they could rely on s. 157.

On the other hand, counsel for the defendants submits that s. 48 is not absolute, in that it does not impose a duty on the manager of ensuring that the roof is secure at all times. Counsel goes on to submit that the steps which the manager is required to take are such steps in the defined categories as would from time to time be seen to be necessary on an expert and careful appreciation of the situation,
C but without hindsight. He submits that the question whether the manager has taken such steps must be judged by having regard to the state of information and technical knowledge available immediately before the accident, all proper steps to make such knowledge and information available having been taken. I do not set out all the other contentions of counsel for the defendants, but it is necessary to add that he further submits that the word "secure" refers to
D danger from liability to falls, but not including falls due to attacks on supports which were sufficient up to the time of attack. He says that there may be liability for such attacks if negligence is shown, but that such liability would not be under s. 48. On the facts of this case, he submits that there was no contravention of s. 48, and, in any event, he submits that the accident resulted from the plaintiff's own fault in going under a dangerous roof when he knew that he should
E not do so. A respondent's notice under R.S.C., Ord. 58, r. 6, has been served by the defendants in this case (6).

On those submissions, I feel that it is necessary to state my view of the meaning of s. 48 and then to consider its application to the facts of this case. There has been some difference of judicial opinion in regard to this matter. In *Peacock* v. *Dorman Long* (*Steel*), *Ltd.* (7), on June 13, 1960, EDMUND DAVIES, J., referred to
F the decision of THESIGER, J., in the present case and said that, if he interpreted the judgment in a certain way, while he respected the judgment, he did not regard himself as being bound by it and did not follow it. He said:

> "I regard s. 48 as an attempt to improve the old s. 49. Under s. 49 [of the Act of 1911] there is no doubt at all that the manager would be liable under the circumstances I have postulated. I cannot think that s. 48 has cut down
G the protection of a workman, or reduced the liability of the National Coal Board."

On the other hand, in *Winkler* v. *National Coal Board* (8), on May 4, 1960, WINN, J., referred to *Wright* v. *Jenkins* (9), a decision of Nottinghamshire Quarter Sessions Appeal Committee, and said:

H > ". . . I myself think that the construction of the section [s. 48 of the Act of 1954] which was given in *Wright* v. *Jenkins* (9) . . . is in law correct. I do not regard that section as imposing an absolute duty."

In *Wright* v. *Jenkins* (10), the following passage appears in the judgment of T. R. FITZWALTER-BUTLER, ESQ., the chairman of quarter sessions:

I > "In our view, the duty imposed on a manager by this section [s. 48 of the Act of 1954] is to take such steps as a competent manager, in the light of his own experience and in the light of generally accepted mining practice, would have taken."

Counsel for the defendants has largely based one of his submissions on that wording. I am bound to say, that, for my part, I feel uneasy about such an

(6) See p. 596, letter H, ante. (7) (York Assizes, June 13, 1960), unreported.
(8) (Leeds Assizes, May 4, 1960), unreported. (9) (1958), 43 Cr. App. Rep. 17.
(10) (1958), 43 Cr. App. Rep. at p. 19.

approach to the section. That approach seems to me to introduce words which are not to be found in the Act and to suggest a measure of duty no higher than would exist without any statutory provision.

If a section begins with the words " It shall be the duty ", it seems to me that an absolute duty is being imposed and the words that follow must then be looked at to see the nature and extent of the duty which is imposed. I have read the section (11). Section 48 (1) begins with the words " It shall be the duty ". Those words are imperative. They impose a definite obligation. What is the duty? It is a duty in relation to " every road and working place in the mine ". It is a duty " to take . . . steps ". A further duty is imposed by s. 48 (2). Under s. 48 (1) what are the " steps "? They are:

> ". . . steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road or working place . . ."

What is the nature and quality of those steps? The steps are such " as may be necessary for keeping the road or working place secure." What do the words " as may be " mean? They point to the fact that the imposed duty is a continuing one, so that the manager must ask himself: "Are any steps necessary for keeping the road or working place secure? " If, in litigation, a question arises whether a manager either failed to consider, or wrongly answered, any such question, then it will be for the court to decide whether, at the relevant date, there were steps which it was necessary for the manager to take for keeping the road or working place secure, and which he failed to take. I read the words " take . . . such steps . . . as may be necessary for keeping the road or working place secure " as meaning, " take such steps as are necessary in order to keep the road or working place secure ". It is to be observed that the steps are the necessary ones; they are not limited to the steps which some particular manager, acting honestly, may have thought to be necessary. The steps are those which are necessary for keeping the road or working place secure. For a road or place to be kept secure, it must, if necessary, be made secure. If, for any reason, it ceases to be secure, it must again be made secure.

In regard to the meaning of the word " secure ", authoritative guidance is afforded in the speeches in *Gough* v. *National Coal Board* (12), which was a case under the Act of 1911. LORD REID said (13):

> " In my judgment, the respondents' argument involves an erroneous assumption as to the meaning of the word ' secure ' in this context. The purpose of this part of the Act is to prevent accidents, and to my mind ' secure ' here means in such a state that there will be no danger from accidental falls. The word cannot mean in such a state that the side or roof will stand up against deliberate attack, for no part of a mine can be secure in that sense. I can see nothing inconsistent in saying that a side or roof shall be made secure against accidental falls at a time when steps are being taken to bring it down deliberately."

LORD TUCKER, in his speech, said (14):

> " In *Marshall* v. *Gotham Co., Ltd.* (15), I had occasion to refer to the word ' secure ' in a regulation identical with s. 49 [of the Act of 1911] and said: ' I agree that the word " secure " does not involve security from the effects of earthquake or an atom bomb, but I think it must include security from all the known geological hazards inherent in mining operations '. I do not desire to qualify in any way what I said in that case, but would only observe that deliberate assault on the mine face was not within my contemplation as a geological hazard."

---

(11) See p. 600, letter I, ante. (12) [1959] 2 All E.R. 164; [1959] A.C. 698.
(13) [1959] 2 All E.R. at p. 170; [1959] A.C. at p. 711.
(14) [1959] 2 All E.R. at p. 172; [1959] A.C. at p. 713.
(15) [1954] 1 All E.R. at p. 943; [1954] A.C. at p. 374.

A Lord Denning said (16):

> " But, save for such exceptions, the obligation to render the face secure is a continuing obligation to make it secure, that is, free from danger of unintended falls."

B The relevant time in reference to which the inquiry would relate would be, in the first place, the period prior to the time when some insecurity of roof or working place occurred or became manifest, and, in the second place, the period after such time. Within such latter period, there would be the obligation to replace insecurity by security. In ordinary circumstances, if there were an unintended fall of a roof, the inference would be clear that the necessary steps to keep the roof secure had not been taken; it would not avail a manager to say: C " I never thought that this would happen ", or " I did not realise that any steps were necessary ". The inquiry under s. 48 of the Act of 1954 would be an inquiry whether there were steps which it had been necessary for him to take in order to keep the roof secure. If the fall had only taken place because some evilly disposed person had pulled away a prop which supported a girder, then in the absence of some special circumstances, such as any which pointed to the likelihood of D such an event and called for special measures, it would not seem that the manager had failed to take any necessary steps. So far as human activities or operations are concerned, I would not think that it would be necessary for a manager to provide against the consequences of human conduct which, in the ordinary course of events, was unlikely and not to be expected. But, if some fall resulted, not from human intervention, but because of lack of control of the movement E of strata or lack of support of a road or working place, then the inquiry would be whether there had been a failure to take such steps as had been required, or had been necessary, to bring it about that the road or working place was secure. The inquiry would not be whether the manager had been negligent: it would be whether steps to control or support had been necessary to bring it about that the roof or working place was secure. The experience or the competence or the F perceptiveness of any particular manager would not come into question or be relevant. The steps which are necessary in order to keep a road or working place secure must be taken. Doubtless, in dealing with technical matters such as the methods of supporting roof and sides, the assistance of expert testimony will be needed, but the expert evidence cannot, even by reference to currently adopted mining practice, diminish the measure of the obligation imposed by the G statute, which is to take the steps that are requisite so that, or to bring it about that, roads and working places are secure. A step which is necessary is none the less necessary, even though it was not known to be necessary and even though someone was not negligent in not knowing that it was necessary. If, however, necessary steps have not been taken, then there may be the defence that is indicated by s. 157. It could be proved that it was impracticable to avoid or prevent H contravention. " Impracticable " is a familiar word which can be understood by all and which needs neither synonym nor paraphrase. A consideration of s. 157 tends to confirm in my mind the view which I have expressed as to the meaning of s. 48. That which is necessary may be something more than that which is practicable; but if " the necessary steps " in s. 48 are defined as those steps which " a competent mining engineer, in the light of his own experience and in I the light of generally accepted mining practice " (17), would take, then surely such necessary steps could only be those which are practicable.

Having given my view as to the construction of s. 48, I cannot agree with counsel for the plaintiff that the words have the meaning that the manager must " ensure " that a road or working place is kept secure. That is not what is said, and I feel that it is very important to keep to the words of the section and not to

---

(16) [1959] 2 All E.R. at p. 175; [1959] A.C. at p. 718.
(17) See p. 603, letter I, ante.

introduce others. If Parliament had wished to use the word " ensure " in this section, it could have done so. That word is to be found in other sections in the Act (18). What is said in s. 48 is that the manager must take such steps as are necessary for keeping the road secure.

Is there then any evidence in this case that down to the moment when the tub displaced the support, the manager had failed to take such steps? I can see none. The road in question was properly supported. Then came the mishap to the support. But that did not involve that the manager had failed to take steps to keep the road secure. He had not failed. The road had been secure. When, owing to the accidental assault on security, a state of insecurity was created, then the occasion arose for a new and further fulfilment of the continuing duty of the manager to take steps. But there is no evidence that he failed at that stage. The situation was in fact being dealt with by the overman with the utmost dispatch and probably before there would even be time for the manager to be made aware of the situation. In my judgment, the evidence positively negatives any suggestion of failure on the part of the manager down to the moment of the mishap and there is no evidence of any failure during the few minutes which intervened between that moment and the moment when the plaintiff was injured. I consider, therefore, that the claim rightly failed and I would dismiss the appeal.

PEARCE, L.J., read the following judgment: I agree. But I regret to find myself not wholly in accord with the views expressed by my Lord with regard to the meaning of the words : " such steps as may be necessary " in s. 48 of the Mines and Quarries Act, 1954. I venture to think that they have a somewhat different connotation.

We have been helped by very full and clear arguments on both sides. Counsel for the plaintiff admitted for the purposes of his main argument that before the tub damaged the concrete prop and caused the girder to fall there was no contravention of s. 48. The manager had taken such steps as might be " necessary for keeping the road or working place secure " and it was in fact secure. But he argues that, the moment after the damage had been caused by the tub and the girder had fallen, there was a contravention of s. 48. For there was then a state of insecurity and, therefore, the defendants from that moment failed to keep the road secure. He frankly admits that this argument is dependent on reading the words in s. 48 (1) " to take . . . such steps . . . as may be necessary for keeping the road or working place secure " as if they were " to ensure that the road or working place shall be kept secure." Thus, he argues, there is an absolute duty to keep the road or working place secure (subject always to the escape provided by s. 157 on proof of impracticability), and a state of insecurity, however caused, constitutes a contravention of s. 48.

He seeks to justify this drastic paraphrase of s. 48 by referring to previous enactments. The Coal Mines Regulation Act, 1872, had provided, by s. 51:

> " The following general rules shall be observed, so far as is reasonably practicable . . . (16) The roof and sides of every . . . road . . . shall be made secure . . ."

That provision was re-enacted in the Coal Mines Regulation Act, 1887 (19). The Coal Mines Act, 1911, provided, by s. 49, that " The roof and sides of every travelling road and working place shall be made secure . . ." The escape clause, ". . . if it is shown that it was not reasonably practicable to avoid or prevent the breach " was then for the first time put into a separate section, s. 102 (8). In *Edwards* v. *National Coal Board* (20), it was not doubted that any insecurity of roof or sides constituted a breach of an absolute duty under s. 49 of the Coal Mines Act, 1911. Against that background of eighty years of absolute liability

(18) See, for example, s. 66 (2), s. 74 (1), and s. 82 (2); 34 HALSBURY'S STATUTES (2nd Edn.) 567, 573, 579. (19) Section 49, r. 21, of the Act of 1887.
(20) [1949] 1 All E.R. 743; [1949] 1 K.B. 704.

A it is incredible, argues counsel for the plaintiff, that the legislature intended by the Mines and Quarries Act, 1954, s. 48, to destroy or to erode the right which miners had so long possessed and to reduce the absolute liability of owners to what would in most cases be merely the ordinary common law liability, laid on their manager, namely, a duty to " take such steps as may be necessary for keeping the road or working place secure."

B Yet that is what the Act apparently says. It is difficult to argue that the words of the section mean " shall ensure that the road or working place shall be kept secure " when, in fact, the words are " [shall] take . . . such steps . . . as may be necessary for keeping the road or working place secure." And the argument is made still more difficult by the fact that in s. 74 (1) and s. 82 (2) of the same Act the words " It shall be the duty of the manager of every mine to ensure " are C actually used in connexion with other duties. If that was also intended in s. 48, why was it not also thus expressed? In other sections (s. 51 (3), s. 55 (5), s. 56 (2), s. 61, s. 66 (7)), the words " [shall] secure that " are used, presumably with a meaning similar to that of the words " shall ensure that." Moreover in s. 55 both the expressions " to take such steps as are necessary for securing " and " to secure that " are used with an apparent intention that they shall mean D different things. Section 55 (1) provides:

> " It shall be the duty of the manager of every mine to take such steps as are necessary for securing that there is constantly produced in all parts of the mine below ground ventilation adequate for the following purposes . . ."

And s. 55 (5) provides that, when the ventilation is interrupted,

E > " . . . it shall be the duty of the manager . . . to secure that, until the ventilation is restored, access to that part of the mine is so restricted as to prevent [persons from entering]."

If the " taking of such steps as are necessary " is tantamount to " securing ", then the difference in wording is odd; and, moreover, it would then appear F that the interruption of ventilation must constitute a contravention; and it is surprising, if so, that the section does not mention that it is a contravention when dealing with the duty which arises owing to such interruption. Further, in s. 38 of the Act of 1911 a provision that shafts " shall be . . . made secure " is repeated in the same terms (so far as material to this argument) in s. 30 (1) of the Act of 1954, showing that where the same liability is intended the same words G are used, as one would expect.

Undoubtedly there is force in the careful argument of counsel for the plaintiff. He sought to support it by other smaller points which really add little or nothing to the obvious force of the main argument. But, in my view, that argument cannot survive the plain language of the Act of 1954 and the inference to be drawn from those other sections to which I have referred.

H I do not accept the argument that one must consider s. 49 of the Act of 1911 and s. 48 of the Act of 1954 divorced from the escape clause. In considering the language to be used and the burdens to be imposed by those sections respectively, Parliament must have taken into account the respective escape clauses. To say that under the Act of 1911, or any previous statute, the owners were insurers, or the duty was absolute, is apt to be misleading. In each case liability was I subject to the practicability of avoiding the contravention. It was, of course, very important to a plaintiff that there was a presumption of absolute liability which enabled him to succeed unless the owners by their evidence showed that the escape clause applied. But one cannot properly say that the owner of a house is under an " absolute " liability for anything falling from his window on to a passer-by merely because he is liable under the doctrine of res ipsa loquitur unless he can show that he was not negligent, or (to borrow the words of s. 102 (8) of the Act of 1911) " that it was not reasonably practicable " to stop the object from falling out of the window. If one compares s. 49 of the Act of 1911, as modified

by the escape clause, with s. 48 of the Act of 1954, as modified by the escape clause, the contrast is not nearly so dramatic as it appears to be when one compares them without any consideration of the respective escape clauses.

The Act of 1954 has made various alterations. The general provision under s. 49 of the Act of 1911 that

> " The roof and sides of every travelling road and working place shall be made secure . . ."

becomes a personal liability on the manager under s. 48 of the Act of 1954. Instead of being an abstract general liability, it is transformed into the manager's personal duty to take such steps as are necessary. It is by taking steps that a person carries out a personal duty. Those steps are defined in s. 48 (1), namely,

> ". . . such steps by way of controlling movement of the strata in the mine [a matter not formerly mentioned in the previous Act] and supporting the roof and sides of the road or working place . . ."

Further, he has by s. 48 (2) a duty

> ". . . to take such steps as may be necessary for securing that he is at all material times in possession of all information relevant for determining the nature and extent of any steps which it is requisite for him to take in order to discharge efficiently the duty imposed on him by the foregoing subsection."

Thus s. 48, in substance, deals with what might be described as long-term planning duties. Section 49 of the Act of 1954 deals, as did s. 50 of the Act of 1911, with the regular day-to-day systematic support for the roof and sides in accordance with the regulations and also with rules to be made by the manager.

In *Wright* v. *Jenkins* (21) T. R. FITZWALTER-BUTLER, ESQ., the chairman of Nottinghamshire Quarter Sessions, in dealing with the manager's liability under s. 48 of the Act of 1954, said:

> " First of all, s. 48 uses different language from that of the corresponding sections in earlier Acts, and we think that has been done for a purpose. If the duty was already absolute, as it undoubtedly was, it obviously cannot be made higher; if the duty was to remain the same, there would be no necessity for using different words; but, if it were desired to diminish the duty, then, in our view, the use of different language would be appropriate. Secondly, there is introduced for the first time into this section a new element, namely, control of movement of strata. That is an element into which unknown factors must, to some degree, enter; and that consideration also, we think, must be borne in mind. Thirdly . . . there are other sections in this Act where an absolute duty is obviously created and where language of a different kind is used."

Those cogent observations were approved obiter by WINN, J., in *Winkler* v. *National Coal Board* (22) at Leeds Assizes on May 4, 1960. I find myself with all respect to my Lord unable to share his view that those observations are in any way erroneous.

These alterations embodied in the wording of s. 48 of the Act of 1954 have not, however, changed the burden of proof. If there is insecurity, the burden lies on the manager, and the plaintiff is still entitled to judgment on proof of an accident due to insecurity of the roof if nothing further is proved. For the insecurity is prima facie evidence that the necessary steps have not been taken. But the mere fact that insecurity results does not make the manager liable if he proves that he did take " such steps . . . as may be necessary." His duty to take those steps is absolute, but he is not made to ensure their success. If " such steps . . . as may be necessary " meant " steps which, after the event, are shown in retrospect

(21) (1958), 43 Cr. App. Rep. at p. 18.
(22) (Leeds Assizes, May 4, 1960), unreported.

A to have been necessary ", he would be put (subject to the escape clause) in the position of an insurer; for, in nearly all cases of (for instance) collapse of a roof, it is possible by subsequent investigation to find steps which, had the unknown been known, could have successfully prevented the collapse. But that meaning is not, as I think, the normal and natural meaning of the words " [shall] take such steps as may be necessary." If that meaning was intended, it could easily B have been so expressed. Nor did counsel for the plaintiff argue in favour of such an interpretation. Such an interpretation would, I think, be a reversion to the artificial abstract conception of absolute liability which has been discarded in the Act of 1954 in favour of the real concept of an efficient person taking steps which are necessary in the light of knowledge which it is possible for him to possess. Section 48 (2) clearly contemplates that the manager can " discharge efficiently C the duty imposed on him " by determining in the light of " all information relevant " (which cannot, I think, include information which it is physically impossible to possess) " the nature and extent of any steps which it is requisite for him to take." Whether steps are necessary must, therefore, in my opinion, be decided in the light of all the facts which were known or ought to have been known at the time when the decision to take those steps fell to be made and when D it was still possible for those steps to be taken. And an immediate notional failure to take steps cannot be imputed to the manager at the moment of an unforeseeable occurrence without giving him any space of time in which such steps could physically be carried out to remedy the occurrence.

The escape clause under the Act of 1954 is somewhat more restricted than that under the Act of 1911. It is slightly more difficult to show that avoidance of the E breach was " impracticable " than to show that it was " not reasonably practicable." The difference of meaning between the two expressions is hard to define; and further definitions of words that in themselves express a shade of meaning are not helpful. But the difference, though hard to define, exists, and in a borderline case it might produce a difference in the result. The word " reasonably " has a slight tendency to modify the word " practicable." I respectfully agree F with the words of LORD REID in *Marshall* v. *Gotham Co., Ltd.* (23):

> " But, in my judgment, there may well be precautions which it is ' practicable ' but not ' reasonably practicable ' to take . . ."

In the result, I do not find the difference between s. 49 of the Act of 1911 and s. 48 of the Act of 1954, with their respective escape clauses, very startling. The G abstract absolute duty has become a concrete practical duty, personal to the manager and he cannot avoid it. It is not so stringent as was the impersonal duty, but the escape clause has become a little stricter. The total difference between the old and the new sections is certainly not so great or so incredible as to indicate that it cannot have been intended. It cannot justify us in giving to the words of the statute a meaning other than their plain ordinary meaning.

H As to the particular facts of this case and the application of s. 48 to them, I agree with what my Lord has said. The manager did not fail to take such steps as were necessary and there has been no breach of s. 48. In my judgment, the learned judge came to the right conclusion and the appeal should be dismissed.

PILCHER, J.: I agree that this appeal should be dismissed. Section 48 of the Mines and Quarries Act, 1954, imposes for the first time a personal duty on I the manager of every mine in the words of the section. The words relating to the control of movement of the strata in the mine are new ones which do not appear in the earlier Act. Clearly, under s. 48 (1), the manager has in the first place personally to consider, and, no doubt, reconsider from time to time, what general system of support is appropriate to each particular road or working place in the mine, and, no doubt, to see that the system or systems approved by him are installed, maintained and altered from time to time if he considers this necessary,

(23) [1954] 1 All E.R. at p. 942; [1954] A.C. at p. 373.

the actual work of installation, maintenance and alteration being done by his subordinates. The prop which was displaced by the tub which ran off the line in the present case, with the resultant displacement of the girder which caused the first fall of stone, was a unit in a form of " systematic support " for the roof, the obligations in respect of which are set out in s. 49 of the Act of 1954 and it would seem that this systematic support was properly installed and maintained under rules made by the manager under s. 49 (5). Section 48 (2) provides:

> " It shall be the duty of the manager of every mine to take such steps as may be necessary for securing that he is at all material times in possession of all information relevant for determining the nature and extent of any steps which it is requisite for him to take in order to discharge efficiently the duty imposed on him by the foregoing subsection [s. 48 (1)]."

The main submission of counsel for the plaintiff was that the words of s. 48 (1), requiring the manager

> ". . . to take, with respect to every road . . . such steps by way of . . . supporting the roof . . . as may be necessary for keeping the road . . . secure . . ."

imposed on the manager an absolute obligation to ensure that the roof was at all times kept secure, subject, of course, to any defence available to the defendants under the escape clause in s. 157 of the Act. He submitted, in effect, that, from the time when the prop was knocked down and the supporting girder collapsed, which seems to have been only a few minutes or so before the second fall of stone which injured the plaintiff, the roof was not secure; that the mine manager was, in consequence, in breach of his absolute duty to keep the roof secure; that he remained in breach of his duty until the plaintiff's accident happened; and that the defendants cannot, therefore, escape liability for an accident due to this breach.

There was no evidence that the general system of support in this road was not perfectly proper or that the particular prop and girder which fell were insecure or improperly positioned. Counsel for the plaintiff conceded, I think, that until the prop was knocked down the roof at the material place was in fact secure, and, whether he intended or not to make that full concession, it seems to me that it would have been impossible for him to argue that the prop in question was not in fact secure prior to the derailment of the tub. It is equally clear that, after the prop was knocked down, the roof was and remained insecure until after the accident. On the facts found by the learned judge, which are accepted for the purposes of this appeal, it was not suggested that the defendants or their servants had been guilty of any negligence between the time when the prop fell and the time when the plaintiff's accident occurred.

The main submission of counsel for the plaintiff necessarily involved that his appeal must fail unless he could satisfy this court that s. 48 (1) imposed an absolute obligation on the mine manager by himself and his subordinates to keep the roof secure, with a consequent responsibility on the defendants to pay damages for any injury sustained by their servants due to a fall of roof while the roof was in a state of insecurity, as it admittedly was when the plaintiff's accident occurred.

Section 48 (1) imposes for the first time on the mine manager personally the duty of taking such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road as may be necessary for keeping the road secure, and, as I have indicated, s. 48 (2) requires the manager to take steps to see that he is at all times equipped with the necessary information to enable him to discharge efficiently, and I stress the word " efficiently ", the duty imposed on him under s. 48 (1). There is no doubt, therefore, that the duties and responsibilities imposed by the section on the mine manager are heavy ones. Section 48 is the first of the fasciculus of sections in the Act of 1954,

which deal with support, and in particular with the support of the roof and sides of roads and working places in the mine. It is clear, on the evidence and the facts found, that the particular prop which was knocked down was perfectly properly set up and was a unit in the systematic support which obtained in the area. It was not suggested that it would ever have collapsed as it did if it had not been the object of an extraneous " attack " by the tub in question. This attack caused it and the girder to collapse and thus caused the roof to become insecure. Thereafter it is common ground that no amount of care or diligence on the part of the mine manager could have got the roof into a condition of security before the plaintiff's accident occurred.

There was no evidence why the tub ran off the line into the prop except that it had been damaged in an earlier derailment. It may have been derailed for the second time because of this damage or possibly because there was some débris or rubbish on the line. All this is a matter of speculation and has nothing to do with the support of the road as such. Section 36 of the Act deals with the duty of the manager not to permit vehicles to come into contact with supports as this tub did, and it may well be that a proper examination of the tub in question would have shown that it was liable to run off the line and come into contact with supports. If the tub ran off the line because of débris or rubbish left on the line, the defendants would have been in breach of their common law duty, and possibly also of some statutory duty, to keep the line free from obstruction. It seems proper to have these matters in mind, although the plaintiff's action here was brought under s. 48 and it is with the proper construction of this section that we are concerned. It is perhaps trite to observe that the section in question should, in the first place, be construed, if possible, in accordance with the natural meaning of the words used, divorced from a consideration of the words used in comparable sections of earlier Acts dealing with the question of support. I confess that the words of the section which require the manager to take such steps in the two matters as may be necessary for keeping the road secure do not appeal to me as being, in themselves, apt to impose on the manager an absolute duty by such steps to ensure security. The requirement in sub-s. (2) that the manager shall equip himself with the necessary information to discharge his duties under sub-s. (1) efficiently also introduces to my mind the concept of a high personal duty which is inconsistent with an absolute obligation to ensure security.

In my opinion, the steps which the manager was obliged to take under the section were such steps as appeared to him to be necessary for keeping the roof and sides of the road secure in the light of the knowledge which he had or ought to have had when he took the steps in question. If it turns out that the manager failed to take a necessary step or took a wrong step in the light of what he knew or ought to have known before insecurity arose, he will be in breach of the section; but I find myself unable to assent to the view that " the necessary steps " which he is obliged to take under the section as a matter of construction include steps the necessity for which could be ascertained only after insecurity arose.

I have naturally felt myself in some considerable difficulty in arriving at a conclusion as to the proper construction of this section by reason of the fact that LORD MORRIS OF BORTH-Y-GEST and PEARCE, L.J., have taken differing views as to its construction, although the result of the case will not be affected by that. But I have had the advantage of reading the judgment of PEARCE, L.J., which has just been delivered. I respectfully agree with every word of it and I should like to be permitted to adopt, without repeating, his careful analysis of the various material sections of the Act of 1911 and the Act of 1954 which impose absolute liability in regard to support and other matters on the mineowner and also those sections of the Act of 1954 which only require the mine manager to " take steps ". I also agree with the conclusion at which PEARCE, L.J., arrives as to the proper construction of s. 48 (1). It is, I think, quite clear that, when Parliament intends to impose an absolute liability to ensure security, apt words are used to do so. The fact

that different words are used in s. 48 of the Act of 1954, in regard to support, from the clear words used in s. 49 of the Act of 1911, where the mineowner's obligation in this respect was absolute, leads me to suppose that some change in the obligation was intended. An absolute obligation cannot be rendered more onerous, and I therefore conclude that, if a change was intended, it must have been in the direction of a relaxation of the concept of absolute liability. This conclusion, taken in conjunction with what I think is the ordinary and natural meaning of the words, leads me, in the difficult situation in which I find myself, to agree with PEARCE, L.J., and regretfully to have to disagree with the construction put on the section by LORD MORRIS. In the result, therefore, in the view which I take, the mine manager was never in breach of this section from the time when the roof was rendered insecure until the time of the occurrence of the second fall which injured the plaintiff. The defendants, therefore, do not need to invoke the provisions of s. 157, and, had they needed to do so, they would, on the facts found by the learned judge, and for the reasons stated by my Lord, have been entitled successfully to do so.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the plaintiff); *D. H. Haslam*, agent for *W. M. Burnside*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

THE BEAVERFORD. OWNERS OF DUMB BARGE SUNWELD *v.* CANADIAN PACIFIC RAILWAY CO. AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hewson, J.), October 24, 1960.]

Admiralty—Practice—Preliminary acts—Port authority allegedly engaged in directing movement of vessels—Whether port authority should file preliminary act—R.S.C., Ord. 19, *r.* 28 (1).

The S., owned by the plaintiffs, came into collision with the B., owned by the C.P.R., the first defendants, and thereby suffered damage. An official of the port authority, the second defendants, was said at the material time to have been actively engaged in, or directing, the movement of the S., and another official of that authority was said to have signalled the B. into the cutting where the collision took place. The plaintiffs issued a writ against both defendants and filed a preliminary act in accordance with R.S.C., Ord. 19, r. 28*. They applied for and obtained an order from the Admiralty registrar for both defendants to file preliminary acts. On appeal by the port authority,

Held: under R.S.C., Ord. 19, r. 28 (1), the filing of preliminary acts was not restricted to vessels in some way or other interested in or connected with the collision (p. 615, letter H, post) and it was alleged that, as officials of the port authority were directing or taking an active part in the movement of the vessels concerned, preliminary acts should be filed by the port authority as well as by the owners of the vessels.

Per CURIAM: one of the principles of the filing of preliminary acts is that there must be mutuality: no party must be put at an advantage or at a disadvantage through such filing (see p. 615, letter C, post).

[As to preliminary acts in Admiralty actions, see 1 HALSBURY'S LAWS (3rd Edn.) 86, 87, paras. 184, 185, and, especially para. 187; and for cases on the subject, see 1 DIGEST 177, 178, *890-898*.

For R.S.C., Ord. 19, r. 28, see ANNUAL PRACTICE (1960) 479.]

* The relevant terms of R.S.C., Ord. 19, r. 28, are printed at p. 615, letter H, post.

A Cases referred to:

Carlston, The, Balcombe, The, [1926] P. 82; 95 L.J.P. 51; 134 L.T. 766; 17 Asp. M.L.C. 33; Digest Supp.

El Oso, The, (1925), 133 L.T. 269; 16 Asp. M.L.C. 530; Digest Supp.

Summons.

B This was a summons by way of appeal brought by the second defendants, the Port of London Authority, from a decision of the Admiralty registrar dated Aug. 30, 1960, whereby he ordered that both the first defendants, the Canadian Pacific Railway Co., and the second defendants, should file preliminary acts within fourteen days of the commencement of the Michaelmas Term, 1960. The short facts of the case and the main arguments of counsel for the second C defendants and the plaintiffs are set out in the judgment. The main ground of appeal by the second defendants was that they should not file a preliminary act as they were not one of the parties involved in the collision. The authority and cases enumerated below* were cited in argument in addition to those in the judgment.

D *Gerald Darling* for the plaintiffs.

J. Franklin Willmer for the first defendants, the Canadian Pacific Railway Co.†

J. S. Hobhouse for the second defendants, the Port of London Authority.

HEWSON, J.: The dumb barge Sunweld, owned by the plaintiffs, came into collision with the steamship Beaverford, which is owned by the first E defendants, the Canadian Pacific Railway Co., on Jan. 27, 1960. The collision occurred, as I am told, in the Connaught cutting, which joins the Royal Albert Dock to the King George V Dock—and I speak there from memory. The writ was issued on Mar. 14, 1960, against the Canadian Pacific Railway Co. as defendants, and also against the Port of London Authority. The plaintiffs filed a preliminary act on June 21, 1960. The learned registrar made an order that F both the defendants should file preliminary acts, and that the plaintiffs were to have the costs of the summons before him against the second defendants, the Port of London Authority, who, as I understand it, resisted any suggestion that they should file a preliminary act in this case. The Port of London Authority appeal against the order of the learned registrar on two points, viz., that they should not file a preliminary act, and that they should not have to G pay the costs of the summons before the registrar.

This is an unusual case and before I proceed to describe it in any further detail I must refer to the order which applies to preliminary acts, namely, R.S.C., Ord. 19, r. 28 (1), which says this:

H "In actions in any Division for damage by collision between vessels, unless the court or a judge otherwise orders, the plaintiff shall [within so many days] and before any pleading is delivered, file with the registrar . . . a document to be called a preliminary act, [which shall contain certain particulars]."

I The particulars are well-known to practitioners in this court. They consist of

---

* R.S.C., Ord. 3, r. 2; *The John Boyne,* (1877), 3 Asp. M.L.C. 341; *Webster* v. *Manchester, Sheffield & Lincolnshire Ry. Co.,* (1884), Bitt. Rep. in Ch. 172; 5 Asp. M.L.C. 256, n.; *The Alexandra,* (1888), 6 Asp. M.L.C. 384, n.; *Secretary of State for India* v. *Hewitt & Co., Ltd.,* (1888), 6 Asp. M.L.C. 384; *Armstrong* v. *Gaselee,* (1889), 22 Q.B.D. 250; 6 Asp. M.L.C. 353.

† The second defendants did not issue a notice of appeal against the first defendants but His Lordship (who had directed that the summons be heard in open court) took the view that the first defendants were interested parties—that it was a matter that affected all parties and that, therefore, the first defendants were entitled to be present.

answers to fifteen questions (1), and the first point taken valiantly by counsel, on behalf of the Port of London Authority, is that this series of questions must be read in conjunction with the earlier part of this order. He has strongly pressed on me in considering this rule that I must not lose sight of the fact that the questions are primarily designed for application to vessels being navigated.

There is no doubt that when there is a collision between two or more vessels preliminary acts must be filed. There is no doubt in appropriate cases, subject to the exercise of the discretion of the court, that where more than two ships are concerned, but only two are in collision, preliminary acts should be filed.

I do not think it is necessary for me to go in any great detail into the law which has been accumulated in the course of years on those points. It is sufficient for me to say that the matter is summarised in ROSCOE'S ADMIRALTY PRACTICE (5th Edn.), at p. 300 from which the following excerpt is taken from the judgment of LORD MERRIVALE, P., in *The El Oso* (2):

> " In *The El Oso* (2) . . . the practice was laid down by LORD MERRIVALE, P., . . . as follows (3): ' The conclusion at which I have arrived is that the true view, at any rate so far as this Division is concerned, is that the practice as to requiring preliminary acts, outside of the cases in which parties to the collision by their vessels are parties to the litigation, is a matter for the discretion of the court. There is no difficulty with regard to the normal damage case. That is, the case where vessels have been in collision and the owners of one vessel bring their suit against the owners of the other in the Admiralty jurisdiction to determine the liabilities. The rule undoubtedly applies in its full force in these cases. The difficulty arises with regard to what I may call " third party " collisions. It seems to me . . . that the proper course is that there should be the communication between the solicitors which commonly takes place in Admiralty cases, and the solicitors should ascertain whether on the one side or the other the parties are ready to take advantage of R.S.C., Ord. 19, r. 28 . . . If both parties are not ready to deliver preliminary acts [by " ready " I understand LORD MERRIVALE, P., means " willing "] the matter should be raised by summons in the registry.' The principle is mutuality. Where there are two defendants to an action an order will not be made at the instance of one defendant that the other defendant should file a preliminary act: *The Carlston, The Balcombe* (4)."

The peculiar facts of this case are these. The Port of London Authority is the second defendant, and it is not suggested that at any time any of their vessels were present or that any of their vessels were in any way responsible for this collision. The difficulty in this case is that until pleadings are closed the court cannot be aware of the real facts, and in such circumstances it must rely on statements made by counsel in good faith as to the circumstances leading up to the collision. I am assured by counsel for the plaintiffs that it is their case that

---

(1) These questions (named particulars in the order) were as follows—(i) the names of the vessels which came into collision and the names of their masters; (ii) the time of the collision; (iii) the place of the collision; (iv) the direction and force of the wind; (v) the state of the weather; (vi) the state and force of the tide; (vii) the course and speed of the vessel when the other vessel was first seen or immediately before any measures were taken with reference to her presence, whichever was the earlier, and all subsequent alterations to the course or speed of the vessel up to the time of the collision; (viii) the lights (if any) carried by the vessel; (ix) the distance, bearing and approximate heading of the other vessel when first seen; (x) the lights (if any) of the other vessel which were first seen; (xi) whether any lights of the other vessel, other than those first seen, came into view before the collision; (xii) what measures were taken, and when, to avoid the collision; (xiii) the parts of each vessel which first came into contact and the approximate angle between the two vessels at the moment of contact; (xiv) what sound signals (if any) and when were given; (xv) what sound signals (if any) and when were heard from the other vessel.

(2) (1925), 133 L.T. 269; 16 Asp. M.L.C. 530.

(3) (1925), 133 L.T. at p. 273; 16 Asp. M.L.C. at p. 533.

(4) [1926] P. 82; 17 Asp. M.L.C. 33.

the barge with which the Beaverford came in contact was at the material time being moved in some way or another by one of the officials of the Port of London Authority. I am also told by him that at the material time a lockmaster or a bridge operator—the official operating the bridge in the cutting—blew a whistle signal directing the Beaverford to enter the cutting. In the absence of pleadings (which, of course, cannot be available to the court at this stage) I must rely on such statements. I am told by counsel for the second defendants that they do not accede to counsel for the plaintiffs' suggestion that any official of the Port of London Authority was on board the barge at the material time. Nevertheless, prima facie there are before me facts from which I can conclude that one of the issues in this case is that some one or other official of the Port of London Authority may have been actively engaged in the movement of the barge and was engaged in the direction of the ship. So we have a peculiar set of circumstances, which very seldom arises, and I have to do the best I can in deciding whether or not preliminary acts ought to be filed.

Let it be said at once that one of the principles of the filing of preliminary acts is that there must be mutuality, and that is that no party must be put at an advantage or at a disadvantage through such filing. Counsel for the second defendants has strongly pressed on me that there is no jurisdiction given to this court under the rule unless it be confined to damage by collision between vessels and/or, in cases where more than two vessels are concerned, unless the other parties, the third or fourth parties, are also vessels. He says that in reading R.S.C., Ord. 19, r. 28 (1) as a whole, it must be regarded as being solely directed to vessels being navigated. He says, with some force, that most of the questions are directed to navigational matters which cannot be adequately dealt with by people on the shore; they must be confined to vessels either colliding or in some way bound up with the collision between two other vessels. As I say, there is some force in this. The questions in the preliminary act are such as: "the time of the collision"; "the place of the collision"; "the state of the weather"; "the direction and force of the wind"; "the state and force of the tide"; "the course and speed of the vessel when the other vessel was first seen or immediately before any measures were taken with reference to her presence . . ."; "the lights (if any) carried by the vessel"; "the distance, bearing and approximate heading of the other vessel when first seen"; "the lights (if any) of the other vessel which were first seen"; "whether any lights of the other vessel, other than those first seen, came into view before the collision"; "the parts of each vessel which first came into contact . . .", and what sound signals (if any) were given, and so on. There is also, as counsel for the plaintiffs has reminded me, art. (xii) of the preliminary act, which says: "what measures were taken, and when, to avoid the collision".

I know of no case where preliminary acts have been ordered in respect of parties other than vessels, but the fact that there is no reported case does not, in my opinion, bind me to restrict the application of preliminary acts to vessels in some way or another interested in or connected with the collision. The words of R.S.C., Ord. 19, r. 28 (1), are plain:

> "In actions in any Division for damage by collision between vessels, unless the court or a judge otherwise orders, the plaintiff . . . and the defendant shall . . . file . . . a preliminary act . . ."

I feel in no way constrained by those words to restrict the filing of preliminary acts to vessels provided there is a collision between two vessels, so on that part of the argument counsel for the second defendants fails.

The matter is then left as one of discretion of the court, and in exercising discretion the court must be informed fully enough to weigh up the contentions of the parties and the position in which each party was at the material time in order to observe those facts which go to the making up of a preliminary act.

Counsel for the plaintiffs has emphasised before me that one of the main questions in the preliminary act is: " what measures were taken, and when, to avoid the collision " (5). In this case, so far as I am aware, we have the second defendants, the Port of London Authority, with employees actively engaged at the time in both the movement of the barge and the direction of the ship. I have in mind that for, I think, over a hundred years now it has been the practice in this Division for vessels in collision to file preliminary acts so that there may be on record admissions binding on the parties, but not on the court, which are set down at the earliest possible moment after the collision. It is a practice which should not be departed from except in very exceptional circumstances.

I have already referred to the particular and peculiar facts of this case. It seems to me that, when you have a port official directing or taking an active part in the movement of one or other of the vessels which came into collision, a preliminary act should be filed by the colliding vessels and should also be filed by that directing authority. He, at least, should be able to answer the most important article in the preliminary act, namely, art. (xii) (5).

I realise that this is not so much a departure from usual practice, but an extension of it, and I do not flinch from what I have said. I do not wish it to be understood from my finding in this case that it must necessarily follow that in every case where a port authority is in any way connected with a collision it should file a preliminary act; but in the particular facts of this case, in my view, it should.

One further reason for my decision is that the learned registrar heard all the arguments in this case, I am told at some length, and in the exercise of his discretion he ordered preliminary acts to be filed, and unless there is a good reason, or good reasons, why I should make any change I feel that I should uphold his exercise of discretion in this case. I have given my own reasons for so doing, and it must follow from what I have said that this appeal summons must be dismissed.

[His Lordship ordered that the preliminary acts of the first and second defendants should be filed within twenty-one days of Oct. 24, 1960, the plaintiffs to have their costs of the appeal against the second defendants and the first defendants' costs of appearing at the appeal also to be paid by the second defendants. The registrar's order as to costs to stand (the registrar had made an order that the second defendants should pay the costs of the plaintiffs on the application before him on Aug. 30, 1960).]

Summons dismissed.

Solicitors: *J. A. & H. E. Farnfield* (for the plaintiffs); *William A. Crump & Son* (for the first defendants); *G. D. G. Perkins* (for the second defendants).

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

---

(5) See art. (xii), footnote (1), p. 614 ante.

WESSANEN'S KONINKLIJKE FABRIEKEN N.V. *v.* ISAAC MODIANO BROTHER & SONS, LTD.

[Queen's Bench Division (Diplock, J.), October 31, November 1, 1960.]

Arbitration—Procedure—Umpire—Status of arbitrators appearing at commercial arbitration before umpire—London Cattle Food Trade Association—Arbitrators becoming advocates for parties who appointed them—Judicial notice of practice—Power of arbitrator, in capacity of advocate, to waive irregularity in procedure before umpire.

A dispute having arisen between buyers and sellers under a contract in the form of the London Cattle Food Trade Association (Incorporated) as to the buyers' right to reject goods, each of the parties appointed an arbitrator in accordance with r. 1 of the association's rules of arbitration which formed part of the contract. By r. 1, if the arbitrators disagreed, they were required to appoint an umpire who was a member of the association and whose decision would be final. The two arbitrators having disagreed, appointed an umpire who was a member of the association and arranged for a hearing of the dispute at the umpire's office. At the hearing before the umpire, at which the only other persons present were the two arbitrators, the buyers' arbitrator addressed the umpire first by outlining the facts, which were not in dispute, and arguing the law. When he had finished the sellers' arbitrator put forward his opposing arguments in the course of which he referred to a written opinion of counsel obtained by the sellers of which he had been furnished with a copy. The sellers' arbitrator read out to the umpire all the paragraphs of the opinion dealing with the point he was advocating, stressing the importance of the opinion and suggesting that it strongly confirmed his (the arbitrator's) contentions. The case on which counsel's opinion was obtained was not seen by the umpire. The buyers' arbitrator did not object to the reading of counsel's opinion, and at the end of the hearing the umpire asked the buyers' arbitrator if he, too, wished to submit a legal opinion; the buyers' arbitrator said that he did not. Both arbitrators handed to the umpire their files of documents which, in the case of the sellers' arbitrator, contained the copy of counsel's opinion. The umpire made an award in favour of the sellers. The buyers sought to set aside the award for irregularity in procedure amounting to misconduct by the umpire in that counsel's opinion was read to the umpire and taken away for consideration by him.

Held: once the arbitrators had disagreed and appointed an umpire whose decision was final they were functus officio as arbitrators and appeared at the hearing as advocates for the parties who appointed them (a fact of which the court should, in arbitrations of this character, take judicial notice); accordingly, if it were an irregularity for the sellers' arbitrator to have read and handed counsel's opinion to the umpire, the buyers' arbitrator in his capacity as advocate had implied authority to waive the irregularity and on the facts had plainly done so.

[As to the powers of arbitrators and umpires, see 2 Halsbury's Laws (3rd Edn.) 31, 32, paras. 67-72; as to the conduct of the arbitration, see ibid., 34-38, paras. 78-87.

For cases on proceedings before an umpire, see 2 Digest (Repl.) 576-578, *1083-1110*.]

Motion to set aside award.

This was a motion by buyers to set aside an award of an umpire dated June 15, 1960, made in a dispute between the buyers and sellers, the umpire having been appointed by the two arbitrators nominated by each party to the dispute when the arbitrators failed to agree. The grounds of the motion were that the umpire

misconducted himself in law in that (i) he did not hold a proper judicial investigation of the matter in dispute in the presence of the parties; (ii) he received as evidence the file of correspondence and other documents held by each arbitrator without the other arbitrator seeing the contents of the file; and (iii) he received in evidence and took away for consideration, together with the documents mentioned in (ii), a written opinion of counsel obtained by the sellers without seeing the case on which counsel's opinion was obtained. At the hearing of the motion, ground (iii) only was persisted in by the buyers, the applicants on this motion. The arbitration clause in the contract between the buyers and the sellers, and the facts of the case, are set out in the judgment of DIPLOCK, J.

P. Goodenday for the applicants, the buyers.

B. B. Stenham for the respondents, the sellers.

DIPLOCK, J.: This is a motion to set aside an award made in a commercial arbitration because of the misconduct of the umpire. It was made plain at the outset by counsel on behalf of the applicants, that the misconduct which he alleges is technical misconduct and involves no reflection on the probity of the umpire.

The applicants were the buyers of certain rapeseed expellers to be shipped from Pakistan to Rotterdam by the respondents, who were the sellers. The contract was in the ordinary form of the London Cattle Food Trade Association (Incorporated), and it included the arbitration clause, cl. 26:

> "Any dispute on this contract to be settled by arbitration in London, in accordance with the rules and regulations of the London Cattle Food Trade Association (Inc.), which are indorsed hereon and are deemed to form part of this contract."

The rules are the familiar rules relating to arbitration, and it is sufficient that I should read only a portion of r. 1:

> "Any dispute arising out of a contract embodying these rules shall be referred to arbitration in London, each party appointing one arbitrator, who shall be a member of the association, and not interested in the transaction, and such arbitrators shall have the power, if and when they disagree, to appoint an umpire, who shall be a member of the association, whose decision is to be final."

A dispute having arisen between the buyers and the sellers as to the right of the buyers to reject the goods for an admitted breach of condition, each of the parties appointed an arbitrator under the provisions of the arbitration clause; the buyers appointed a Mr. Williams and the sellers a Mr. Owen, and the buyers and sellers respectively at some time provided their arbitrators with documents relating to the dispute. The two arbitrators did not in fact meet; they had a conversation over the telephone, and, as is not unusual in these arbitrations which are not purely quality arbitrations, they disagreed. They appointed as umpire a Mr. Phillips, and arranged with Mr. Phillips for a hearing at Mr. Phillips' office at some date in June, 1960. All three were, as the arbitration rule, r. 1, required, members of the association, and Mr. Owen, the sellers' arbitrator, and Mr. Phillips, the umpire, were men of long-standing experience in London Cattle Food Trade Association arbitration. It may be that Mr. Williams was also, but the extent of his experience does not appear from his affidavit.

At the hearing (1) Mr. Williams presented the arguments in favour of the buyers. For that purpose he outlined the facts (which were not really in dispute) and addressed to the umpire his arguments on the effect of the law on those facts. When he had finished, Mr. Owen, the arbitrator of the sellers, put forward his conflicting arguments, in the course of which he referred to counsel's opinion

(1) At the hearing before the umpire only the two arbitrators, Mr. Williams and Mr. Owen, were present and no other persons.

which had been obtained by the sellers, a copy of which had been furnished to him. He read out to the umpire a number of paragraphs of the opinion, and, indeed, all the paragraphs of the opinion which dealt with the particular point which he was advocating. It is apparent from his notes that he stressed the importance of the opinion (the author of which he incorrectly described as " a Queen's Counsel " (2)) and suggested to the umpire that the opinion strongly confirmed, and was, indeed, conclusive in favour of, the contentions which he was advancing. This was done without protest by the buyers' arbitrator and, at the end of it, the umpire asked the buyers' arbitrator whether he wished to reply —whether he had anything to say in reply or whether he desired to obtain and submit a legal opinion such as the sellers' arbitrator had done. Mr. Williams said that he did not. Both parties then handed to the umpire, without any objection from one or the other, their files of documents, which one now knows contained the relevant correspondence in the case of both the arbitrators, and, in the case of Mr. Owen, contained the copy of counsel's opinion from which he had read and also his own notes from which he had advanced his argument.

In the notice of motion it was contended that the umpire had misconducted himself in three respects: first, that he had not held a proper judicial investigation of the matter in dispute in the presence of the parties; secondly, that he had received as evidence the files of correspondence held by each arbitrator without the other arbitrator seeing the contents of the file; and, thirdly, that he took away counsel's written opinion without seeing the case on which such opinion was obtained. The first two grounds have not been persisted in in the argument before me.

It is, I think, plain and fully time that the court should take judicial notice of the fact that, in commercial arbitrations of this kind, under the rules of the London Cattle Food Trade Association, where arbitrators are appointed who, on disagreeing, appoint an umpire whose decision is final, the arbitrators, once they have disagreed and have agreed on an umpire, are functus officio as arbitrators and act at the hearing before the umpire as advocates for their respective appointors. That is a practice which two of the witnesses in the affidavits say has been going on for twenty-five years. A glance at the cases decided in these courts thirty and forty years ago (3) shows that the practice has been going on since the beginning of this century. And it is clear that the practice, when arbitrators have been appointed in this way, is that the parties themselves are represented at the hearing before the umpire by the arbitrators and by no one else unless they express a desire to be otherwise represented.

As regards the second ground, namely, the reception of the file of correspondence held by the respective arbitrators without the other arbitrator seeing the contents of the file, that again has not been proceeded with before me. It is plain that the two arbitrators trusted one another and that this was done by each with the consent of the other. Now that the files have been seen, since they are exhibited to the affidavits, it is obvious that the trust which each had in the other was justified. But, even if it had not been, I apprehend that the consent of each of the arbitrators to that course being adopted, would waive any irregularity in the procedure which was concerned.

Counsel for the applicants has really limited his argument here to the contention, first, that the reading of counsel's opinion, with or without the case, was an irregularity, that the handing of it in to the umpire was a further irregularity (but, I apprehend, of the same kind), and that it was an irregularity which the buyers' arbitrator had no authority to waive. Counsel for the applicants, I think, concedes (as he must) that if his arbitrator had authority to waive the irregularity,

---

(2) The opinion was that of counsel representing the sellers at the hearing of the motion.

(3) See, e.g., *French Government* v. *Tsurushima Maru* (*Owners*) ((1921), 37 T. L.R. 961) and *Bourgeois* v. *Weddell & Co.* ([1923] All E.R. Rep. 587), both of which were cited to the court in the present case.

then he cannot succeed in setting the award aside, for it is clear law that a party to an arbitration can waive an irregularity. A

It therefore becomes necessary for me to consider what is the extent of the authority of an arbitrator when appearing before the umpire in a commercial arbitration of this kind. There is no authority directly on the point, but it seems to me that the position is fairly clear. Once the arbitrators have disagreed and appointed an umpire they are functus officio as arbitrators. If they attend, B as they do, the hearing before the umpire, it is plainly as advocates for the parties who appointed them, for unless they attend in that capacity as representatives of the parties, they have no right to discuss the matter with the umpire at all. As advocates for the parties they present the evidence and conduct the argument, as in this case Mr. Williams presented the evidence and conducted the argument for the buyers and Mr. Owen presented the evidence and con- C ducted the argument for the sellers. It seems to me a necessary implication that a person appointed, as the arbitrators are at this stage of the proceeding, to act as advocate for the parties, must have all the necessary powers to agree to the form of the procedure; to admit, for instance, facts, and to agree to the method of proof of fact. It does not seem to me that it can possibly be said to be outside the implied authority of an arbitrator acting in those circumstances to waive or D agree to any irregularity in procedure which occurs.

Therefore, whether or not it was improper, strictly speaking, of Mr. Owen to read the opinion of counsel without making it plain that he was adopting it as part of his argument, such an act, if it were an impropriety or irregularity, was one that could be waived by the advocate of the other side, and was plainly waived by Mr. Williams. E

This decision makes it unnecessary for me to consider whether the course adopted by Mr. Owen was an improper course or not. He says in his affidavit that he read the opinion as a convenient way of putting his argument in support of the sellers' contention that the rejection was invalid, and that no objection was taken by Mr. Williams to his doing so. I doubt very much whether that course would have amounted to an irregularity, even if any irregularity had F not been waived. It has, however, been waived and the question does not arise.

In my view, there was no misconduct, however technical, on the part of the umpire in following a procedure, even if irregular, in which the irregularity was waived by the representative on each side, who, in my view, plainly had implied authority from the parties so to waive those irregularities.

The motion accordingly fails. G

Motion dismissed.

Solicitors: *Alexander Fine & Co.* (for the applicants, the buyers); *Coward, Chance & Co.* (for the respondents, the sellers).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

JACKSON *v.* JACKSON AND PAVAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Phillimore, J.), October 14, 20, 1960.]

Divorce—Adultery—Evidence—Register of births—Illegitimate child—Entry in register signed by reputed father—No identification of father's signature—Name and occupation of co-respondent the same as those entered as being the father's—Appearance entered by co-respondent but no defence to charge of adultery—Whether evidence justified finding of adultery against co-respondent—Costs against co-respondent—Births and Deaths Registration Act, 1953 (1 & 2 *Eliz.* 2 *c.* 20), *s.* 10, *s.* 34.

An entry in a register of births is prima facie evidence of the truth of the entry in so far as the entry is required to be made by statute (see p. 624, letter A, post).

The husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. The suit was undefended. At the hearing of the petition the husband adduced evidence of admissions of adultery made by the wife and produced a birth certificate relating to an illegitimate child born during the marriage to the wife. A witness who had inspected the entry in the register to which the certificate related identified the wife's signature thereon, but although the father had, pursuant to s. 10 of the Births and Deaths Registration Act, 1953, signed the register, there was no evidence of identification of the signature of the father. The co-respondent had entered an appearance by solicitors so that it was not possible, by comparing the signature on acknowledgment of service, to identify him as the child's father. However, there was evidence (apart from the certificate) that the name and occupation of the co-respondent were the same as those entered as being the father's on the register. The address entered on the register was one at which it was known that there was at one time a man with the wife.

The court found adultery proved against the wife but adjourned for further argument the questions (i) whether or not the evidence justified a finding of adultery against the co-respondent and (ii) whether or not an order for costs should be made against him.

Held: (i) there would be a finding of adultery against the co-respondent since (a) the entry in the register was prima facie evidence of an admission of adultery by the child's father, (b) by virtue of s. 34 of the Act of 1953 the certificate replaced, for the purposes of the evidence, the actual entry on the register, and (c) the evidence before the court, which the co-respondent had not contested, was sufficient to satisfy the court that the man who signed the register as the child's father was the same person as the co-respondent (see p. 624, letter E, post).

Re Stollery ([1926] All E.R. Rep. 67) applied.

(ii) an order for costs would be made against the co-respondent since, on the evidence, it was proper to assume that the co-respondent knew, or, if he had taken trouble to inquire, would have known, that the wife was married (see p. 624, letter H, post).

Langrick v. *Langrick & Funnell* ([1920] P. 90) applied.

[Editorial Note. This decision may be considered with that in *Perring* v. *Perring and Simpson* ([1949] 2 All E.R. 334).

As to entry in register of births as evidence, see 15 HALSBURY'S LAWS (3rd Edn.) 381, para. 678; and for cases on the subject, see 22 DIGEST (Repl.) 315, *3270-3282*.

As to entry in register as evidence of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 240, para. 452; and for cases on the subject, see 27 DIGEST (Repl.) 323, 324, *2690-2694*.

For the Births and Deaths Registration Act, 1953, s. 10, s. 34, see 33 HALSBURY'S STATUTES (2nd Edn.) 603, 624.

For the Registration (Births, Still-births, Deaths and Marriages) Consolidated Regulations, 1954, reg. 22, see 19 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 17.]

Cases referred to:

Brierley v. *Brierley & Williams*, [1918] P. 257; 87 L.J.P. 153; 119 L.T. 343; 27 Digest (Repl.) 323, *2691*.

Goodrich, In the Estate of, Payne v. *Bennett*, [1904] P. 138; 90 L.T. 170; sub nom. *Payne* v. *Bennett*, 73 L.J.P. 33; 22 Digest (Repl.) 315, *3276*.

Irish Society v. *Derry (Bp.)*, (1846), 12 Cl. & Fin. 641; 8 E.R. 1561; 22 Digest (Repl.) 344, *3672*.

Langrick v. *Langrick & Funnell*, [1920] P. 90; 89 L.J.P. 114; 123 L.T. 94; 27 Digest (Repl.) 546, *4945*.

Stollery, Re, Weir v. *Treasury Solicitor*, [1926] All E.R. Rep. 67; [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; 22 Digest (Repl.) 315, *3279*.

Wilton & Co. v. *Phillips*, (1903), 19 T.L.R. 390; 22 Digest (Repl.) 315, *3277*.

Petition.

The husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. The co-respondent entered an appearance by solicitors. The suit was undefended and came before PHILLIMORE, J., on Oct. 14, 1960. The evidence of adultery adduced by the husband consisted of admissions, oral and written, made by the wife to the husband both directly and through her solicitors, and of a birth certificate showing that on Oct. 29, 1957, the wife had given birth to a child whose father's name was Bruno Pavan, which was the name of the co-respondent. A witness testified that the signature of the mother in the register of births was the signature of the wife; but there was no evidence whether the signature of the father was that of the co-respondent. PHILLIMORE, J., adjourned the case for argument on the questions whether or not there was evidence on which the court could find adultery proved against the co-respondent and whether or not an order for costs should be made against him.

D. C. Calcutt for the husband.

PHILLIMORE, J.: Counsel who, in a most useful argument, has referred me to the statutes and the authorities, submits that the entries in the birth certificate are prima facie evidence of those facts required to be entered by statute, and I think that that is right. The registration of births was first governed by the Births and Deaths Registration Act, 1836. This Act was followed by the Acts of 1837 and 1874. For practical purposes registration of births is now covered by the provisions of the Births and Deaths Registration Act, 1953. Section 39 of the Act of 1953 gives the Registrar General power to make regulations as to what matters must be registered and those regulations are the Registration (Births, Still-births, Deaths and Marriages) Consolidated Regulations, 1954 (S.I. 1954 No. 1596). They require (1) the completion of a form to show when and where the child was born; its name, if any; its sex; the name and surname of the father; the name, surname and maiden surname of the mother; the occupation of the father; the signature, description and residence of the informant; when the birth was registered and the signature of the registrar. Section 10 of the Act of 1953 provides that:

> "... in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person

(1) Regulations 22 et seq.: 19 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 17 et seq.

acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother."

In the form before me it is stated that there was born on Oct. 29, 1957, at the Hackney Hospital at Hackney, a girl named Beryl, and then the name and surname of the father is Bruno Pavan (the name of the co-respondent). The name and surname and maiden surname of the mother are given as Elsie May Pavan, otherwise Jackson, formerly Finch, of 53, Wilton Way, Hackney. The occupation of the father is given as hotel waiter. The signature and description and residence of the informants are Bruno Pavan, father, E. M. Jackson, mother, and the address, 53, Wilton Way, E.5. It is clear, therefore, that these entries relate to the birth of an illegitimate child. A witness who inspected the original register identified the signature of the mother as that of the wife. It was not possible to identify the signature of the co-respondent. The document which I have before me is a certificate signed by the registrar which is put before the court pursuant to the provisions of s. 34 of the Act of 1953 and which, under those provisions, I am to regard as " evidence of the birth ". To what extent are the entries in that document evidence of the birth and of the circumstances of the birth and of the parents responsible for the birth ?

I think that question is really concluded by the decision of the Court of Appeal in *Re Stollery, Weir* v. *Treasury Solicitor* (2). The court was there considering the claim of two plaintiffs to be next of kin on an intestacy. The matter turned on, inter alia, the contents of three birth certificates, and in considering the effect of those certificates, and their entries the court referred to a decision of the House of Lords, *Irish Society* v. *Bishop of Derry* (3) in which the judges had been asked to advise the House on the effect of entries in public documents. In that case PARKE, B., had given (4) the following advice:

> " In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not. A marriage or burial register would certainly be admissible to prove a marriage or death, in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time."

SIR E. M. POLLOCK, M.R., in his judgment went on (5):

> " That appears to be a wide statement that the entries by the public officer are presumed to be true, and, if so, it might be said that the statement of the father and of the mother appearing in the copy of the certificate must show that those persons were the father and mother of the child "

and after reviewing *Wilton & Co.* v. *Phillips* (6), *In the Estate of Goodrich, Payne* v. *Bennett* (7) and *Brierley* v. *Brierley & Williams* (8) he sums up his opinion as follows (9):

> " It appears to me . . . that the true effect of s. 38 [of the Act of 1836] (10) is that these certificates are evidence of the date of the birth although not absolute and conclusive, but still it is to be taken as—I think one may here use the words—prima facie evidence of the date of the birth . . ."

That conclusion is based on the fact that this certificate really replaces, for the purposes of the evidence, the actual entry made by a public officer and that the details entered are entered by him pursuant to statutory requirements.

(2) [1926] All E.R. Rep. 67; [1926] Ch. 284. (3) (1846), 12 Cl. & Fin. 641.
(4) (1846), 12 Cl. & Fin. at p. 668.
(5) [1926] All E.R. Rep. at p. 71; [1926] Ch. at p. 310. (6) (1903), 19 T.L.R. 390.
(7) [1904] P. 138. (8) [1918] P. 257.
(9) [1926] All E.R. Rep. at p. 72; [1926] Ch. at p. 313.
(10) Now s. 34 of the Act of 1953.

I think that the judgment of SARGANT, L.J., in that same case, in which he emphasises (11) the distinction between entries pursuant to the requirement of the statute and what I may call superfluous entries, is also in point. I am satisfied that the law is that any entry in a register of births is prima facie evidence of the truth of the entry in so far as the entry is one required to be made by statute.

Since the certificate which is put before me in effect takes the place of the register, I have a certificate showing that this child was acknowledged by a man and by a woman to have been the child of Bruno Pavan. The woman was the wife, because her signature has been identified, and was passing under the name of Elsie May Pavan, of 53, Wilton Way, Hackney. The man is described as a hotel waiter and he signed his name in column 7, and the mother, the wife, has signed hers immediately below. I think that, in the light of the provisions of s. 10 of the Act of 1953, in so signing that register both these persons made a clear admission that the child was illegitimate and the child of them both. The question remains: am I satisfied that this man, Bruno Pavan, was the co-respondent in this case ? The husband cannot identify his signature. He has never seen it. The co-respondent's solicitors have been careful to enter an appearance for him. That avoids the risk, which would have arisen if the co-respondent had signed the acknowledgment of service, of the signature being compared with that on the register. The co-respondent has not chosen to come here and contest the suit. It is a very unusual name, but there is evidence, apart from the certificate, that he was a hotel waiter. There is the address—an address to which he subscribes. That is an address at which it is known there was a man at one time with the wife. The husband caught a glimpse of him. I think that I am entitled to be satisfied on these facts that the man who signed the register is the man for whom solicitors have entered an appearance. It seems reasonable to assume that if there had been some error in identity a defence would have been put forward.

I turn finally to the question of costs. It is clear that apart from this certificate there is no evidence that the co-respondent knew the wife to be married. I do not think that that necessarily prevents the court from making an order for costs. I have been referred to the decision of LORD MERRIVALE, P., in *Langrick* v. *Langrick & Funnell* (12). The President made it perfectly clear that the court had a complete discretion and for himself he would make an order for costs in a case where the co-respondent, even if he did not know that a woman was married, ought to have known. In the present case, the co-respondent signed the register with the wife. Of course, that follows long after the original adultery, but I see no reason to suppose that, if he had wanted to discover, before he committed adultery with her, whether or not she was married, he would not have been able to do so. He has not appeared to dispute the matter and in those circumstances I think that it is proper to assume that he knew that she was a married woman, or that he would have known if he had taken any trouble to inquire, and to make an order for costs. Accordingly, I am satisfied that the wife committed adultery with the co-respondent, and he with her, and I make an order for costs against him.

Solicitors: *Abbott, Baldwin & Co.* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

---

(11) [1926] All E.R. Rep. at p. 79; [1926] Ch. at pp. 327, 328. (12) [1920] P. 90.

R. *v.* NOTTINGHAM JUSTICES, *Ex parte* BROWN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 27, 28, 1960.]

Animal—Dog—Dangerous dog—Information—Whether proceedings were validly instituted or validated—Dogs Act, 1871 (34 & 35 *Vict. c.* 36), *s.* 2—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 55), *s.* 42, *s.* 100 (1).

The applicant was charged by way of information for that she, "on Sept. 26, 1959, in the City of Nottingham was the owner of a dangerous dog which was not then and there kept under proper control contrary to s. 2 of the Dogs Act, 1871". She pleaded guilty, and the justices ordered that the applicant, being the owner of a dangerous dog, should keep the dog under control. Section 2 provides, so far as relevant: "Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control . . ."

On a motion for an order of certiorari to remove and quash the justices' order,

Held: the initial words of s. 2 of the Dogs Act, 1871, quoted above, were of an administrative character and did not create an offence; the information, therefore, was a nullity, and the defect, viz., that there was no offence, could not be cured by s. 42* of the Magistrates' Courts Act, 1952, nor could the proceedings, having been wrongly instituted, be validated by s. 100 (1)† of the Act of 1952, and the justices' order would be quashed.

Haldane v. *Allan* (1956 S.C. (J.) 41) approved.

Lockett v. *Withey* ((1908), 99 L.T. 838) criticised; *R.* v. *Hughes* ((1879), 4 Q.B.D. 614) distinguished.

[As to the distinction between an information and a complaint, see 25 HALSBURY'S LAWS (3rd Edn.) 185, para. 336; and for cases on the subject, see 33 DIGEST 336, *476*, *477*.

As to proceedings against the owners of dangerous dogs, see 1 HALSBURY'S LAWS (3rd Edn.) 693, para. 1321; and for cases on the subject, see 2 DIGEST (Repl.) 385-387, *596-616*.

For the Magistrates' Courts Act, 1952, s. 42 and s. 100 (1), see 32 HALSBURY'S STATUTES (2nd Edn.) 456 and 501.

For the Dogs Act, 1871, s. 2, see 1 HALSBURY'S STATUTES (2nd Edn.) 864.]

Cases referred to:

Gray v. *Customs Comrs.*, (1884), 48 J.P. 343; 33 Digest 337, *477*.

Haldane v. *Allan*, 1956 S.C. (J.) 41; [1956] S.L.T. 325; 3rd Digest Supp.

Lockett v. *Withey*, (1908), 99 L.T. 838; 72 J.P. 492; 2 Digest (Repl.) 386, *606*.

R. v. *Hughes*, (1879), 4 Q.B.D. 614; 48 L.J.M.C. 151; 40 L.T. 685; 43 J.P. 556; 33 Digest 336, *476*.

Motion for certiorari.

This was a motion on behalf of Betty Brown for an order of certiorari to remove into the High Court and quash, an order made by the justices in petty sessions sitting at the Guildhall, Nottingham, on Jan. 11, 1960, whereby they ordered that the applicant, being the owner of a dangerous dog, should keep the said dog under proper control. The applicant was charged by way of information for that she, on Sept. 26, 1959, was the owner of a dangerous dog which was not then and there kept under proper control, contrary to s. 2 of the Dogs Act, 1871. The applicant pleaded guilty, whereupon the justices adjudged that the dog was dangerous and was not kept under proper control, that the applicant was the owner of the dog and they ordered that she should keep the dog under proper control.

---

* For s. 42, see p. 626, letter H, post.

† For s. 100 (1), see p. 627, letter B, post.

In this motion for an order of certiorari, the applicant contended that the initiation of the original proceedings by information was wrong, and rendered void the order made thereon, and that the order was wrong in law. Her contention was based on s. 2 of the Dogs Act, 1871, which provides: "Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous . . ."

J. P. Comyn for the applicant.

The respondent did not appear and was not represented.

LORD PARKER, C.J.: Section 2 of the Dogs Act, 1871, reads in this way:

> "Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding 20s. for every day during which he fails to comply with such order."

Looking at this matter quite apart from authority, it seems to me plain on the wording of that section that two stages are envisaged. In the first stage, the court of summary jurisdiction on a complaint being made may make a certain order in a summary way. The second stage is this, that if the person concerned fails to comply with that order, he shall be liable to a penalty. On the wording of that section, therefore, the first step is really in the nature of a civil or administrative proceeding, quite apart from the fact that it speaks throughout of a complaint. Certainly, there is no offence involved at any stage until there is failure to comply with an order which is made, when a penalty may be inflicted.

The matter has come before the courts in Scotland in *Haldane* v. *Allan* (1). In the course of his judgment the Lord Justice-General, LORD CLYDE, said this (2):

> " In my view, [s. 2 of the Dogs Act, 1871] contemplates two quite separate proceedings, both of which may take place before a court of summary jurisdiction and both of which may be initiated by the procurator-fiscal. The first is an administrative process involving no question of any offence or penalty, but involving an order by the court in regard to what is to be done with the dog. The second proceeding envisaged in the section is of quite a different character. It is a criminal process for a penalty in respect of failure to comply with an administrative order."

I entirely agree with the analysis of the Lord Justice-General.

The next question that arises is whether, although this was by way of information and not by way of complaint, the matter is cured by s. 42 of the Magistrates' Courts Act, 1952. Section 42 says this:

> " In any enactment conferring power on a magistrates' court to deal with an offence, or to issue a summons or warrant against a person suspected of an offence, on the complaint of any person, for references to a complaint there shall be substituted references to an information."

No doubt the object of that section was this, that in the older statutes references to complaints and informations in regard to offences were used indiscriminately. In no case was an information used where the matter was a civil proceeding, but in the case of offences, sometimes the statute talked of the proceedings being instituted by information and sometimes by complaint. No doubt it was for that reason that s. 42 was passed and, indeed, on its face it only applies to offences because it says:

> " In any enactment conferring power on a magistrates' court to deal with

(1) 1956 S.C. (J.) 41. (2) 1956 S.C. (J.) at p. 44.

A an offence, or to issue a summons or warrant against a person suspected of an offence . . ."

In other words, it is dealing with offences and saying plainly that in reference to offences there shall be substituted references to an information. That, therefore, cannot touch this case.

B The other section which it might be thought could cure this mistake in the initiation of the process is s. 100 (1), which reads in this way:

> " No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the
> C evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint."

In other words, if one is dealing with an information no objection shall be allowed if it is deficient in substance or in form. Equally, if one is dealing with a complaint, no objection shall be allowed if it is deficient in substance or in form, but
D there is nothing in that section which would allow an information to be valid and free from objection when the process should have been commenced by way of complaint. Indeed, it is to be observed that some four days after the coming into force of the Magistrates' Courts Act, 1952, the matter came before Oxford County Sessions, where they held that s. 100 (1) could not validate, as it were, proceedings which were wrongly instituted.

E Finally, this court has been very properly referred to a number of cases cited in an affidavit by the clerk to the justices, who have not appeared to object to this order. In one, at any rate, to which we have been referred, *Lockett* v. *Withey* (3), dealing with quite a different matter, it does look as if proceedings commenced by information under s. 2 of the Dogs Act, 1871, had come before this court
F without any objection being taken to the method by which the proceedings had been commenced. Evidently the point was not raised and, indeed, it is not clear from the report whether the information was in regard to what I have called the first stage in s. 2, or whether it was in respect of the second stage, disobedience of an order already made.

G Three other cases were referred to by the clerk to the justices, perhaps the most important of which is *R.* v. *Hughes* (4). That was a case in which magistrates perfectly properly dealt with a case which was brought before them on a warrant, and it later appeared that the warrant had been obtained illegally in that there was no written information on oath by the constable concerned. Apparently the defendant did not move to set aside the proceedings and conviction, but pro-
H ceedings were taken against the constable for perjury. Notwithstanding the fact that the proceedings had been illegally commenced, it was held that there were judicial proceedings properly before the magistrates and that, accordingly, perjury lay. For myself, I find it unnecessary to go through the case in detail. It is clearly quite a different case from this case. It may well be that whereas the defendant in that case could have moved to set aside his conviction on the ground
I that the warrant was illegal, yet the constable concerned was guilty of perjury since, until the conviction was set aside, there were judicial proceedings in which he had given evidence on oath. Indeed, in a later case to which we were referred, *Gray* v. *Customs Comrs.* (5), Lord Coleridge, C.J., said this (6):

> " In this case I think the point raised has been directly ruled in the case of

---

(3) (1908), 99 L.T. 838.
(4) (1879), 4 Q.B.D. 614.
(5) (1884), 48 J.P. 343.
(6) (1884), 48 J.P. at p. 344.

R. v. *Hughes* (7), which is a case of great authority, and was decided by no less than nine judges, and only one of those judges dissented from the judgment. The point there settled was shortly this, that where a defendant is actually charged and appears before justices, and those justices have jurisdiction, and though the defendant may have been brought before the justices by illegal process, yet inasmuch as the justices have jurisdiction and they adjudicate on the case, that adjudication cannot afterwards be disputed by raising objections to the arrest."

To my mind, that passage in the judgment of LORD COLERIDGE, C.J., points the distinction between *R.* v. *Hughes* (7) and this case. In *R.* v. *Hughes* (7) the justices had jurisdiction, whereas here the process from the very beginning was a nullity and they never had any jurisdiction at all. Accordingly, I have come to the conclusion in this case that the proceedings were wrongly initiated. They were a nullity from the beginning, and neither the plea of guilty nor s. 42 of the Magistrates' Courts Act, 1952, nor s. 100 (1) can in any way cure that invalidity. Accordingly, the order, in my judgment, should go.

ASHWORTH, J.: I agree, and would only add one small point which seems to me to support very much the application in this case. The applicant's affidavit exhibits the summons marked A, and the order made thereon marked B, the documents issued by the court at Nottingham before which she appeared. The summons refers to an information. The order made thereon, which is a printed form, obviously appropriate for the Dogs Act, 1871, and proceedings under s. 2, contains in print the expression, so-and-so: " having made a complaint that Betty Brown was the owner of a dangerous dog ", and goes on: " on hearing the said complaint the said court does adjudge that the said dog is dangerous ". That form, in my judgment, is absolutely correct and, unfortunately, in this instance, before that stage was reached, the inspector had called it an information.

ELWES, J.: I agree.

Order accordingly.

Solicitors: *Hancock & Willis*, agents for *German & Soar*, Nottingham (for the applicant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

(7) (1879), 4 Q.B.D. 614.

A

Re VUMA, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., and Harman, L.J.), October 26, 1960.]

Company—Winding-up—Compulsory winding-up—Petition by judgment creditor—Majority of creditors opposing—Whether special circumstances must be shown for winding-up order—Discretion of court—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 346 (1).

B

A judgment creditor of a limited company issued execution but the effects of the company were claimed by a third party and there were no assets. The creditor presented a petition for the compulsory winding-up of the company which was supported by two other creditors, but was opposed by them at the hearing, though they did not adduce any evidence to support their opposition. The total of the debts of these two creditors exceeded that of the judgment creditor. Between the dismissal of the petition and the appeal, the three creditors received an offer of payment of their debts by instalments and a payment was made in pursuance thereof.

C

Held: the court's discretion under s. 346 (1)* of the Companies Act, 1948, was not limited to merely having regard to the wishes of the majority of creditors, and in the special circumstances of this case, viz., that the company had no assets at all and the absence of any evidence on the part of those who opposed the petition why the company should continue, the winding-up order should be made.

D

Re B. Karsberg, Ltd. ([1955] 3 All E.R. 854) considered and distinguished.

E

Appeal allowed.

[As to the wishes of creditors on the hearing of a winding-up petition, see 6 HALSBURY'S LAWS (3rd Edn.) 552, para. 1064; and for cases on the subject, see 10 DIGEST (Repl.) 877-879, *5801-5819.*

For s. 346 (1) of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 723.]

F

Case referred to:

Karsberg (B.), Ltd., Re, [1955] 3 All E.R. 854; [1956] 1 W.L.R. 57; 3rd Digest Supp.

Appeal.

G

A.E.I. Hotpoint, Ltd., a judgment creditor of the respondent company, Vuma, Ltd., appealed against an order of BUCKLEY, J., made on July 4, 1960, dismissing the judgment creditor's petition for the winding-up of the company. The grounds of appeal were, inter alia, that the judge ought not to have dismissed the petition having regard to the following facts: (i) that the company was insolvent and unable to pay its debts; (ii) that it had no available assets to satisfy the petitioning creditor's execution debt; (iii) that the debts of the company were £3,721 16s. 2d., and its capital £100; and (iv) that the only offers of payment made at the hearing on behalf of the company would not have resulted in payment of the debts for upwards of two and a half years, even if such offers had been punctually performed; and the company was thus insolvent and with no reasonable expectation of solvency and should have been wound up in the interest of commercial morality and public policy.

H

I

J. R. Bickford Smith for the petitioning creditor.

R. B. S. Instone for the respondents (the company and the opposing creditors).

LORD EVERSHED, M.R.: This petition was presented by a judgment creditor, A.E.I. Hotpoint, Ltd., for the winding-up of Vuma, Ltd. When the matter came before BUCKLEY, J., it emerged that the only other two creditors

---

* The relevant terms of s. 346 (1) of the Companies Act, 1948, are set out at p. 630, letter C, post.

who were known to exist, but who had hitherto supported the petitioning creditor, had changed their minds and opposed the making of the order. The amounts owing to the two opposing creditors, which is something to which by s. 346 of the Companies Act, 1948, the court should have regard, were considerably more than the amount owing to the petitioning creditor. It is said by counsel for the opposing creditors that, if the majority of the creditors oppose the making of an order, that is the end of the matter unless some special circumstances are shown; and the special circumstances which he suggested should be shown were that the opposing creditors were acting from some irrelevant or improper motive or that some fraud was established in the conduct of the company's business. I cannot accept the statement which counsel makes that his general proposition is the view of everybody in the Companies Court. The language of the statute, so far as relevant in s. 346 (1), is that

> " The court may, as to all matters relating to the winding-up of a company, have regard to the wishes of the creditors . . . as proved to it by any sufficient evidence . . ."

In PALMER'S COMPANY LAW (20th Edn.), at p. 700, it is stated thus:

> "A petitioning creditor who cannot get paid a sum presently payable has, as against the company, a right, ex debito justitiae, to a winding-up order; even though the assets are overcharged by debentures. This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the court in its discretion may refuse the order."

If that is a correct statement, it is very far removed from the proposition submitted by counsel for the opposing creditors. In BUCKLEY ON THE COMPANIES ACTS (13th Edn.), at p. 450, the matter is put more as counsel has stated it:

> " This right of the creditor, however, is not his individual right but his representative right as one of a class. If a majority of the class, viz., the creditors of like degree, take a different view, the court, in the absence at all events of special circumstances making an order ' just and equitable ', gives effect to such right as the majority desire to exercise."

The cases cited are the same as those referred to in PALMER'S COMPANY LAW, and of the cases cited we have been particularly referred to the one in this court recently of *Re B. Karsberg, Ltd.* (1).

I look first at the facts of this case as shown by the only evidence before the court. The petition relates that the company was formed in February, 1959, with an issued capital of £100. The objects of the company were to carry on business as general merchants. It seems that, by the autumn of the same year in which the company was formed, it had become indebted to the petitioning creditor to the extent of nearly £600. The petitioning creditor got judgment in the Queen's Bench Division and then proceeded to try to levy execution. According to para. 6 of the petition, in May of this year execution was issued but the effects of the company were claimed by one, F. C. Hopkinson, whoever he may be. He bears the same name as one of the two signatories to the memorandum. In other words, it appears from the evidence before us that the company has no assets whatever and no attempt has been made on the respondents' side to show that it has any assets or any prospects of successful business. The only other thing that ought to be added is this. It seems that the reason why the opposing creditors took the view which they took was that the three creditors received through the solicitors representing the company an offer of payment by instalments, and we are told (and, of course, I accept it) that that offer between the dismissal of the petition and today has been implemented, i.e., counsel for the

(1) [1955] 3 All E.R. 854.

A petitioning creditor says he received a cheque from a firm of solicitors which has been cashed. I have no doubt that the opposing creditors have formed the view in their own, quite natural, material interests that if the petition is dismissed they will get something, and perhaps in due time everything, from whoever is providing the money, whereas if the company is wound up they will find an absence of anything available for anybody. That is a good explanation of why B they oppose the petition. But again I cannot accept the proposition of counsel for the opposing creditors that, if that perfectly relevant view is taken by the opposing creditors, the court has no function to perform. The court may and will regard the fact that perhaps that is the best chance of the creditors being paid. Against that I am impressed by the circumstance that on the only evidence before us this company has no assets at all. We know nothing about what it C has done and, so far as the evidence goes, it appears to have no prospects whatever of having any assets. If special circumstances must be shown, I would not have thought that that was other than a special circumstance which the court ought to consider in deciding whether this company ought to carry on business.

In *Re B. Karsberg, Ltd.* (1) the company was in voluntary liquidation. Of D the fifty-six creditors, fifty-one at least opposed and their view was that the voluntary liquidation was the best thing for everybody concerned and that in the voluntary liquidation the necessary inquiries and control would be made and exercised. It was pointed out by this court that, where a company went into voluntary liquidation, a compulsory order would not be made if satisfactory grounds were shown for continuing the voluntary liquidation and particularly if E the vast majority of the creditors thought that was the best thing to do. I cannot see on the facts and on what ROMER, L.J., said in that case that it follows that in this case there is nothing more to be said once it is established that two out of the three creditors, who admittedly are owed more than the petitioning creditor, prefer and express their preference for no order and no winding-up. Here is a judgment creditor. Any assets which would be or could be found would be F subject to execution at once, and, as I say, if special circumstances have to be shown, I would have thought on the evidence that enough has been shown. With great respect to BUCKLEY, J., I do not think it was right simply to treat the fact of the majority opposition as conclusive. I am persuaded on the material in this case that the court, in the exercise of its discretion, ought to order a winding-up, and I would accordingly allow the appeal.

G

HARMAN, L.J.: I agree. In the circumstances disclosed in the petition it was at least incumbent on those who opposed it to say why they opposed it and to explain to the court what it was that induced them, a company in Ireland and another one in Rotterdam, to leave this hopelessly insolvent and assetless company encumbering the ground. They did not do that but they persuaded the H judge that all he had to do was to count heads. With every respect to him, I do not think that is right. The position shown was one which gave grounds for the gravest suspicion as to the company's trading and as to its position in the commercial community. It was not enough, I think, for two people who had supported the petition simply to walk into court and say: " We now do not support it " without putting in an affidavit. Neither the opposing creditors nor the I company chose to file any evidence at all, and in my view it is not the law and never has been that in those circumstances a judgment creditor is not entitled to his remedy. I observe that in the passage in BUCKLEY ON THE COMPANIES ACTS (13th Edn., at p. 450), which alone gives some colour to the respondents' case, the creditors are spoken of as " creditors of like degree ". I am not sure I understand what that means. Of the three creditors here one has a judgment on which it has tried to effect execution, the second has a judgment and the third none, and it may be that that has something to do with what the text-book says. It does seem to me that a creditor who has pursued his remedy to judgment and has

proceeded to execution and finds no assets at the company's place of business other than assets claimed by some third party is at least entitled to put the opposition on their oath as to why they oppose his otherwise just demands. I would, therefore, allow the appeal.

Appeal allowed.

Solicitors: *Cochrane & Cripwell* (for the petitioning creditor); *McKenna & Co.* and *Coward, Chance & Co.* (for the opposing creditors); *Clifford Symons* (for the company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MORTON *v.* CHANEY. MORTON *v.* CHRISTOPHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 21, 1960.]

Firearms—Certificate—Owner of rifle holding firearm certificate lending rifle to person not holding certificate nor exempt from holding certificate—Instruction to shoot rats—"Sporting purposes only"—Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 12), *s.* 4 (7).

The respondent W.J.C. was the owner of a .22 rifle for which he held a firearm certificate to enable him to kill vermin on a caravan site of which he was the owner. He lent the rifle to the respondent R.J.C. who was a tenant on the caravan site with instructions that he should shoot rats on the site. The respondent R.J.C. did not hold a firearm certificate in force, nor was he a registered firearms dealer. The respondent W.J.C. was charged with lending the rifle to the respondent R.J.C. contrary to the Firearms Act, 1937, s. 11*, and the respondent R.J.C. was charged with having the rifle in his possession when not holding a firearm certificate in force contrary to s. 1† of the Act. By s. 4 (7)‡ of the Act, a person carrying a firearm belonging to another person holding a firearm certificate may, without himself holding a certificate, have in his possession that firearm under instruction from and for the use of that other person "for sporting purposes only".

Held: the shooting of rats was not shooting "for sporting purposes" within the meaning of s. 4 (7) of the Act and, accordingly, the respondents were guilty of the offences charged.

Per CURIAM: the mere fact that some sort of shooting is a sport in the sense that someone gets enjoyment out of it is not enough to bring it within the words "for sporting purposes only" in s. 4 (7) of the Firearms Act, 1937 (see p. 634, letter B, post).

Appeals allowed.

[As to exemptions from holding a firearm certificate, see 10 HALSBURY'S LAWS (3rd Edn.) 595, para. 1108.

For the Firearms Act, 1937, s. 4 (7), see 5 HALSBURY'S STATUTES (2nd Edn.) 1098.]

Cases Stated.

These were two Cases Stated by justices for the county of Huntingdon in respect of their adjudication as a magistrates' court sitting at St. Ives on Nov. 24, 1959. On Oct. 15, 1959, the appellant, Arthur Thomas Morton, preferred two informations against the respondents, William James Chaney and Raymond

* For the relevant portion of s. 11, see p. 633, letter H, post.
† For the relevant portion of s. 1, see p. 634, letter C, post.
‡ Section 4 (7) is set out at p. 633, letter I, post.

John Christopher, charging (i) that on or about Aug. 25, 1959, at Oldhurst, Huntingdon, the respondent Chaney lent a firearm and ammunition, namely, a .22 rifle to which Part 1 of the Firearms Act, 1937, applied, to the respondent Christopher, not being a registered firearms dealer and not showing that he was, by virtue of the Act, entitled to purchase or acquire the firearm and ammunition without holding a firearm certificate, contrary to the Firearms Act, 1937, s. 11; and (ii) that on or about Aug. 26, 1959, at Oldhurst, Huntingdon, the respondent Christopher had in his possession a certain firearm, namely, a .22 rifle to which Part 1 of the Firearms Act, 1937, applied, he not then holding a firearm certificate in force at the time, contrary to the Firearms Act, 1937, s. 1. The respondent Christopher pleaded guilty, and, after the justices had heard evidence as to the circumstances of the offence, he was sentenced to pay a fine of 10s. After sentencing the respondent Christopher the justices heard the information preferred against the respondent Chaney. The following facts were found. The respondent Chaney was the owner of a caravan site known as The Grove, Oldhurst, and the respondent Christopher was a tenant on the site. The respondent Chaney was the owner of a .22 rifle for which he held a firearm certificate issued by the Huntingdonshire County Police on June 25, 1957. The certificate was issued to him so that he could kill vermin on the caravan site. On Aug. 25, 1959, the respondent Chaney lent the rifle to the respondent Christopher with instructions that the respondent Christopher should shoot rats on the caravan site. The respondent Christopher did not hold a firearm certificate.

It was contended by the appellant that by reason of these facts, the respondent Chaney was in breach of s. 11 of the Firearms Act, 1937. It was contended by the respondent Chaney that he was not in breach thereof because the loan of the rifle to the respondent Christopher came within the meaning of s. 4 (7) of the Firearms Act, 1937.

The justices were of opinion that the loan of the rifle by the respondent Chaney to the respondent Christopher was within the meaning of s. 4 (7) of the Firearms Act, 1937, and further that the shooting of rats was a sporting purpose, and, accordingly, they found the respondent Chaney not guilty of the alleged offence. They were further of opinion that, since they had found the respondent Chaney not guilty of the alleged offence, the respondent Christopher had been wrongly convicted of an offence under s. 1 of the Firearms Act, 1937. Accordingly, they recalled the respondent Christopher and dismissed the information against him. The appellant now appealed.

Edward L. Gardner, Q.C., and *W. K. Topley* for the appellant.

The respondents did not appear and were not represented.

LORD PARKER, C.J., stated the facts and continued: Under s. 11 of the Firearms Act, 1937, it is provided, so far as it is relevant, that:

> " (1) No person shall sell or transfer [and, without looking at the definition of " transfer " in s. 32 (1), I would interpose that " transfer " includes " lend "] to any other person in the United Kingdom, other than a registered firearms dealer, any firearm or ammunition to which this Part of this Act applies, unless that other person produces a firearm certificate authorising him to purchase or acquire it or shows that he is by virtue of this Act entitled to purchase or acquire it without holding such a certificate."

If one then goes back to s. 4 (7), one finds this provision:

> " A person carrying a firearm or ammunition belonging to another person holding a certificate may, without himself holding a certificate, have in his possession that firearm or ammunition under instructions from and for the use of that other person for sporting purposes only."

The sole question, therefore, is whether the respondent Christopher was in possession of this rifle under instructions from and for the use of the respondent

Chaney " for sporting purposes only ". The justices have held that the instructions given that the respondent Christopher should shoot rats made the case into one of having the rifle in his possession for sporting purposes. For my part, I find it unnecessary and, indeed, inadvisable, to attempt any definition as to what is included within those words " for sporting purposes only ". There are two things about which I am clear. One is that the mere fact that some sort of shooting is a sport in the sense that someone gets enjoyment out of it is not enough to bring it within those words. The second thing is that, so far as this case is concerned, I am satisfied that the shooting of rats is not, in the ordinary sense of the term, shooting for sporting purposes. Accordingly, so far as the respondent Chaney is concerned, the case must go back to the justices with a direction that the offence was proved.

The other information concerns the respondent Christopher, who was charged with having this rifle in his possession without holding a firearm certificate, contrary to s. 1 of the Act of 1937. Section 1 provides, so far as it is material:

> " (1) . . . no person shall purchase, acquire or have in his possession any firearm or ammunition to which this Part of this Act applies unless he holds a firearm certificate . . ."

That is the general provision. Section 4, to which I have referred, provides exemptions, sub-s. (1) providing that

> " The following provisions of this section shall have effect notwithstanding anything in s. 1 of this Act ",

and that is followed by sub-s. (7), to which I have already referred. It is clear that the respondent Christopher, for the same reasons as the respondent Chaney, was guilty of the offence charged. Indeed, he pleaded guilty and was fined 10s. It so happened that his case came on first, and the justices, having found the respondent Chaney was not guilty of the offence, then recalled the respondent Christopher and found him not guilty. It seems to me that that action of the justices, on any view, was wrong. The moment they had sentenced the respondent Christopher, they were functi officio (1), and could do nothing more in the matter. In having him back and finding him not guilty, they were clearly acting in excess of their jurisdiction. Accordingly, so far as the respondent Christopher is concerned, the case must also go back to the justices with the direction that they exceeded their jurisdiction in dismissing the information against him, and that he was guilty of the offence.

ASHWORTH, J.: I agree with my Lord's judgment in both cases.

ELWES, J.: I also agree.

Appeals allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. C. Aylward*, Huntingdon (for the appellant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

---

(1) Compare 25 HALSBURY'S LAWS (3rd Edn.) 215, note (x) citing, e.g., *R. v. Campbell, Ex p. Hoy* ([1953] 1 All E.R. 684).

R. *v.* EPSOM JUSTICES, *Ex parte* DAWNIER MOTORS, LTD.

[Queen's Bench Division (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 5, 6, 26, 1960.]

Quarter Sessions—Appeal to—Exemption from penalty—Information by employers against employees alleged to be actual offenders dismissed—Notice of appeal to be given to employees—Merchandise Marks Act, 1926 (16 & 17 *Geo.* 5 *c.* 53), *s.* 6—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 55), *s.* 84 (1).

Trade Mark—False trade description—Exemption from penalty claimed by employers—Procedure—Claim to exemption to be considered only after employers found guilty—Merchandise Marks Act, 1926 (16 & 17 *Geo.* 5 *c.* 53), *s.* 6.

The applicants were charged with selling three gallons four and a quarter pints of petrol to which the false trade description of four gallons of petrol was applied, contrary to s. 2 (2) of the Merchandise Marks Act, 1887, as amended*, and two of their employees were charged with aiding and abetting them in committing this offence. The applicants preferred informations under s. 6 of the Merchandise Marks Act, 1926†, against these two employees, alleging that the employees were the actual offenders, that the applicants had used due diligence to enforce compliance with the provisions of the Act, that their employees had committed the offence without the applicants' consent, connivance or wilful default, and that, therefore, the applicants were exempt from penalty by virtue of s. 6 of that Act. The justices heard the informations against the applicants and their employees together by consent, found the applicants guilty of the offence charged and their employees guilty of aiding and abetting them, and fined both the applicants and their employees. They found, however, that the informations preferred by the applicants against their employees were not made out. The applicants appealed to quarter sessions, and their notice of appeal, given pursuant to s. 84 (1)‡ of the Magistrates' Courts Act, 1952, stated the general grounds of appeal to be "that the penalty imposed was too severe," and was only addressed to and served on the clerk to the justices and the prosecutor. They contended that the penalty imposed by the justices was too severe, and also that they were entitled to exemption from penalty under s. 6 of the Act of 1926. Quarter sessions reduced the penalty, but decided that they had no jurisdiction to hear the appeal on the question of exemption from penalty.

The applicants applied for certiorari to quash their conviction and for mandamus to quarter sessions to determine whether they were entitled to exemption from penalty under s. 6 of the Act of 1926.

Held: (i) the procedure adopted at the hearing of a charge of contravening s. 2 (2) of the Merchandise Marks Act, 1887, as amended, must enable a defendant to raise matters of defence, and only after this had been done and he had been found guilty should the justices go on to consider whether the defendant could obtain exemption from penalty under s. 6 of the Merchandise Marks Act, 1926; the applicants had failed to prove that the justices' procedure did not satisfy these requirements, and, therefore, certiorari would not be granted (see p. 638, letters F and G, post).

(ii) appeal lay to quarter sessions on a claim for exemption from penalty under s. 6 of the Merchandise Marks Act, 1926 (as also on such a claim

---

* Section 2 (2), as amended, is printed at p. 637, letter I, post.

† Section 6 is printed at p. 638, letter C, post.

‡ Section 84 (1) provides: "An appeal from a magistrates' court to quarter sessions shall be commenced by the appellant's giving notice of appeal . . . to the clerk of the magistrates' court and to the other party."

under similar enactments, e.g., the Shops Act, 1950, s. 71 (6), the Sale of Food (Weights and Measures) Act, 1926, s. 12 (5), the Food and Drugs Act, 1955, s. 113 (1) and the Factories Act, 1937, s. 137 (1)) for the following reasons— A

(a) the third-party proceedings, although initiated by a separate information, were not separate proceedings from the original information (see p. 639, letter C, post). B

R. v. *Derby Recorder, Ex p. Spalton* ([1944] 1 All E.R. 721) applied.

(b) the exemption from penalty (or acquittal in the case of some similar enactments to s. 6 of the Act of 1926) was not conditional on the conviction of the actual offender (see p. 641, letter B, post).

Malcolm v. *Cheek* ([1947] 2 All E.R. 881) applied; *Walkling, Ltd.* v. *Robinson* ([1929] All E.R. Rep. 658) explained and distinguished. C

(iii) since, however, the amended notice of appeal was expressed merely as a notice of appeal against severity of the penalty and was not given to the employees concerned, notice of appeal had not been duly given and mandamus to hear the appeal would not be granted (see p. 641, letter E, post).

D

[As to notice of appeal to quarter sessions, see 25 HALSBURY'S LAWS (3rd Edn.) 299, para. 583; and as to the grounds of appeal stated therein, see ibid., 304, para. 592; and for cases on these subjects, see 33 DIGEST 393-396, *1040-1063.*

As to rights of an employer to secure exemption from penalty by charging actual offender, see 10 HALSBURY'S LAWS (3rd Edn.) 695, para. 1327.

E

For the Merchandise Marks Act, 1926, s. 6, see 25 HALSBURY'S STATUTES (2nd Edn.) 1171.

For the Magistrates' Courts Act, 1952, s. 84 (1), see 32 HALSBURY'S STATUTES (2nd Edn.) 486.]

Cases referred to:

Hammett (R. C.), Ltd. v. *Crabb, Hammett (R. C.), Ltd.* v. *Beldam,* [1931] All E.R. Rep. 70; 145 L.T. 638; 95 J.P. 180; Digest Supp. F

Hammett (R. C.), Ltd. v. *London County Council,* (1933), 97 J.P. 105; 49 T.L.R. 209; Digest Supp.

Malcolm v. *Cheek,* [1947] 2 All E.R. 881; [1948] 1 K.B. 400; [1948] L.J.R. 388; 112 J.P. 94; 2nd Digest Supp.

R. v. *Derby Recorder, Ex p. Spalton,* [1944] 1 All E.R. 721; [1944] K.B. 611; 113 L.J.K.B. 556; 171 L.T. 222; 108 J.P. 193; 2nd Digest Supp. G

Walkling, Ltd. v. *Robinson,* [1929] All E.R. Rep. 658; 99 L.J.K.B. 171; 143 L.T. 105; 94 J.P. 73; Digest Supp.

Motions for certiorari and mandamus.

Dawnier Motors, Ltd. ("the applicants") applied for certiorari to bring up and quash an order of petty sessions convicting them of an offence under the Merchandise Marks Act, 1887, s. 2 (2), as amended, and in the alternative for mandamus to Surrey Quarter Sessions Appeal Committee to hear the applicants' appeal from this order in so far as it claimed exemption from penalty under the Merchandise Marks Act, 1926, s. 6. The facts are stated in the judgment of LORD PARKER, C.J. The application for certiorari is reported only for the statement by the court as to the procedure to be adopted by magistrates on the hearing of such a claim for exemption. At the conclusion of the argument the court dismissed both motions, but stated that it would give its reasons later. H I

E. J. R. Crowther and *John Clark* for the applicants.

R. M. G. Simpson for the respondents, Surrey County Council, the prosecuting authority.

Cur. adv. vult.

Oct. 26. **LORD PARKER, C.J.,** read the following judgment: On Oct. 5, 1960, counsel moved on behalf of the applicants, Dawnier Motors, Ltd., first for an order of certiorari to bring up and quash an order made by the justices of the petty sessional division of Epsom on May 11, 1959, convicting the applicants of an offence against s. 2 (2) of the Merchandise Marks Act, 1887, and inflicting a fine, and secondly, and in the alternative, for an order of mandamus to the appeal committee of the quarter sessions for the county of Surrey requiring the appeal committee to hear the appeal by the applicants from the order of petty sessions in so far as the applicants claimed to be exempt from any penalty under s. 6 of the Merchandise Marks Act, 1926. At the end of the hearing we dismissed both the motions and stated that we would give our reasons at a later date.

The circumstances in which these proceedings arise are as follows: On Apr. 6, 1959, a summons was issued and subsequently served on the applicants to answer an information preferred by Leslie George Greenhill, a divisional inspector of weights and measures, that, on Mar. 14. 1959, they did unlawfully sell to David James Mackie three gallons four and a quarter pints of petrol to which a false trade description was applied, in that, at the time of sale a cash sales receipt was given to Mr. Mackie wherein the quantity of petrol sold was stated to be four gallons, contrary to the Merchandise Marks Act, 1926, s. 2 (2), as amended. Two employees of the applicants, Hunt and Nichols, were also summoned to answer informations preferred by Mr. Greenhill that they had aided and abetted the applicants in committing the offence charged and, further, that they had committed wilful fraud in the use of a petrol pump. On Apr. 13, 1959, the applicants, under the provisions of s. 6 of the Merchandise Marks Act, 1926, preferred informations against Hunt and Nichols that they were the actual offenders, so that, on proof that the applicants had used due diligence to enforce compliance with the provisions of the Act and that Hunt and Nichols had committed the offence without their consent, connivance or wilful default, they should get exemption from any penalty. On May 11, 1959, all the informations preferred against the applicants and against their employees were heard together by the justices of the petty sessional division of Epsom (1) when the justices found that the applicants had committed the offence charged and that their employees had aided and abetted the commission thereof. The justices, however, found that the informations preferred by the applicants against their employees were not made out. In the result, the justices fined the applicants £50 and ordered them to pay ten guineas costs and fined each of the employees £10. By an amended notice of appeal dated May 29, 1959, the applicants appealed to the appeal committee of the quarter sessions for the county of Surrey, stating that the general grounds of such appeal were that " the penalty imposed was too severe ". The appeal was heard on June 26, 1959, when the appeal committee held that they had no jurisdiction to re-hear the question whether the applicants could prove what I may shortly call the necessary due diligence and non-connivance to enable them to be exempt from any penalty. The appeal committee did, however, consider that the penalty imposed was too severe and reduced it to a fine of £25.

The ground on which certiorari is claimed is that the justices found that the applicants had been guilty of the offence without giving them the opportunity of stating their defence to the charge and calling evidence in regard thereto. This, it is said, was contrary to natural justice and, accordingly, the conviction should be quashed.

Before considering this contention, reference must be made to the relevant statutory provisions. By s. 2 (2) of the Merchandise Marks Act, 1887, as amended by s. 4 of the Merchandise Marks Act, 1953, it is provided as follows:

> " Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any

(1) All the informations were heard together by consent of all parties.

trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves either— (a) that, having taken all reasonable precautions against committing an offence against this Act, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description, and that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (b) that otherwise he had acted innocently; be guilty of an offence against this Act."

Further, by s. 6 of the Merchandise Marks Act, 1926, it is provided:

"Where an employer or principal is charged with the offence of having acted in contravention of, or failed to comply with, the provisions of this Act or any Order in Council made under this Act he shall be entitled on information duly laid by him and on giving not less than three days' notice of his intention to the prosecution to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he has used due diligence to enforce compliance with the provisions of this Act or of the order, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall, subject to the provisions of sub-s. (5) of the last preceding section, be summarily convicted of the offence, and the employer or principal shall be exempt from any penalty."

It will be seen, therefore, that the only matters of defence which can be raised are those contained in para. (a) and para. (b) of s. 2 (2) of the Act of 1887. If a defendant fails to prove either of those matters, he is guilty of the offence. He has, however, a right under s. 6 of the Act of 1926 to have the actual offender brought before the court, and on proof of due diligence and non-connivance to have the actual offender convicted and obtain for himself a statutory exemption from any penalty. Accordingly, the procedure to be adopted at the hearing of any such charge must enable a defendant to raise matters of defence, and only after this has been done and he has been found guilty should the justices go on to consider whether he can obtain exemption from penalty. It is this procedure which the applicants claim that the justices failed to adopt in the present case.

[His Lordship considered the evidence on this point, stated that the applicants had failed to satisfy him on the facts that the proper procedure was not carried out by the justices, and continued:] Accordingly, in my judgment, the application for certiorari must be refused.

The application for mandamus raises a point of considerable difficulty which, as far as I know, has never been finally decided, namely, whether an appeal lies on a claim for exemption from penalty under s. 6 of the Merchandise Marks Act, 1926. It was urged before the appeal committee, and before us, that no such appeal lies, in that exemption from penalty is dependent on the conviction of the actual offenders, and that, since Hunt and Nichols had, in effect, been acquitted before the justices, they could not be convicted by the appeal committee. This was the view which appealed to the appeal committee, who, accordingly, refused to consider whether the applicants were entitled to the statutory exemption from penalty. Third-party procedure of the type found in s. 6 of the Act of 1926 is to be found in many statutes. In some it takes the form, as here, of saying that, on proof of due diligence and non-connivance, the actual offender shall be convicted and that the defendant to the original charge shall be exempt from penalty: cf. the Shops Act, 1950, s. 71 (6), and the Sale of Food (Weights and Measures) Act, 1926, s. 12 (5). In others it takes the form of providing not for exemption from penalty but for acquittal: cf. the Food and Drugs Act, 1955, s. 113 (1), and the Factories Act, 1937, s. 137 (1). In the latter class of case, unlike the

present, the third-party procedure goes to matters of defence. Again, in some cases it is provided that, on proof of due diligence and non-connivance, the actual offenders "may", as opposed to "shall", be convicted: cf. the Food and Drugs Act, 1938, s. 83 (1), (2). In cases in which the third-party procedure goes to matters of defence it would, indeed, be odd if those matters could not be raised on appeal. Indeed, it seemed to me that counsel for the respondents felt bound to concede that an appeal in such a case would lie, but he contended that the position was different where, as here, the third-party procedure went only to penalty. I confess that I can see no logical reason for the distinction. It is true that there is no question of escaping conviction and that, on appeal, due diligence and non-connivance can be proved in mitigation so as to reduce the penalty to an absolute discharge or a nominal fine, but, unless there is an appeal, the convicted person is at the mercy of the court and cannot claim statutory exemption from any penalty.

In my judgment, an appeal lies in all these cases. There are, I think, two fallacies underlying the respondents' argument. In the first place, it is wrong to look on the third-party proceedings as separate proceedings. It is true that they take the form of a separate information, but I think the true view is that the original information and the third-party information are all one proceeding. This, indeed, was the view expressed by Humpheys, J., in *R.* v. *Derby Recorder, Ex p. Spalton* (3), and I agree with it. In the second place, it is wrong to look on acquittal or exemption from penalty, as the case may be, as conditional on the conviction of the actual offenders. The provisions in regard to third-party procedure do not say so. They only provide that, once it is proved that the third party is the actual offender and that the defendant has proved due diligence and non-connivance, two results will follow, first, conviction of the actual offender and, secondly, exemption from penalty or acquittal of the defendant. Assuming, though not deciding, that, on an appeal by an employer whose third-party information has been dismissed, it is not open to the appeal committee to bring about the first of these results, namely, conviction of the actual offender, it does not follow that the second result, namely, exemption from penalty or acquittal of the defendant, is thereby rendered impossible. Support for this construction is to be found in *Malcolm* v. *Cheek* (4). In that case, a defendant charged with an offence against the Food and Drugs Act, 1938, availed himself of the third-party procedure contained in s. 83 (1) of that Act, a third-party procedure which dealt with matters of defence. Through no fault of the defendant, the third party was not served, and, accordingly, was not before the court and could not be convicted. Yet it was held by this court that the defendant who had proved that the third party was the actual offender, and had also proved due diligence and non-connivance, was entitled to be acquitted. In his judgment Lord Goddard, C.J., said (5):

> "In my opinion, the respondent [the original defendant] had done everything in this case which it was necessary for him to do to avail himself of the defence which the subsection affords, and the magistrate, having come to the conclusion that the contravention was due to the act or default of the person against whom the information was laid and not to that of the respondent, and also that the respondent had used all due diligence to secure that the provisions of the Act were complied with, rightly held that the respondent was entitled to avail himself of the defence provided by the subsection."

It is true that s. 83, unlike the section now under consideration, merely provided that the third party "may be convicted of the offence", but I cannot think that

(2) Repealed; now replaced by the Food and Drugs Act, 1955, s. 113 (1).
(3) [1944] 1 All E.R. at p. 724; [1944] K.B. at p. 617.
(4) [1947] 2 All E.R. 881; [1948] 1 K.B. 400.
(5) [1947] 2 All E.R. at p. 883; [1948] 1 K.B. at p. 407.

the decision of the court would have been any different if the words had been " shall be convicted of the offence ". A

It is also to be noted that a person who has been convicted and fined has now an undoubted right to appeal against sentence. An employer whose third-party information has been dismissed and who wishes to appeal against that dismissal is, in truth, appealing against his sentence and claiming exemption from any penalty. There is no statutory provision excluding such an appeal B against sentence, and if what has been loosely termed an appeal under s. 6 of the Merchandise Marks Act, 1926, is regarded as an appeal against sentence (which, in essence, it is), there is no reason for deciding that it cannot be entertained.

Although, as I have already said, the point has not so far been finally decided, we were referred to several cases touching on the matter. In *Walkling, Ltd.* v. C *Robinson* (6), employers, prosecuted under the Sale of Food (Weights and Measures) Act, 1926, for the sale of bread of less weight than it purported to be, exercised the third-party procedure laid down in s. 12 (5) of that Act against an employee, one Pearce, alleging that he was the actual offender. The justices refused to convict Pearce and did not exempt the employers from penalty. There was an appeal to quarter sessions, who stated a Case for the decision of the D Divisional Court, one of the questions left for the decision of the court being whether the court of quarter sessions had any power to exempt the appellants from any penalty, having regard to the fact that the employee had been acquitted. It was held by this court that quarter sessions had no such power, and, indeed, one member of the court, TALBOT, J., referred to the relief given by the subsection as " conditional " on the conviction of the actual offender. E At first sight, therefore, this would appear to be a decision in favour of the respondents' contention in the present case. That, however, was a case in which the justices had expressly found that, while due diligence had been exercised, the wrong third party had been brought before the court in that Pearce was not the actual offender. This, indeed, was pointed out by AVORY, J., who had been a member of the court, in the later case of *R. C. Hammett, Ltd.* F v. *Crabb* (7). In that case, he said:

> " I only wish to add that I reserve my opinion on the question which I have more than once asked during the progress of this case, namely, whether the employer or principal has not a right of appeal to quarter sessions in a case where the justices have convicted the principal and G have refused to convict the employee or manager. In my view *Walkling, Ltd.* v. *Robinson* (6), which counsel for the appellants relied on in answer to that point, is not an authority that precludes employers in such cases from appealing to quarter sessions on a question of fact, because in that case it was expressly found that the manager or employee had not, in fact, committed the offence, and he had been acquitted by the justices. The H difficulty that was pointed out in that case was that the appellants could not appeal to quarter sessions against their own conviction without saying that the manager had been improperly acquitted, and it was not open to them to say that he had been improperly acquitted. For that reason, I do not think that case is any authority, and to avoid the difficulties which have arisen in this case I only wish to reserve, as I have said, my opinion I whether the proper procedure, instead of stating the Case as if it were a question of law, would be an appeal to quarter sessions on the facts."

Finally, in *R. C. Hammett, Ltd.* v. *London County Council* (8), AVORY, J., treated the question as undecided, saying:

> " I only wish to say that it must not be taken as an authority for the

(6) [1929] All E.R. Rep. 658. (7) [1931] All E.R. Rep. at p. 73.
(8) (1933), 49 T.L.R. at p. 212.

proposition that an appeal does lie to quarter sessions. That point, although it appears to have been raised at quarter sessions, was not decided there, and this present special case does not raise the point. It is desirable, in my opinion, that the question whether there is an appeal to quarter sessions under such circumstances should be determined at some time."

Accordingly, there is, I think, nothing in the cases which prevents me from coming to the conclusion, as I do, that an appeal lies on the question of exemption from penalty. The matter does not, however, rest there. As Croom-Johnson, J., said in *R.* v. *Derby Recorder, Ex p. Spalton* (9):

> " . . . appeals to quarter sessions are the creature of statute and . . . certain things have to be proved by the person who desires to bring on an appeal. It is true the appeal is by way of a re-hearing, but because the rules which provide for the appeal must be observed, the very first question which always arises . . . is: Are the notices [of appeal] in order? "

In the present case, as I have already said, the amended notice of appeal stated: " the general grounds of such appeal are that the penalty imposed was too severe ". The notice, therefore, on its face was merely a notice of appeal against severity of penalty and was not against refusal to grant statutory exemption from penalty. Again, it is provided by s. 84 (1) of the Magistrates' Courts Act, 1952, that the notice of appeal must be given to " the clerk of the magistrates' court and to the other party ". " Other party " clearly includes " other parties ", and I am quite clear that, in an appeal against failure to grant statutory exemption from penalty or acquittal, as the case may be, the third party is a party to whom notice must be given under that provision: see again, in this connexion, *R.* v. *Derby Recorder, Ex p. Spalton* (10).

On these narrow, though as it seems to me valid, grounds, I think that the application for mandamus also fails.

ASHWORTH, J.: I agree entirely with the judgment which has just been given.

ELWES, J.: I also agree.

Applications dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. R. Drummond & Co.*, Epsom (for the applicants); *Crofts & Ingram and Wyatt & Co.*, agents for *Clerk to the Surrey County Council* (for the respondents).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

---

(9) [1944] 1 All E.R. at p. 726; [1944] K.B. at p. 619.
(10) [1944] 1 All E.R. 721; [1944] K.B. 611.

BRAITHWAITE *v.* WINWOOD.

[CHANCERY DIVISION (Cross, J.), October 24, 27, 1960.]

Practice—Adjournment of proceedings—Inherent power to adjourn proceedings—Mortgagee's claim for possession—Principal sum not repayable by instalments.

Mortgage—Possession of mortgaged property—Mortgagee establishing right to possession—Discretion to allow mortgagor time to assign mortgage.

Mortgage—Sale—Exercise of power—Equitable estoppel—Conduct estopping mortgagee from exercising power.

On Dec. 5, 1955, the plaintiff sold a dwelling-house to the defendant for £650, and it was agreed that the plaintiff should allow £500 of the purchase price to remain outstanding on the security of a mortgage of the house free of interest. On the same day, the defendant executed a mortgage in favour of the plaintiff by which, in consideration of £500 expressed to be paid by the plaintiff to the defendant, the defendant covenanted to pay to the plaintiff on Mar. 5, 1956, £500 without interest, and it was further provided that "if the [defendant] shall duly and punctually observe and perform all the covenants by him (other than the covenant for payment of the principal sum) and the agreement and provisions herein contained and if the power of sale applicable hereto shall not have arisen the [plaintiff] will not call in or require payment of the principal sum before Dec. 5, 1965". The defendant also by the mortgage assigned to the plaintiff a policy of insurance securing payment of £500 at the expiration of the mortgage period at an annual premium, and the defendant covenanted to pay the premiums. The mortgage contained no attornment clause. The defendant lived in the house. In 1958 the local authority served notice of their intention to obtain a clearance order relating to the house, and the plaintiff began negotiations with the defendant for the repurchase by the plaintiff of the house. In July, 1959, before the clearance order was confirmed or the negotiations for the repurchase concluded, the defendant left the house to live elsewhere. The defendant ceased to pay the premiums on the policy of insurance, believing that it was no longer required as he was selling the house, and the policy was converted into a paid-up policy for £187 10s. The negotiations for the repurchase failed, and on Mar. 16, 1960, the plaintiff issued a summons against the defendant claiming possession and an order for the payment of £500 under the mortgage, basing his claim on the defendant's breach of covenant in failing to pay the premiums on the policy. The defendant wished (since the repurchase of the house had not been effected) to resume payment of the premiums and to reoccupy the house. On May 26, 1960, at the defendant's request, the plaintiff (who held the paid-up policy) agreed to the defendant's paying the overdue premium on the policy and signed a letter to the insurance society agreeing to the reinstatement of the policy. In June, 1960, the plaintiff informed the defendant that he insisted on proceeding with his claim for possession. At the hearing, the question was also raised whether the plaintiff's power of sale had arisen. The defendant had made no attempt to arrange for the mortgage to be transferred, and did not resume occupation of the house.

Held: (i) on the true construction of the mortgage, the power of sale was exercisable at the date of the issue of the summons, because at that time there were subsisting breaches of the mortgagor's covenant to pay premiums; and the plaintiff was not estopped (under the doctrine of equitable estoppel) by his subsequent conduct from exercising that power, since, on the evidence, the defendant failed to establish that that conduct was intended to affect the legal relations between the parties or that the plaintiff had so conducted himself that he could not be heard to deny that his conduct was so intended.

(ii) assuming that the court had discretion not to order possession to be given to the plaintiff mortgagee but to give the defendant time to arrange for the mortgage to be transferred, no such indulgence would be allowed, since the defendant had taken no action in that regard in the four months which had elapsed since June, 1960, and was not living in the house; accordingly there would be an order for possession.

Hinckley & South Leicestershire Permanent Benefit Building Society v. *Freeman* ([1940] 4 All E.R. 212) applied.

Dictum of HARMAN, J., in *Fourmaids, Ltd.* v. *Dudley Marshall (Properties), Ltd.* ([1957] 2 All E.R. at p. 37) not applied.

[As to power to adjourn summons for possession of mortgaged premises, see 27 HALSBURY'S LAWS (3rd Edn.) 365, para. 689; and for cases on the subject, see 35 DIGEST 397, 398, *1394-1404* and SUPPLEMENT.

As to conditions for exercise of power of sale, see 27 HALSBURY'S LAWS (3rd Edn.) 299, para. 562; and for cases on the subject, see 35 DIGEST 498, 499, *2286-2294*.]

Cases referred to:

Combe v. *Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215: 3rd Digest Supp.

Fourmaids, Ltd. v. *Dudley Marshall (Properties), Ltd.*, [1957] 2 All E.R. 35; [1957] Ch. 317; [1957] 2 W.L.R. 931; 3rd Digest Supp.

Hinckley & South Leicestershire Permanent Benefit Building Society v. *Freeman*, [1940] 4 All E.R. 212; [1941] Ch. 32; 110 L.J.Ch. 36; 164 L.T. 399; 2nd Digest Supp.

Robertson v. *Ciliu*, [1956] 3 All E.R. 651; [1956] 1 W.L.R. 1502; 3rd Digest Supp.

Adjourned Summons.

The plaintiff, Jonathan Frederick Braithwaite, the mortgagee under a legal charge dated Dec. 5, 1955, made between the defendant, Arthur Lewis Winwood, the mortgagor, of the one part, and the plaintiff of the other part, applied by originating summons for an order (i) that the defendant deliver up possession of the mortgaged premises being the freehold property and dwelling-house known as No. 4, The Avenue, Spitalbrook, in Hoddesdon in the county of Hertford; and (ii) that the defendant pay the plaintiff £500 due to him under the covenant in the legal charge dated Dec. 5, 1955, and all or any moneys that subsequently fell due thereunder.

HIS LORDSHIP also, at the request of both counsel, dealt with the question whether the plaintiff was entitled to exercise the power of sale under the legal charge.

N. Micklem for the plaintiff, the mortgagee.

J. Maurice Price for the defendant, the mortgagor.

CROSS, J.: On Dec. 5, 1955, the plaintiff, Mr. J. F. Braithwaite, sold No. 4, The Avenue, Spitalbrook, at Hoddesdon in Hertfordshire, which was one of four adjoining cottages which he owned, to the defendant, Mr. A. L. Winwood, for £650, and it was a term of the bargain between them that the plaintiff should allow £500 of the purchase price to remain on mortgage free of interest; and on the same day the defendant executed a mortgage of No. 4 in favour of the plaintiff. Clause 1 of that document was in these terms:

> " In consideration of £500 now paid by the mortgagee to the mortgagor (the receipt whereof the mortgagor hereby acknowledges) the mortgagor hereby covenants with the mortgagee that he will pay to the mortgagee on Mar. 5 next [1956] the sum of £500 without interest Provided always and it is hereby agreed and declared that if the mortgagor shall duly and punctually observe and perform all the covenants by him (other than the covenant for payment of the principal sum) and the agreement and provisions herein

contained and if the power of sale applicable hereto shall not have arisen the mortgagee will not call in or require payment of the principal sum before Dec. 5, 1965."

That was ten years ahead. By cl. 2 the mortgagor as beneficial owner charged the property with payment of the £500; and, by cl. 3, the mortgagor assigned to the mortgagee a policy with the Royal Liver Friendly Society securing payment to him of £500 at the expiry of the ten-year period at an annual premium therein mentioned. Then cl. 4 contained the usual proviso for redemption; and cl. 5 and cl. 6 a number of covenants by the mortgagor, including in cl. 6 (iv) a covenant that the mortgagor would during the continuance of the security punctually pay all premiums for keeping on foot the policy assigned by way of security.

It is to be observed that that mortgage did not contain any attornment clause. The mortgagor lived in the cottage which had been conveyed to him for several years after the execution of the mortgage, and he duly paid the premiums required for keeping up the policy. Then, at the end of 1958, the local authority formed the view that all four of the cottages ought to be demolished, and they served notices of their intention to obtain a clearance order—both, I suppose, on the mortgagee as owner of the three other cottages and certainly on the mortgagor as owner of No. 4. The mortgagee took the view, and takes the view, that it would be best for him to be in a position to redevelop all four properties if they were pulled down, and so he began negotiations with the mortgagor with a view to repurchasing No. 4. Then, in July, 1959, before the clearance order was confirmed or the negotiations for repurchase had been concluded, the mortgagor left No. 4 and since then has lived elsewhere. As it appeared to the mortgagor then that the policy would no longer be required because he thought he was going to sell the property back to the mortgagee, he stopped paying the necessary premiums to maintain the policy, with the result that the society converted it to a fully-paid policy for £187 10s. It is not suggested that that decision of the mortgagor to discontinue paying the premiums was caused by anything said or done by the mortgagee.

Unfortunately, the negotiations fell through, as I understand, because the parties could not agree which of them was to take the compensation money payable if No. 4 was demolished; and on Mar. 16, 1960, the mortgagee issued this summons against the mortgagor, asking for possession of the property and an order for payment to the mortgagee of the £500 due under the charge. In his affidavit in support he exhibited the mortgage and pointed out that there had been default in the payment of the premiums under the policy and said that by reason of that breach of covenant he was advised that his power of sale under the charge had become exercisable. The mortgagor put in an affidavit on May 11, 1960, in answer, in which he explained that the reason for stopping paying the premiums was that he thought he was going to resell the property to the mortgagee, and he said that now the negotiations had broken down he was ready and willing to pay to the society £52 8s. 4d. which at that time was the amount necessary to reinstate the policy. He said that he wished to be allowed to pay the arrears of premiums to the society and to be allowed to retain possession of the premises. The reason why he said he wished to be "allowed" to pay the arrears was that the society was not willing to allow him to reinstate the policy without the consent of the mortgagee, who, of course, was the legal owner of the policy as it had been assigned to him. I understand that the clearance order has not yet been confirmed, owing to the intervention of the Society for the Protection of Ancient Buildings, and so one does not know at the moment whether or not the premises will be pulled down.

The matter came before the master on May 17, 1960, and the mortgagee did not ask for any order for payment. He only asked for an order for possession. The master made an order for possession within twenty-eight days of service

A of the order; but, subsequently, at the request of the mortgagor, he adjourned the matter to the judge. On May 26, 1960, the mortgagor went to see the mortgagee with a letter to the insurance society which he asked the mortgagee to sign, by which the mortgagee was to agree to his reinstating the policy. After consulting his solicitors, the mortgagee on May 27, 1960, wrote to the mortgagor in the following terms:

B

> "Referring to your call at my house last night, I have now had a word with my friend Mr. Stanley [his solicitor] and he and I both agree that on grounds of justice I ought to agree to your paying the overdue premium on your insurance assigned to me with the Royal Liver Society, and I have accordingly signed the form and sent it along in the envelope which you handed to me to be witnessed."

C

Having received that letter, the mortgagor paid to the society the arrears needed to reinstate the policy, and on June 15, 1960, the mortgagor's solicitors wrote to the mortgagee's solicitors in these terms:

> "We write to confirm that £67 being the amount required for premiums up to date by the Royal Liver Friendly Society, has been despatched to the
D society and we have asked that they confirm this payment to you. Please then be kind enough to confirm to us that no further action is being taken against Mr. Winwood [the mortgagor] on the proceedings instituted against him."

That letter was answered on June 16, 1960, by the mortgagee's solicitors in these terms:

E

> "We thank you for your letter of June 15, contents of which are noted. We must make it clear to you that the present proceedings will certainly go on. There has been a grave breach of covenant by Mr. Winwood [the mortgagor] and our client [the mortgagee] is entitled to possession and will press the judge for an order to that effect. You will appreciate that the master has already made an order for possession but Mr. Winwood [the
F mortgagor] objected to this and asked for the case to go to the judge. That being so, the judge must hear the case which has been adjourned to him and is likely to come up for hearing quite soon."

That being the position, the parties both asked me to decide not simply the question whether or not the mortgagee ought to have possession of the property,
G but also the entirely separate question whether the mortgagee is now entitled to exercise the power of sale. I agreed to do this, and for this purpose I allowed both parties to give oral evidence supplementing their affidavit evidence and each was cross-examined by counsel for the other.

On the question whether or not the power of sale is exercisable, it is first necessary to decide what is the meaning of cl. 1 of the legal charge. The Law of
H Property Act, 1925, draws a distinction between the arising of the statutory power of sale and its exercise. Section 101 (1) of the Act provides that where the mortgage is made by deed, as this mortgage was, a mortgagee shall, by virtue of the Act, have "a power, when the mortgage money has become due, to sell . . ." Under an ordinary mortgage, the mortgage money becomes due six months after the date of the mortgage, and the power of sale arises then; but s. 103 of the Act
I provides that the mortgagee shall not exercise the power of sale, although it has arisen, unless and until either (i) notice requiring payment of the mortgage money has been served and default has been made for three months in the payment of the principal, (ii) some interest payable under the mortgage has been in arrear and unpaid for two months, or (iii) there has been a breach of some provision contained in the mortgage deed.

It is difficult to apply the distinction between the arising and the exercise of the power of sale to cl. 1 of this deed. To say that the power of sale arose on Mar. 5, 1956, makes nonsense of the proviso, because the proviso is that the

mortgagee will not call in the principal money until Dec. 5, 1965, if the covenants be punctually observed and if the power of sale shall not have arisen. I think that this clause really draws no distinction between the arising of the power of sale and the moment when it becomes exercisable. What, in effect, the mortgagee is saying is: " If you comply with all the covenants, I will not call in the money until Dec. 5, 1965, but on your default the power of sale shall at once arise and become exercisable ". Any other construction would make nonsense of the clause.

On that footing, the power of sale was exercisable at the date of the issue of the summons, because at that time there was a subsisting breach of covenant, namely, the failure of the mortgagor to keep up payment of the premiums. To this failure the mortgagee had not in any way contributed. The question is whether the subsequent events estop the mortgagee from saying that the power of sale is still exercisable.

Counsel for the mortgagor relied in this connexion on the principle of equitable estoppel which is conveniently stated by DENNING, L.J., in *Combe* v. *Combe* (1). The material words are these (2):

> ". . . where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

It is said that at the interview on May 26 and by his letter of May 27, 1960, the mortgagee in effect promised the mortgagor that if the mortgagor paid up the arrears, he (the mortgagee) would not rely on the mortgagor's having allowed the policy to lapse as a default which enabled him to exercise the power of sale. The evidence as to what passed at the interview on May 26, 1960, is not very satisfactory. The mortgagor said that the question of his retaining possession was discussed at the interview and that he took it, after receiving the letter, that the mortgagee was withdrawing the proceedings. The mortgagee, on the other hand, said that he did not remember the mortgagor's asking to be allowed to remain in possession, that if he had been asked to discontinue the action he would certainly have refused, and that he thought the mortgagor had no justification for taking the letter as meaning that the proceedings would be dropped. It is unfortunate that the mortgagee did not state in the letter what was clearly stated by his solicitors on June 16, 1960, after the policy had been reinstated, that his consent to its reinstatement had nothing to do with the discontinuing of the proceedings or did not imply that he was going to discontinue the proceedings. But it must be, I think, for the mortgagor to establish the equitable estoppel; and, on the evidence, I cannot hold that what was said by the mortgagee at the interview or in the letter was intended to affect the legal relations of the parties or that the mortgagee so conducted himself that he cannot be heard to say that he did not intend to affect the legal relations of the parties. After all, his consent was needed to the reinstatement of the policy in any case because he was the legal owner of it, and he may well have thought the mortgagor wished to reinstate the policy quite apart from any effect it might have on the proceedings. On that footing, I need not consider whether what the mortgagor did (paying up the premiums) would or would not be a sufficient acting on the mortgagee's assurance or promise to found the estoppel, supposing that I had thought that there was a promise or assurance by the mortgagee.

(1) [1951] 1 All E.R. 767; [1951] 2 K.B. 215.
(2) [1951] 1 All E.R. at p. 770; [1951] 2 K.B. at p. 220.

I now have to turn to the question whether the mortgagee ought to have an order for possession, which is a totally different matter. The position before the Supreme Court of Judicature Acts, 1873 and 1875, was quite clear, that under the ordinary mortgage where the legal estate in fee simple was given to the mortgagee, the mortgagee could at once take possession if he wished to do so, and the Court of Chancery would never grant an injunction restraining him from doing so. The Court of Chancery had its own weapon which it used against a mortgagee who did take possession. He would have strictly to account for his receipts in any redemption proceedings; but equity never intervened by injunction to prevent the mortgagee exercising his legal right to take possession. After the Judicature Acts, the two jurisdictions were fused, but the mortgagee's right to obtain an order for possession was a right which was enforced in the Queen's Bench Division and not in the Chancery Division. In 1936, by R.S.C., Ord. 55, r. 5A, claims for payment and for possession under mortgages were transferred to the Chancery Division, and the mortgagee was deprived of the right to sign judgment for possession in default of the mortgagor's appearance which hitherto he had had in Queen's Bench Division proceedings. Since 1936, now that the matter has been transferred to this Division, the mortgagee has to prove his case before he can get an order for possession, even though the mortgagor does not appear. In 1936 practice directions were issued for the guidance of masters in these cases. I only need read a short passage from them. Under the heading of " Relief claimed ", there are these words (3):

> " When possession is sought and the defendant is in arrear with any instalments due under the mortgage or charge and the master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit, and if the defendant is in default of appearance direct the plaintiff's solicitor to communicate such terms to the defendant by letter."

In *Hinckley & South Leicestershire Permanent Benefit Building Society* v. *Freeman* (4), the question was raised whether this part of the practice directions was valid. It was argued that, though the mortgagee now had to prove his case and could not sign judgment in default of appearance, nevertheless when once he had proved his case, the court had no power to refuse an order for immediate possession in order to give the mortgagor time to make arrangements to have the mortgage transferred to someone else or otherwise to put his affairs in order. That argument was rejected by FARWELL, J., in the *Hinckley* case (5), and UPJOHN, J., approved that decision in the later case of *Robertson* v. *Cilia* (6). Having had the *Hinckley* case (4) cited to him, he said (7):

> " No doubt, I have power to adjourn this matter for a reasonable period to give the mortgagor an opportunity of making some offer acceptable to the mortgagee, and, if necessary, trying to find means of discharging the loan altogether. That was the whole object of the alteration of the Rules of the Supreme Court in 1936, namely, to prevent a mortgagee turning a mortgagor out of possession almost literally overnight without giving him an opportunity to meet and try to satisfy his creditor."

Those were both cases of building society mortgages repayable by instalments, to which the part of the practice direction to which I have referred expressly relates. In *Fourmaids, Ltd.* v. *Dudley Marshall (Properties), Ltd.* (8), HARMAN, J., expressed the view (9) that what was said in those cases did not apply to ordinary mortgages where the money lent was not repayable by instalments; that, in such cases, the court had no discretion, and that once the mortgagee

(3) R.S.C., Ord. 55, r. 5A (1960) ANNUAL PRACTICE at p. 1506.
(4) [1940] 4 All E.R. 212; [1941] Ch. 32.
(5) [1940] 4 All E.R. at p. 216; [1941] Ch. at p. 39. (6) [1956] 3 All E.R. 651.
(7) [1956] 3 All E.R. at p. 655. (8) [1957] 2 All E.R. 35; [1957] Ch. 317.
(9) [1957] 2 All E.R. at p. 37; [1957] Ch. at p. 321.

proved his case the order for possession must go. Though I hesitate very much to differ from him I cannot see the logic of the distinction. I can well understand it being held, as was argued in the *Hinckley* case (10), that the function of the court in these cases is limited to seeing that the mortgagee proves his case and that the mortgagee cannot be deprived of a legal right by a rule of court or a practice direction. But, if once one accepts, as HARMAN, J., does, that the court has power to give time, even when the mortgagee has proved his case, I cannot see why that power should be only exercisable in the case of mortgages repayable by instalments, though I appreciate that there may be much more occasion for exercising it in the case of a mortgage of the house in which the mortgagor is living than in the case of mortgages of other property.

Assuming, however, that I have a discretion in this matter, I do not think that I ought to exercise it in the mortgagor's favour. It was, no doubt, understandable that he should have stopped paying the premiums in 1959 because he thought that he was going to sell his house back to the mortgagee. Again, when the negotiations broke down, he was at once anxious to reinstate the policy and until he got the mortgagee's solicitors' letter of June 16, 1960, it was not unreasonable for him to think that once he reinstated it he would be safe. Therefore, if this case had come before me at the end of June, 1960, I might have been disposed to give the mortgagor a period of time to see whether he could not arrange to have the mortgage transferred; but for the last four months—July, August, September and October—the mortgagor has done absolutely nothing. He has just let the matter drift on and he is not in fact living on the property. All he says is that if the clearance order is not confirmed and the property remains standing, he would like to go back and live there; and if the property is demolished he would rather sell the site himself than allow it to be sold by the mortgagee together with the sites of the other three houses.

In these circumstances I do not think that he is entitled to any more indulgence than he has already had. Therefore, I propose to make an order for possession now. Logically, I suppose it might be said that I ought to make it operative at once, but I shall make it operative in the usual way, twenty-eight days after service.

[HIS LORDSHIP also declared that the power of sale was exercisable.]

Solicitors: *Curwen, Carter & Evans* (for the plaintiff); *Coode, Kingdon, Cotton & Ward*, agents for *Derrick Bridges & Co.*, Barnet (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(10) [1940] 4 All E.R. 212; [1941] Ch. 32.

HORTON *v.* HORTON.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), October 31, November 1, 1960.]

Contract—Consideration—Rectification claim—Separation deed amended by supplemental agreement—Possible claim for rectification as consideration for amending agreement.

Husband and Wife—Separation deed—Supplemental amending agreement providing retroactively for deduction of tax from periodical payments—Possible claim for rectification as consideration for amending agreement.

In a separation agreement under seal the husband agreed to pay the wife "the monthly sum of £30", and he regularly paid this sum without making any deduction for tax or accounting for it to the Inland Revenue. Some months later, without legal advice, he signed a further agreement with the wife, not under seal, and without any expressed consideration, amending the original agreement by the insertion after the words "monthly sum" of the words "which after deduction of income tax shall amount to the clear sum of £30 each month", and declaring that the original agreement "was and always has been interpreted by the parties hereto as if the said amendment had been originally in the said agreement when the same was first executed". It was found that the original agreement did not carry out the parties' intention.

Held: the second agreement was a valid and enforceable agreement since it was executed for a consideration in that it represented a compromise of the wife's possible action for rectification of the original agreement, an action in which she would have had some prospect of success.

Appeal dismissed.

[**Editorial Note.** As regards rectification of deeds where tax reduction is sought, cf. *Whiteside* v. *Whiteside* ([1949] 2 All E.R. 913), and, generally, 26 HALSBURY'S LAWS (3rd Edn.) 914.

As to compromises as consideration for an agreement, see 8 HALSBURY'S LAWS (3rd Edn.) 118, para. 205; and for cases on the subject, see 12 DIGEST (Repl.) 223-227, *1659-1689*.

As to a wife's consideration for a maintenance agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 881, para. 1455; and for cases on the subject, see 27 DIGEST (Repl.) 219-222, *1742-1772*.]

Appeal.

The husband, George William Horton, appealed against an order of His Honour JUDGE GEOFFREY HOWARD, sitting at West London County Court, made on Apr. 5, 1960, giving judgment for the wife, Nora Veronica Horton, in an action by the wife in respect of payments claimed to be due to her under a separation agreement under seal dated Mar. 12, 1954, as amended by a subsequent memorandum in writing. The ground of appeal was that the judge was wrong in law and had misdirected himself in holding that there was good consideration for the contract embodied in the memorandum to the deed. The facts are stated in the judgment of UPJOHN, L.J.

E. R. Moulton-Barrett for the husband.

J. A. Nevin for the wife.

UPJOHN, L.J., giving the first judgment at the request of ORMEROD, L.J., said: This is an appeal from a judgment given on Apr. 5, 1960, by His Honour JUDGE GEOFFREY HOWARD, sitting at West London County Court. The action is between a wife and a husband, the wife being the plaintiff and the husband the defendant. The question which falls for consideration is as to payments which are due from the husband to the wife under certain documents dealing with their separation. The parties were married in April, 1942, and they

parted in 1954. The defendant entered into a separation agreement under seal, dated Mar. 12, 1954, which recited, among other things, that the husband had agreed to pay the wife the monthly sum of £30 " for and towards her maintenance and support during the joint lives of the husband and wife " as hereinafter mentioned. The deed then went on to contain a number of covenants common in separation deeds, such as a covenant that the wife might live separate and apart from the husband, and a mutual covenant not to molest. The third covenant was in this form:

> " The husband shall during the joint lives of himself and his wife and so long as the wife shall perform and observe the agreements and stipulations on her part herein contained pay to the wife the monthly sum of £30 on the first day in every month during the continuance of these presents."

Then follow a number of other covenants which I need not read. The husband paid the £30 a month without any deduction of tax, although it is plain that, on the true construction of that deed, he ought to have deducted tax and have accounted in one way or another for the tax to the Inland Revenue. Such payments continued for about ten months. In January, 1955, the wife was minded to supplement her income by going out to work and she consulted her solicitor, a Mr. Freeborough, who was—to quote the judge's words—

> " quick to perceive that if she did so and the husband under the form of the agreement as it stood changed his mind and elected to deduct tax, she might well suffer loss in no longer being able to reclaim the full rebate."

Accordingly, he asked the husband to come and see him and put in front of him a supplementary agreement which the husband read through and signed without any separate independent legal advice. The supplemental agreement was indorsed on the original separation deed. It was not a document under seal. It is in these terms:

> " It is hereby mutually agreed between the parties hereto that cl. 3 of the within written agreement shall be amended by the insertion after the words ' monthly sum ', of the words ' which after deduction of income tax shall amount to the clear sum of £30 each month '. It is further declared that the within written agreement was and always has been interpreted by the parties hereto as if the said amendment had been originally in the said agreement when the same was first executed."

That is signed by the husband and wife. It is undated but there is no dispute that it was signed in January, 1955. So the effect of that memorandum, if it is enforceable, is to change the obligation of the husband from paying £30 a month less tax to the wife into an obligation on him to pay £30 a month tax free, using that expression as meaning such a sum as after the deduction of tax should amount to £30. The whole question that the learned county court judge had to decide, and that we have to decide, is whether that memorandum is enforceable or not.

The husband continued to pay £30 a month until some time in 1958. In May or June of that year, the Commissioners of Inland Revenue made a claim on him for the tax deducted by him on making payment to his wife. The real trouble was this. The husband's income was not very large, and, therefore, he had an insufficient fund of taxed income to pay the £30 a month and retain the tax which he notionally deducted from the wife's annuity. Certainly some part of the tax which he notionally deducted ought to have been paid over by him to the Inland Revenue. We have been told that a very substantial sum, something in the neighbourhood of £360, has been claimed by the commissioners in respect of tax due by the husband in respect of deductions made under the deed and the memorandum. He did not pay his wife the annuity thereafter, and in June, 1958, the wife made a claim in the county court for one month's annuity of £30. That was defended by the husband, but ultimately he allowed the

matter to go by default and judgment was given against him. In the view which I take of the matter, however, those proceedings do not concern us in this court. In December, 1959, the husband started proceedings under the Maintenance Agreements Act, 1957, to vary the provisions of the deed of 1954, and those proceedings, we have been told, are standing over pending the judgment in this case.

It is submitted by counsel for the husband, who has said everything possible on behalf of his client, that there is no consideration for the memorandum executed in 1955 as it is not under seal, and that, therefore, the wife cannot sue under the memorandum and deed but only under the deed, in which case, of course, she is entitled only to £30 a month less tax. The learned county court judge expressed his view in these words when he dealt with that argument:

> "This side of the case has given me anxiety but the conclusion I have reached is that if two parties to a document agree that it does not correctly express their intentions and desire to amend the agreement and put right an error or omission in it, the creation of a newer and clearer document is thereby made for a good consideration, i.e., the removal of doubt. Every variation of any agreement must at least be likely to be more favourable or unfavourable to one or other party thereto. When two people admit that any written agreement does not express their true intention, there must surely be some consideration for substituting a document which does so by expressing their true intention instead of saying something else. The de facto position—i.e., that the husband as before was paying her £30 clear—remained in any case unaltered after the memorandum was signed."

I understand the learned judge to be expressing the view on the facts that he was satisfied that the parties had not in the original deed correctly expressed their intention, and that that intention was, in fact, correctly expressed in the supplemental memorandum. Counsel for the husband has submitted that there has been no consideration for this memorandum—it is a mere nudum pactum—to pay an additional sum, i.e., the tax due on each of the instalments. He has submitted that there was no doubt to be resolved, and that the learned judge was wrong in stating that the consideration could be the removal of a doubt. One must remember that the note of the learned judge's judgment was made some time later from the notes of others, and it may be that the exact language that he used is not before us. But it seems to me clear that all the learned judge is saying there is this. There was a genuine doubt what the parties had originally intended, and they discussed the matter. The learned judge thought it was plain that the parties originally intended that the husband was going to pay a sum tax free, and, therefore, they entered into that agreement so as to resolve the doubts as to what the parties had intended. I accept at once the argument of counsel for the husband that no doubt whatever arose on the effect of the original deed. The doubt which arose was whether the original deed in fact carried out their mutual intention.

Counsel for the husband has further submitted that, in any event, the consideration was too nebulous to be enforceable. He points out that, had the true intention originally been to secure that the wife was merely to have £30 a month spending money (as the husband said in evidence) and had rectification proceedings followed, the correct form of the rectification proceedings would be to ask for some order whereby the wife was to get £30 a month after deduction of tax, but that she would undertake to pay to the husband any sums recovered by her from the income tax authorities. That may well be so.

The real truth of the matter is this. The original deed did not carry out the parties' intention, as the learned judge held. The wife could have made some claim to rectification. It may be, as I have just said, that that should be limited

in some way. But she thought, and was advised no doubt, that she had some right to obtain more than she was entitled to under the existing deed and she must have done that by means of a suit for rectification. Indeed, counsel for the husband has submitted that rectification proceedings ought to have been brought here. But the legal effect of what the parties did was that, the wife believing that she had some good claim for rectification (I do not put it any higher than that), entered into an agreement with her husband to resolve that matter. The agreement they entered into, in those circumstances, is surely plainly an agreement for consideration. If some such document had not been signed by the husband in January, 1955, the wife would have been entitled to take rectification proceedings. Whether or not they would have succeeded does not matter but, on the evidence, she had some prospect of success. But in order to compromise the matter, they executed this agreement, which is not under seal, and in those circumstances, it seems to me, that plainly is a document executed for consideration.

I confess I have much sympathy for the husband here, but the trouble arises not because he has been badly advised but because he has not been advised at all. No doubt, had he been advised, he would have been warned of two matters. First, that, under the document which he was being asked to sign, his wife would get more than £30 a month spending money. Secondly, that having regard to his own financial position, he would himself have to account for some part of the tax notionally deducted to the Inland Revenue. But, unfortunately, he was not advised on those two matters when he signed this document, and I am unable to come to any conclusion except that which the learned judge reached. This was an agreement made for consideration, viz., that the wife refrained from taking rectification proceedings. Accordingly—I say again, with some regret—I would dismiss this appeal.

ORMEROD, L.J.: I agree. There is nothing I wish to add except that I also share the regret which UPJOHN, L.J., has expressed.

WILLMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *W. G. Street & Co.* (for the husband); *Gerald Samuels & Shine* (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SMITH *v.* BAKER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), November 8, 1960.]

Animal—Dog—Dog attacking boy—Complaint preferred by police officer investigating case against owner of dog—Whether valid—Dogs Act, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.

Magistrates—Complaint—Dog attacking boy—Complaint preferred by police officer investigating case against owner of dog—Whether complaint valid—Dogs Act, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.

A dog owned by S. jumped at and attacked a boy and bit him above his left ear. A police officer preferred a complaint against S. under s. 2 of the Dogs Act, 1871, which provides that any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control. The magistrates made an order that the dog be destroyed, which order was confirmed by the appeal committee of quarter sessions. S. contended that the proper person to lay the complaint was the boy who was bitten and not the police officer.

Held: the complaint had been properly preferred, since the word "complaint" in s. 2 of the Act of 1871 was unqualified as to whom the complainant should be and the police in the majority of cases were the proper people to lay the complaint as it was brought in the public interest and for the benefit of the public.

Appeal dismissed.

[As to dangerous dogs, see 1 HALSBURY'S LAWS (3rd Edn.) 693, para. 1321; and for cases on the subject, see 2 DIGEST (Repl.) 389, *688-692*.

As to persons who may lay information and make complaint, see 25 HALSBURY'S LAWS (3rd Edn.) 186, para. 338; and for cases on the subject, see 33 DIGEST 324, 325, *389-391*.

For the Dogs Act, 1871, s. 2, see 1 HALSBURY'S STATUTES (2nd Edn.) 864.]

Cases referred to:

Haldane v. *Allan*, 1956 S.C. (J.) 41; 3rd Digest Supp.

Walker v. *Brander*, 1920 S.C. (J.) 20; 57 Sc. L.R. 651; 2 Digest (Repl.) 389, *691*.

Case Stated.

This was a Case Stated by justices for the county of Kent in respect of their adjudication as an appeal committee of quarter sessions for East Kent sitting at Canterbury on Mar. 12, 1960. On Jan. 27, 1960, the respondent, Montague Baker, preferred a complaint against the appellant, Kathie Katherine Smith, that she was the owner of a dangerous dog which was not kept under proper control at Brookland, Kent, on Jan. 15, 1960, contrary to s. 2 of the Dogs Act, 1871. The complaint was heard by the justices for the petty sessional division of Ashford sitting at Ashford on Feb. 18, 1960, when they made an order against the appellant that the dog, having been found to be dangerous and not kept under proper control, be destroyed. The appellant appealed* to the appeal committee, and the appeal was heard on Mar. 11 and 12, 1960. The following facts were found. On Jan. 15, 1960, at about 3.10 p.m., a seven-year old boy, Ian Peter Anthony Turpin, was attacked by an alsatian dog belonging to the appellant. At the material time the dog was not under control. The dog jumped at the boy as he was walking along the pavement to his home and bit him above his left ear. The boy was thrown to the ground by the dog, which then stood over him, causing the boy to be shocked and frightened. Other persons had previously been bitten by this dog. On Jan. 27, 1960, a complaint was preferred by the respondent, who was an inspector of police.

It was contended by the appellant that the proceedings against her could not

* Under the Dogs Amendment Act, 1938, s. 1.

lawfully be instituted by the respondent because he was the police officer investigating the case, and not the person aggrieved and that the complaint ought to have been preferred by the boy himself or by his parent on his behalf. It was contended by the respondent that, by virtue of s. 2 of the Dogs Act, 1871, any court of summary jurisdiction might take cognisance of any complaint that a dog was dangerous and not kept under proper control and that there was nothing in that Act or in any other Act to restrict the right of anyone, including a police officer, to lay a complaint in accordance with s. 43 and s. 44 of the Magistrates' Courts Act, 1952*, and r. 4 (2) of the Magistrates' Courts Rules, 1952†.

The appeal committee were of the opinion that the proceedings had been lawfully instituted by the respondent and that, on the evidence, the appellant's dog was dangerous and not kept under proper control and, accordingly, they dismissed the appeal. The respondent now appealed.

The authority and cases enumerated below were cited in argument in addition to those in the judgment‡.

N. R. Fox-Andrews, Q.C., and *H. F. Newman* for the appellant.

Edward L. Gardner, Q.C., and *B. R. Clapham* for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by the appeal committee of quarter sessions for East Kent, who dismissed an appeal by the appellant, the owner of a dog, from an order made by the petty sessional division of Ashford that the dog, having been found dangerous and not being kept under proper control, be destroyed. Before the appeal committee a point was taken, and it is on that point that the Case is stated, namely, whether it was proper that the proceedings by way of complaint should be initiated, as they were, by the police officer investigating the case. As far as the facts are concerned, it is enough to say that the dog in question jumped at and attacked a boy and bit him above his left ear. The case before this court is that the proper person to lay the complaint is the boy who was bitten, and not the police officer.

The first thing to note is that the section in question, s. 2 of the Dogs Act, 1871, provides:

> " Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding 20s. for every day during which he fails to comply with such order."

In a case which recently came before this court (1), we followed a decision in Scotland of *Haldane* v. *Allan* (2) and held that the first part of that section which is dealing with proceedings by way of complaint were not criminal proceedings at all, and that it was not until there was failure to comply with the order that

---

* Section 43 provides: " Subject to the provisions of this Act, where a complaint is made to a justice of the peace acting for any petty sessions area upon which a magistrates' court acting for that area has power to make an order against any person, the justice may issue a summons directed to that person requiring him to appear before a magistrates' court acting for that area to answer to the complaint."

Section 44 provides: " Where no express provision is made by any Act or the rules specifying what magistrates' courts shall have jurisdiction to hear a complaint, a magistrates' court shall have such jurisdiction if the complaint relates to anything done within the petty sessions area for which the court acts . . ."

† Rule 4 (2) is printed at p. 655, letter B, post.

‡ STONES'S JUSTICES' MANUAL (1960), Vol. 2, p. 2687; *Nicholson* v. *Booth & Naylor* ((1888), 58 L.T. 187); *White* v. *Main* ((1897), 24 R. 90); *Rhodes* v. *Heritage* ([1951] 1 All E.R. 904).

(1) *R.* v. *Nottingham JJ., Ex p. Brown*, ante, p. 625. (2) 1956 S.C. (J.) 41.

A the matter became a matter of information and criminal offence. Accordingly, it is said that, in the ordinary way, a complaint should be initiated by the party aggrieved and not by a police officer. Reference has been made to s. 45 and s. 46 of the Magistrates' Courts Act, 1952, both of which appear in Part 2 under " Civil Jurisdiction and Procedure " (3) and which talk about the court after hearing the evidence and the " parties ", and again about the court being satisfied B that the " parties " have had adequate notice, words, it is suggested, which are quite inapt to cover the investigating police officer in any case. Finally, reference was made to r. 4 (2) of the Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190) (4), which provides:

> " An information may be laid or complaint made by the prosecutor or complainant in person or by his counsel or solicitor or other person authorised C in that behalf."

There is no suggestion that the police officer was authorised on behalf of the boy who was bitten, and it is said that the reference to complaint being made by the complainant in person is only apt to refer to the person aggrieved, namely, the person bitten.

D For my part, I feel that this case is too plain for argument. " Complaint " in s. 2 of the Dogs Act, 1871, is unqualified as to whom the complainant shall be. It does not say " by a person aggrieved ". It is intended to be absolutely at large. Further, one realises the complete absurdity of the argument when one finds that, under the original statute (5), it is the police who are really charged in the public interest with the duty of taking possession, amongst other things, E of dogs that they find to be savage and dangerous. To take an illustration, supposing a police officer in the exercise of his powers under s. 1 of the Act of 1871 (since repealed) (6) were to take into custody a stray dog that was highly dangerous and, after two or three days, the owner came and tendered his money for his keep and took him away, the police officer could do nothing but would have to wait till somebody was bitten by the dog or aggrieved by the dog before F a complaint could be laid. The truth of the matter is that the police in the majority of cases are the proper people to lay the complaint. It is a complaint brought in the public interest and for the protection of the public, and in coming to that conclusion I am happy to find that it is in accordance with the view taken in Scotland. We have been referred in particular to *Walker* v. *Brander* (7), from which case it appears that in Scotland the procurator-fiscal is the proper person G to lay such a complaint. I have no doubt in this case, and I would dismiss the appeal.

ASHWORTH, J.: I agree.

ELWES, J.: I agree.

Appeal dismissed.

Solicitors: *Geoffrey B. Gush & Co.*, agents for *William Dawes & Co.*, Ashford, Kent (for the appellant); *Sharpe, Pritchard & Co.*, agents for *N. K. Cooper*, Prosecuting Solicitor, Maidstone (for the respondent).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(3) See 32 HALSBURY'S STATUTES (2nd Edn.) 458, 459.
(4) See 13 HALSBURY'S STATUTORY INSTRUMENTS 40.
(5) See the Dogs Act, 1871, s. 1. (6) By the Dogs Act, 1906, s. 10 and Schedule.
(7) 1920 S.C. (J.) 20.

A

EAVES *v.* MORRIS MOTORS, LTD.

[BIRMINGHAM ASSIZES (Winn, J.), October 11, 12, 1960.]

Factory—Dangerous machinery—Duty to fence—Horizontal milling machine—Machine comprising traversing table carrying block in nature of vice—Bolts to be milled affixed to block—Whether block, when moving and carrying bolts, dangerous part of machinery—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

B

The plaintiff was employed by the defendants to operate a Cincinnati horizontal milling machine in their factory. The machine, which was used for milling bolt heads, comprised a traversing table (or traverse) which, in the course of the operation of the machine, moved forward and then backward, carrying a block in the nature of a vice. Before each operation, the operator had to insert two bolts vertically in the vice, the bolts being held in place by the tightening of a nut. By moving a lever in front of the machine, the operator set in motion the traverse, which then went forward, carrying the bolts with it under the rotating cutting wheels. The traverse reversed itself automatically and then stopped when it had returned to a certain position. The operator would then remove the bolts, insert two more bolts, and repeat the operation. During the actual operation, the cutting wheels were guarded by bringing down lower in front of them bars which were clamped to a horizontal cross-piece. While the plaintiff was operating the machine, the block had traversed forward and backward and then stopped, but, as he was about to remove the two bolts from the vice, the block started forward again. As he was hastily withdrawing his fingers lest they should be drawn forward into the cutters, he cut his left index finger on a burr on one of the bolt heads, and, as a result of the injury, he subsequently lost the finger. He claimed damages against the defendants for (among other grounds) breach of their statutory duty under s. 14 (1)* of the Factories Act, 1937, to fence securely every dangerous part of any machinery.

C

D

E

F

Held: the defendants were liable in damages to the plaintiff for breach of their statutory duty under s. 14 (1) of the Factories Act, 1937, because, at the material moment, the block was a moving part of the machinery, and it was a dangerous part of the machinery when it moved because it carried with it the bolts.

G

Hoare v. *M. & W. Grazebrook, Ltd.* ([1957] 1 All E.R. 470) considered; *Lewis* v. *High Duty Alloys, Ltd.* ([1957] 1 All E.R. 740) considered and criticised.

[As to the statutory duty to fence dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 74, para. 126; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1055, *180-218*.

H

For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Hoare v. *M. & W. Grazebrook, Ltd.*, [1957] 1 All E.R. 470; [1957] 1 W.L.R. 638; 3rd Digest Supp.

I

* Section 14 (1) reads: " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

" Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

A *Lenthall* v. *Gimson & Co.* (*Leicester*), *Ltd.*, (Leicester Assizes, May 24, 1956), unreported.

Lewis v. *High Duty Alloys, Ltd.*, [1957] 1 All E.R. 740; [1957] 1 W.L.R. 632; 3rd Digest Supp.

Action.

B The plaintiff, John William Eaves, an infant suing by his father and next friend, William Henry Eaves, claimed damages against the defendants, Morris Motors, Ltd., for personal injuries arising out of their negligence and breach of their statutory duty under s. 14 (1) of the Factories Act, 1937. The case is reported only in regard to the claim based on breach of statutory duty. The facts are stated in the judgment.

C *G. F. I. Sunderland* for the plaintiff.
R. H. Tucker for the defendants.

WINN, J.: This is an interesting case and it may well be that the precise point which arises here has not previously received the attention of a court in a reported case. The machine, a Cincinnati horizontal milling machine, which D I shall have occasion to describe in greater detail later, is one which comprises a traversing table, or traverse, which moves, in the course of the operation of the machine, forward and again backward, carrying a block in the nature of a vice in which, for the purpose of work being done on their heads, two bolts are stood up vertically and held by the tightening of a nut which closes the vice portion of the block. The injury which the plaintiff sustained was a cut on E the index finger of his left hand, produced by a burr, or sharp raised edge or prominence, on one of those bolt heads. The point is whether, in the circumstances and at the material time, the injury was caused by a part of the machine which was a dangerous part of the machinery within s. 14 (1) of the Factories Act, 1937.

The accident occurred on Mar. 31, 1958, in the early part of the night shift F on which the plaintiff was working for the defendants on this machine. It was probably round about 10 or 10.30 p.m. that the incident, and I say incident rather than accident for the moment, took place. During the course of the night shift, the plaintiff, working on piece work, would normally work on some three thousand bolts. It is an operation performed quickly, and speed is required to enable him to reach his piece-work earning standard. Into the G block, which is on the traversing table, the operator inserts two bolts, and, in order to hold them tight in the block, turns the nut at the left-hand end of the block; then, by moving across the lever in the front of the machine, he sets in motion the traverse. That traverse goes forward carrying the bolts with it under the cutting wheels, which would be guarded in the course of the actual operation by bringing down lower in front of them the bars which are clamped H to the horizontal cross-piece. The cutting wheels are rotating, they mill the bolt heads as they pass under; the traverse reverses itself automatically and returns, and, when it has returned to a certain position, it should stop. The incident which gave rise to the accident complained of in this action was that, on this particular occasion, the block traversed forward, traversed back, and then paused for sufficiently long to enable the plaintiff to apply the spanner to the nut, I loosen it somewhat and put each of his hands (I assume the index finger and thumb of the respective hands) on the two bolts. He was about to remove the bolts vertically and throw them into the completed component tin, or storebox, when the block started forward again. In his not unnatural apprehension that his fingers might be drawn forward into the cutters, and in his surprise at the movement occurring at all, the plaintiff hastily withdrew his fingers and, as he withdrew the left index finger, he cut himself on a burr on one of the bolt heads. It was not a big or serious cut, but while the machine went on traversing forward and traversing aft, another workman, who had occasion to go to the surgery,

suggested that the plaintiff should go with him, and the two of them went off together to the surgery.

[His Lordship, after reviewing the evidence, found that the plaintiff (who was a left-handed man) had an earlier cut on the same finger in November, 1957, which might have predisposed the finger to greater harm from the cut which he sustained as a result of the incident on Mar. 31, 1958, than would have been the case if the finger had been wholly healthy; that, although the cut which the plaintiff sustained on Mar. 31, 1958, was not a deep cut which required treatment as a wound, it was an injury sustained by him; and that the injury enabled a virulent infection to enter the cut and set up a sepsis, with the result that the plaintiff eventually lost the finger. His Lordship continued:] It is said that there has been a breach of s. 14 of the Factories Act, 1937. I was referred by learned counsel to several authorities and, in particular, to the decision of Lynskey, J., in *Hoare* v. *M. & W. Grazebrook, Ltd.* (1), in which the learned judge followed the decision of Finnemore, J., in *Lenthall* v. *Gimson & Co. (Leicester), Ltd.* (2). The view of both those learned judges, so far as it is relevant to this case, seems to be that, where the effect of the movement of a component in the machine (a component being something which is undergoing manufacture or manufacturing treatment in a machine) is to produce danger by the physical relation or approach of the component to a part of the machine, then the part of the machinery into juxtaposition with which the component is brought, so that the two of them amount to a danger, is a dangerous part of the machinery within the meaning of s. 14 (1), albeit that that part, considered separate from and not in conjunction with the component, is entirely safe and in no way dangerous. Those two cases decided by those learned judges are really cases in which something of the nature of a nip has been produced. Lynskey, J., used this language (3):

> " The previous decisions do not deal with this point, namely, whether a machine becomes dangerous in the operation which it is intended to perform, by reason of the component part creating a nip with a part of the machine which it is designed to come very close to. Does that make it a dangerous part of the machine? "

Pausing there for a moment, I venture to think that the exact meaning of the learned judge must have been " Does that make " (not " it ") " the part of the machine a dangerous part of the machine? " He was considering, not whether the component was made a dangerous part of the machine, but whether a safe part of the machine was made a dangerous part by reason of the component coming very close to it. Lynskey, J., said (3):

> " I think that it does. I agree with Finnemore, J., that it is not an easy case to decide, but I have no doubt about the matter."

He went on to give his view of the contemplation of the legislature.

On the other hand, Ashworth, J., in *Lewis* v. *High Duty Alloys, Ltd.* (4), which was decided about six weeks before the decision of Lynskey, J., took a view which appears to me to be inconsistent with what I have just stated. In that case, having referred to *Lenthall* v. *Gimson & Co. (Leicester), Ltd.* (5), the decision of Finnemore, J., Ashworth, J., said (6):

> " The importance of the decision is that the learned judge took the view that there could be a breach of s. 14 if the danger in question arose by reason of a conjunction of a part of the machine itself with the material which was being worked on it."

(1) [1957] 1 All E.R. 470. (2) (Leicester Assizes, May 24, 1956), unreported.
(3) [1957] 1 All E.R. at p. 474. (4) [1957] 1 All E.R. 740.
(5) (Leicester Assizes, May 24, 1956), unreported.
(6) [1957] 1 All E.R. at p. 742.

A He considered certain other cases and then said (7):

> " Although I am conscious that the distinction between the present case and that decided by FINNEMORE, J., may be so fine as to be non-existent, I am of opinion that the circumstances of the present case do not disclose any breach of the Factories Act, 1937 . . . The part of the machine about which complaint is made is the V-slide, and that I do not regard as a
B dangerous part of the machine taken by itself. What constituted the danger was the conjunction of the V-slide with a die. The die is not part of the machine; it is material which is being worked by the machine."

Therefore, there is a difference of judicial opinion on the point whether movement of a component which is being worked on by the machine in relation to
C any part of the machine could render that part of the machine dangerous in the sense in which the word is used in the phrase " Every dangerous part of any machinery " in s. 14 (1) of the Factories Act, 1937. If it is logically necessary for me to decide between those two views, I emphatically prefer that expressed by LYNSKEY, J., and FINNEMORE, J., because I think that any such fine distinction as that which it is suggested should be drawn in a contrary sense is
D really incompatible with the fundamental intention of Parliament to be derived from the wording of the Factories Act, 1937. But I do not think that that logical necessity arises in this case because it appears to me that my problem is a rather different and simpler one, i.e., to decide whether or not the block with those bolts standing up in it was a part of the machinery, machinery comprising the bolts; or, putting it in other words, whether one is to regard the bolts in
E the block, standing as they did at the material moment, as part of the block for relevant purposes. There can be no doubt, in my judgment, that the block is part of the machinery, and, at the material moment, a moving part of the machinery. I cannot, for my part, believe that it is right to take the view, and I refuse to take it, that the bolts standing in that block were not themselves part of the block. If the block itself had had a sharp edge and, by moving
F forward, had cut the plaintiff's finger, then it would have been a moving part of the machinery which was dangerous, moving as it was and giving motion to the bolts which were then physically in it. The block comprised the bolts, and the bolts in the block were part of the machinery. It may be only playing with words, but I put my thoughts a little differently when I say that the block itself was a dangerous part of the machinery when it moved, because it carried
G with it those bolts. I find, therefore, that there was a breach of s. 14 (1) which was causative of the injury to the plaintiff.

[HIS LORDSHIP then dealt with the issue of negligence at common law and held that there had been negligence at common law on the part of the defendants, particularly in regard to the maintenance of the machine. HIS LORDSHIP assessed the damages at £1,851 10s. 2d., which included the sum of £601 10s. 2d.
H as special damages, and gave judgment for the plaintiff for £1,851 10s. 2d.]

Judgment for the plaintiff.

Solicitors: *Hewitt & Walters*, Birmingham (for the plaintiff); *Buller, Jeffries & Kenshole*, Birmingham (for the defendants).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

---

(7) [1957] 1 All E.R. at p. 743.

PIDDINGTON *v.* BATES. ROBSON AND ANOTHER *v.* RIBTON-TURNER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), November 8, 9, 1960.]

Trade Dispute—Picketing—Breach of peace anticipated—Obstruction of police—Right of police to take steps to prevent anticipated breach of peace—Whether police justified in limiting number of pickets—Discretion of police officer to take steps that he thought proper—Prevention of Crimes Amendment Act, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.

On June 26, 1959, a trade dispute was taking place which involved the trade union to which the appellant belonged. The respondent, a police officer, went to the premises of a factory in which eight employees, out of a total staff of twenty-four, were working. He found two pickets standing at its front entrance and four standing at its back entrance and ten or twelve persons in the street outside the back entrance mostly wearing picket badges. He spoke to the pickets at the back entrance and as a result two of them moved away. The appellant approached the respondent and asked where the back entrance was. The respondent told him three times that he considered two pickets at each entrance were sufficient, but the appellant said that he was going there. The appellant then pushed gently past the respondent and was gently arrested. The appellant, having been convicted of obstructing a police constable in the execution of his duty, contrary to the Prevention of Crimes Amendment Act, 1885, s. 2, appealed against conviction.

Held: the respondent had reasonable grounds for anticipating that a breach of the peace was a real possibility and, therefore, was acting in the execution of his duty in taking action to prevent such breach; a police officer, charged with the duty of preserving the peace, should be left to take such steps as, on the evidence before him, he thought to be proper, and accordingly the appellant had been rightly convicted.

Appeals dismissed.

[As to criminal offences arising out of the operations of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 514, para. 810; and for cases on the subject, see 43 DIGEST 120, *1237 et seq.*

For the Conspiracy, and Protection of Property Act, 1875, s. 7, see 5 HALSBURY'S STATUTES (2nd Edn.) 888.

For the Trade Disputes Act, 1906, s. 2, see 25 HALSBURY'S STATUTES (2nd Edn.) 1267.

For the Prevention of Crimes Amendment Act, 1885, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 915.]

Cases Stated.

These were two appeals by way of Case Stated by the justices before whom the respective appellants were convicted of obstructing police constables in the execution of their duty, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885.

On June 26, 1959, an information was laid by the respondent, Thomas Bates, against the appellant, Thomas Albert Piddington, that on June 26, 1959, he obstructed the respondent, an officer of the Metropolitan Police when in the execution of his duty at Fowler Road, London, N.1, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885. The information was heard by a metropolitan magistrate sitting at Old Street Magistrates' Court on July 13, 1959, and the following facts were found. On June 26, 1959, there was in existence a trade dispute which involved a registered trade union of which the appellant was a member. On the same date at about 5.40 p.m., the respondent, who was a

A chief inspector of the Metropolitan Police, was on duty at Islington Police Station. At about 5.40 p.m. the respondent, as a result of a telephone message, sent a police constable to the premises of the Free Press, Ltd., Cross Street, London, N.1. There were two entrances to these premises, one in Cross Street, six feet wide, and one in Fowler Road, eleven feet wide. The full complement of staff at these premises was twenty-four and at the material time about eight of the B staff were working inside the premises. There was nothing to show that the appellant knew either the full complement of staff at the premises or that about eight of the staff were working inside the premises at the material time. After the constable's arrival at the premises, two vehicles drew up containing about eighteen men most of whom were wearing picket badges. Two pickets stood outside the front door of the premises while some patrolled the street. Another C police officer, in the presence of the constable, told the appellant that two pickets were enough for the door. The respondent then went to the premises and found two pickets at the front door in Cross Street and four pickets at the back in Fowler Road. He spoke to the pickets at the back entrance and, as a result, two of them moved away. There were about ten or twelve persons in Fowler Road, most of whom were wearing picket badges, when the appellant approached and D said, " Where is the rear entrance? " The respondent told the appellant three times that, in his view, two pickets at each entrance were sufficient. The appellant said, " I'm going there and you can't stop me. I know my rights ", and, " I can stand by the gate if I want to ", and finally, " I'm going to join them. If you don't want me to you'd better arrest me." The appellant then pushed gently past the respondent and was gently arrested. There was no E obstruction of the highway in the vicinity of the premises, nor any disorder, nor any violence, threatened or offered, by any of the pickets or other persons present. In para. (k) of the Case Stated it was found that the respondent arrived at his view that two pickets at each entrance were enough, on the grounds that that number was sufficient for peaceful picketing in view of the number of persons who might then, or later, leave the premises, and that picketing by F persons in excess of that number might lead to intimidation and a breach of the peace.

It was contended on behalf of the appellant that in the peaceful circumstances of the picketing the respondent had no right in law to restrict the number of pickets on the doors to two and that, accordingly, the appellant was not guilty of the offence charged. Two pickets on a door were insufficient to communicate G with workers leaving or entering, because workers generally left or entered in large numbers, nor was it sufficient to communicate with lorry drivers delivering materials to, or taking away products from, the factory premises. Where a right to picket was given by statute it was unlawful to interfere with the right unless there was a real and present indication that there might be obstruction, intimidation, or a breach of the peace. There was no such indication in this H case. The restriction of the number of pickets to two was arbitrary and unlawful.

It was contended on behalf of the respondent that he had a duty to prevent a breach of the peace and that he had reasonable grounds for fearing that such a breach might occur if there were more than two pickets at each entrance. In refusing to obey the respondent's directions, and in beginning to act contrary to them, the appellant was obstructing the respondent in the execution of his I duty.

The magistrate was of the opinion that the respondent was acting in the execution of his duty in seeking to prevent the appellant from joining the two pickets at the back entrance and that the appellant, in refusing to comply with the respondent's direction and pushing past him, was obstructing him in the execution of his duty. Accordingly, the information was proved for the following reasons. A police officer must use his best endeavours to maintain the peace. The respondent was justified in anticipating the possibility of a breach of the peace unless steps were taken to prevent it and it was his duty to

decide the nature of those steps. A police officer's decision should be reached impartially and in good faith, and put into effect without unnecessary force or provocation. There was no evidence that the respondent failed in, or exceeded, his duty in any of those respects. The Trade Disputes Act, 1906, s. 2 (1), which had been referred to, did not render it unlawful for a police officer to limit the number of pickets if such limitation were necessary to maintain the peace, and the fact that he did so, did not of itself divest a police officer of the status of "acting in the execution of his duty". Whether the limitation of pickets was necessary for the maintenance of the peace in any particular case and what number of pickets was consistent with ensuring the maintenance of peace were both questions of fact and in the present case there was evidence from which the magistrate could, and did, infer that the respondent was justified in limiting the pickets as he did. The appellant had called no evidence.

The question for the opinion of the court was whether the magistrate was right in finding the information proved.

On July 8, 1959, an information was laid by the respondent, Humphrey Ribton-Turner, against the appellants, Kenneth Cecil Robson and Joseph Thomas Tee, that they on July 1, 1959, at Queen's Parade Close, London, N.11, unlawfully and wilfully obstructed the respondent, a superintendent of the Metropolitan Police whilst in the execution of his duty, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885. The information was heard by the justices for the county of Middlesex sitting at Highgate on Aug. 6, 1959. This Case Stated was of a nature similar to the Case Stated previously summarised. It was conceded that if the appeal of the appellant Piddington should fail, the appeal of the other two appellants would also fail.

F. H. Lawton, Q.C., and *W. M. Howard* for the appellants.

J. T. Molony, Q.C., and *H. J. Leonard* for the respondents.

LORD PARKER, C.J.: These are two appeals by way of Case Stated by justices before whom the respective appellants were convicted of obstructing police constables in the execution of their duty, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885. The incidents in question arose out of picketing in the course of the recent printing strike, and it is, I think, convenient to deal first with the case of the appellant Piddington because, as I understand, it is conceded that, if his appeal should fail, the appeal of the other two appellants is bound also to fail.

Section 7 of the Conspiracy, and Protection of Property Act, 1875, so far as is material, provides:

> "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or, . . . (4) Watches or besets the house or other place where such other person resides . . .",

commits an offence and is liable to a penalty. To that provision an exemption is made by the Trade Disputes Act, 1906, s. 2 (1), which is concerned with peaceful picketing, and provides:

> "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

The question here is whether the constables were acting in the course of the execution of their duty when, so it is said, they were obstructed. The court

A has been referred to a great number of cases, both Irish and English, dealing with the position when a police constable can be said to contemplate a breach of the peace and to take action to preserve it, but I find it unnecessary to refer to those cases. It seems to me that the law is reasonably plain. First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from B which a constable could reasonably have anticipated such a breach. Secondly, it is not enough that his contemplation is that there is a remote possibility but there must be a real possibility of a breach of the peace. Accordingly, in every case it becomes a question whether, on the particular facts, there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace might occur.

C [HIS LORDSHIP briefly reviewed the facts in the present case and referred to the finding in para. (k) of the Case Stated (see p. 661, letter E, ante) and continued:] The learned magistrate found, so far as it is material:

> "Having regard to the whole of the evidence the respondent was in my opinion justified in anticipating the possibility of a breach of the peace D unless steps were taken to prevent it, and in my opinion it was his duty to decide what those steps should be."

That is challenged by the appellant, as I understand it, on two grounds. The first and the lesser ground, if I may get rid of it at once, is a criticism of the word "possibility" of a breach of the peace. It is said that there must be E something more than a mere possibility. For my part, I agree with that, but I do not read the finding of the magistrate in the Case as saying that here it was just a mere remote possibility. I think that he was referring to it as what I may call a real possibility. The other point goes to an analysis of the evidence, from which it is said that no reasonable man could possibly anticipate a breach of the peace. It is pointed out there was no obstruction in the street; there was F no actual intimidation; and that there were no threats or intimations of violence. It is said that there was really nothing save the fact that picketing was going on to suggest that a breach of the peace was a real possibility.

Every case must depend on its exact facts, and the matter which influences me in this case is the matter of numbers. It is, I think, perfectly clear from the wording of the Case, although it is not expressly so found, that the police knew G that in these small works there were only eight people working at the time. They found two vehicles arriving with eighteen people, milling about the street, and trying to form pickets at the doors and, for my part, on that ground alone, coupled with the telephone call which I should have thought intimated some sense of urgency and apprehension, the police were fully entitled to think as reasonable men that there was a real danger of something more than mere H picketing to obtain or communicate information or to peaceably persuade. I think that, in those circumstances, the respondent had reasonable grounds for anticipating that a breach of the peace was a real possibility. The real criticism, I think, is this: "Well, to say that only two pickets should be allowed is purely arbitrary. Why two? Why not three? Where do you draw the line?" For my part, I think that a police officer charged with the duty of preserving the I Queen's peace must be left to take such steps as, on the evidence before him, he thinks are proper. I am far from saying that there should be any rule that only two pickets should be allowed at any particular door. There, one gets into an arbitrary area, but, so far as this case is concerned, I cannot see that there was anything wrong in the action of this respondent.

Finally, I would like to say that all these matters are so much matters of degree that I, for my part, would hesitate, except on the clearest evidence, to interfere with the findings of the magistrates, who have had the advantage of hearing the whole case and observing the witnesses. In those circumstances,

I am of the opinion that the appeal of Piddington should be dismissed. As, I understand, it is conceded that the other case of Robson and Tee must then fail, I would dismiss that also.

ASHWORTH, J.: I agree and have nothing I can usefully add.

ELWES, J.: I also agree.

Appeals dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the appellants); *Solicitor, Metropolitan Police* (for the respondents).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

LONGHURST *v.* GUILDFORD GODALMING AND DISTRICT WATER BOARD.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), October 18, 19, 1960.]

Factory—Definition—Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether process of making water wholesome "the altering or cleaning" of water—Whether pump house a factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 151 (1) (*b*), (iii), (6).

The plaintiff was employed as an engine driver at the defendant water board's pumping station. Under the Water Act, 1945, Sch. 3, s. 31, the water board were under a duty to provide in their mains and communication pipes a supply of "wholesome water" for domestic purposes. The pumping station consisted of a fenced area of some sixty-four acres on which were two buildings, a filter house and a pump house. Water, collected from springs, was first passed through the filter house to extract any foreign matter and was then chlorinated, while being passed from the filter house into a tank which lay under the filter house and extended under part of the space between the filter house and the pump house. In the tank the chlorine solution used was disseminated in the water. By means of the pumps in the pump house, the water was then pumped out of the tank, put under pressure and forced along the mains, either directly to the houses in the district, or to a reservoir from which the water fell by gravity to feed the houses. On the day of the accident it was the plaintiff's job to clean the machinery in the pump house and to clean the guard-rails of the machines. For this purpose he wore gauntlet gloves. He was in sole charge of the pumping station and alone in it on that day. In the evening the plaintiff was found lying with both arms over the top guard-rail of one of the machines, which was in motion, his right hand having been mangled by the bite of the machine; he was wearing a gauntlet glove on his left hand and the right-hand glove, which was lying under the machine's pulley, showed that it had been through the bite. The broad guard-rails of the machine were the same as those provided in other pumping stations throughout the country, and were, horizontally, about thirteen inches from the edge of the pulley and, vertically, about six inches above the pulley. The plaintiff had no recollection of the accident and there was no clear evidence of how it happened. In an action by the plaintiff for damages for personal injuries based on breach of duty at common law and breach of statutory duty under the Factories Act, 1937, s. 13, to fence securely the machinery, the court found that no breach of duty at common law was established. By s. 151 (1) of that Act, "factory" means, inter alia, premises within the precincts of which persons are employed in manual labour in any pro-

cess for or incidental to "(b) the altering [or] . . . cleaning . . . of any article . . . And . . . also includes . . . (iii) any premises in which the business of washing or filling . . . containers or packing articles is carried on incidentally to the purposes of any factory". By s. 151 (6), where a place, within the precincts forming a factory, is solely used for some purpose other than the processes carried on in the factory it is deemed not to form part of the factory for the purposes of the Act.

Held: there had been no breach of statutory duty because, assuming that the filter house was a "factory", the pump house, being a place where the water was put under pressure and pumped but was not altered, cleaned or adapted, was a place used for purposes that were other than the processes carried on in the filter house, and so, by virtue of s. 151 (6) of the Factories Act, 1937, would be deemed not to form part of that factory; further, although the water was there pumped into pipes, the pump house was not "premises in which the business of . . . filling . . . containers or packing articles is carried on incidentally to the purposes of any factory" within the meaning of s. 151 (1) (iii).

Decision of LORD PARKER, C.J. ([1960] 1 All E.R. 54) affirmed on this ground.

QUAERE: whether water is an "article" within the meaning of s. 151 (1) (b) and whether the filter house was a "factory".

Decision of LORD PARKER, C.J. ([1960] 1 All E.R. 54) that water in the circumstances of the present case was an "article" not affirmed; dictum of SCOTT, L.J., in *Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* ([1948] 2 All E.R. at p. 667) considered (see p. 669, letter D, and p. 670, letter H, post).

Per DEVLIN, L.J.: to my mind an article is something which is articulated —that is, separated from an amorphous mass and given shape and form (see p. 670, letter I, post).

[As to the meaning of factory in the factory legislation, see 17 HALSBURY'S LAWS (3rd Edn.) 11-13, para. 13.

As to a master's duty to provide a safe place of work at common law, see 25 HALSBURY'S LAWS (3rd Edn.) 514, para. 981.

For the Factories Act, 1937, s. 151, see 9 HALSBURY'S STATUTES (2nd Edn.) 1113.]

Cases referred to:

Burns v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 24 Digest (Repl.) 1056, *222*.

Cox v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 24 Digest (Repl.) 1022, *11*.

Summers (John) & Sons, Ltd. v. *Frost*, [1954] 1 All E.R. 901; *affd.* H.L., [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 825; 24 Digest (Repl.) 1055, *217*.

Appeal.

This was an appeal by the plaintiff, Nicholas Alexander Irwin Longhurst, from a decision of LORD PARKER, C.J., dated Nov. 27, 1959, and reported [1960] 1 All E.R. 54, dismissing his action for damages for personal injuries, loss and expense suffered by reason of the negligence or, alternatively, breach of duty, under the Factories Act, 1937, of the defendants, Guildford Godalming and District Water Board, his employers. At the time of the accident the plaintiff was employed as an engine driver at Vann Lane Pumping Station, Hambledon, Surrey. The pumping station consisted of a fenced area of about sixty-four acres in which water, collected from springs, was brought down by gravity to a filter house where it was passed through filters to extract foreign matter; from there the water was passed into a large concrete tank extending under the filter house and under part of the space intervening between the filter house and

the other building on the station, the pump house. On its way from the filter house to the tank the water was chlorinated with a chlorine solution, the solution disseminating in the water in the tank. In the filter house, apart from the filters and the chlorination plant, there was a small Petter engine used for cleaning the filters. In the pump house there was a large pump engine and two smaller pump engines. These engines pumped the water out of the tank, put it under pressure and forced it along the mains. Part of the pressurised water went into a reservoir at a higher level, from which it fell by gravity to feed the houses in the district, and part went direct, through the mains, to the houses. The floor of the pump house consisted of concrete and of quarry tiles around the pumps. The plaintiff had worked at this pumping station for seven years and at other stations since about 1932. On Saturday, Feb. 1, 1958, he was in charge of the station and was alone there; in the ordinary way, he would have gone home between 5 p.m. and 8 p.m. when he would have returned to the station to do the night shift. On Saturdays it was the plaintiff's job to clean the two small pumps in the pump house during the morning, while the large pump was in use; it was then his custom to put the large pump out of operation, at about 1 or 2 p.m., and to start up the two small pumps. It was also his job on Saturdays to clean the floor of the pump house and the guard-rails around the pumps. The plaintiff said that on Saturdays, for the purpose of cleaning up, he wore gauntlet gloves. At about 2 p.m. on Feb. 1, the plaintiff went across to the filter house and entered up certain records as was his custom; he then returned to the pump house. At 4.30 p.m. the wife of the alternate engine driver, a Mrs. Hall, telephoned the station and got no reply; she telephoned again at 4.45 p.m., as she wanted the plaintiff to bring home her husband's shaving tackle, but again got no reply. At 8.15 p.m. she telephoned a third time and still getting no reply, she contacted one of the defendants' superintendents who went down to the station. There he found the plaintiff, almost unconscious, in the pump house, lying over some guard-rails by a machine; his right hand was completely mangled as if it had gone into the bite of the belt and pulley of the machine; he was wearing a gauntlet glove on his left hand and the glove which had been on the right hand was lying on the floor under the pulley showing marks of having been through the bite. There was blood on the floor. The bite of the machine by which the plaintiff was lying was between the pulley, which consisted of five rather sharp edges with grooves in between them, and the belt, which was really four belts joined together and which ran in the grooves of the pulley. There were guard-rails about three feet high around the machine. At the position opposite the bite formed by the belt and pulley the top guard-rail was, horizontally, about thirteen inches from the edge or side of the pulley, and, vertically, about six and a quarter inches above the pulley. When he was found, the plaintiff had both arms over the top guard-rail and was standing square to the pulley; his right arm was caught and kept, by the rotation of the pulley, between the side of the pulley and the bearing. The guard-rails provided at this pumping station were the same as provided in pumping stations throughout the country. The plaintiff had no reliable recollection of the accident. He thought that he must have slipped on the pump house floor while wiping down the guard-rails of the machine, but no marks were found on the floor to indicate a slip and he was wearing hob-nailed boots at the time of the accident. He might have been attempting to wipe the face of the pulley, using his right glove as a rag, and the glove got caught in the bite and dragged the hand with it, but this would be a highly dangerous thing to do when the machine was in motion and it was not suggested that the plaintiff was other than a careful man; further, he said in evidence that the only moving bit of machinery he ever cleaned was the flywheel on the engines, where there was no danger. As a result of the accident the plaintiff's right arm was amputated four inches from the shoulder.

By his statement of claim the plaintiff alleged that the defendants were negligent in that they caused or permitted the plaintiff to work in the pumping

station without assistance; caused and permitted the floor of the premises in the vicinity of the machinery in question to be tiled and slippery, and failed to provide safe premises and a safe system of work for the plaintiff. The plaintiff also alleged breach of statutory duty by the defendants, namely, that contrary to s. 13 of the Factories Act, 1937, they failed securely to fence the machinery. By their defence the defendants denied negligence and breach of s. 13; further, they denied that the pumping station was a factory within the meaning of the Factories Act, 1937.

LORD PARKER, C.J., found that the defendants were not guilty of common law negligence, and held that, although the filter house was a factory within the meaning of s. 151 (1) (b) of the Factories Act, 1937, the pump house was used for purposes other than the processes carried on in the filter house, and so by virtue of s. 151 (6) of the Act, was not part of that factory, and that the alleged statutory duty was therefore not owed by the defendants to the plaintiff.

The plaintiff appealed.

G. G. Blackledge, Q.C., and *P. Perrins* for the plaintiff.

F. W. Beney, Q.C., and *E. W. Eveleigh* for the defendants.

SELLERS, L.J.: If this case involved a final decision on a number of the difficult, important and interesting points which have been raised in the argument, I should have wanted further time to consider how those matters should be dealt with, but this is an unsatisfactory case in which to decide those important and far-reaching matters and I do not find it necessary to give attention to them. My inclination, having read the findings of LORD PARKER, C.J. (1), is to hold that the case fails in limine. It is one of those happily rare cases where, notwithstanding all the investigation that can be carried out, the court cannot find a satisfactory explanation of how the accident happened. It cannot say with any degree of certainty what took place. In those circumstances, it is difficult indeed to consider the further matters as to where liability lies, but, again, I need not pursue that more fully. That aspect of the matter would require much further consideration than these few perfunctory words of mine have given it, but it is at least desirable for a court to start with a satisfactory and acceptable finding of how an accident happened and from that to proceed to consider the issues of liability.

The ascertainable facts in this case have been found with such clarity by the learned Lord Chief Justice (1) that I do not feel there is any occasion for me to delay to re-state them. They are, in effect, unchallenged. It is on those facts that the learned Lord Chief Justice found that there was no breach of duty by the defendants to the plaintiff at common law. That was the subject of the first attack made on the judgment by learned counsel for the plaintiff, but I am satisfied that, on these facts, the Lord Chief Justice arrived at the right conclusion. As what he said has a bearing on the whole case, particularly in relation to the remarks which I have just made, I will read a brief extract from the decision on the allegations of breach of common law duty. LORD PARKER, C.J., said (2):

> "... I can find here no breach of the common law duty. The evidence is that the broad guard-rails provided in this station were the same as are provided in pumping stations all over the country. As Mr. Bewsher, the expert called for the plaintiff, said, the lay-out is the same, and his words were that it would be very unusual to find anything in the nature of close fencing round these machines. There is no evidence of any previous accidents. Moreover, this is a job that a man does on his own without any hurry—there is none of the bustle of a factory or works—where he has ample time to do his work. For my part, I am quite unable to say, to use the

(1) The facts are set out at pp. 665, 666, ante. (2) [1960] 1 All E.R. at p. 57.

other test (3), that it was folly on the part of the defendants not to provide some close fencing which would have prevented, and which alone would have prevented, this accident."

Towards the end of the judgment the Lord Chief Justice indicates that he has considered some of the answers made by a Mr. Fletcher in the course of the evidence. I have nothing more to say on that. I think that, on this evidence, the plaintiff has entirely failed to establish any breach of common law duty and the matter is adequately dealt with by the judgment.

However, the case was framed also on the basis that there had been a breach of the Factories Act, 1937, s. 13, with regard to fencing the pumping machinery which was in the pump house. The answer to that was that the pump house where the accident happened was not subject to the Factories Act, 1937. Apparently waterworks such as these have been regarded throughout the years as not coming under the terms of the Factories Acts and the matter has had to be considered afresh in this case. For the purpose of that argument, consideration had to be given to the fact that, in the arrangement of this particular place where water is collected and dealt with, the premises are in two parts. There is a filter house where the water is collected and treated. I will deal with that a little more fully in a moment. Then there is a dividing space under which there is a tank which contains the water which is collected. On the other side of that, in the forefront of the photograph, is the pumping house, and in the pumping house there is one large pump and two smaller ones which are used, I think, alternately—at least not at the same time—for pumping the water from the place where it has been collected along a pipe or pipes up to a reservoir, at an unspecified distance away but, I apprehend, some distance away.

It was submitted on behalf of the defendants that no consideration need be given to the requirements of the Factories Act, 1937, in regard to safety, particularly s. 13, because the Factories Act itself does not apply. The learned Lord Chief Justice has accepted that submission and I am of the view that this court should not interfere with that. He arrived at a conclusion which I find acceptable, although it raises questions which are, perhaps, not wholly free from doubt. It requires consideration of some of the provisions of s. 151 of the Factories Act, 1937. Subsection (9) of that section need not be referred to more fully. Quite clearly, although this waterworks undertaking is not carried on for gain, it is a public work which would make the Act applicable if it otherwise applied. The question has arisen as to the application of sub-s. (1) of s. 151, which reads as follows:

> "Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article [which does not apply here]; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain [which does not apply here] and to or over which the employer of the persons employed therein has the right of access or control."

The learned Lord Chief Justice has found that, in the filter house of these premises, there was taking place an altering or cleaning of the water which was brought in, and that particular finding was not challenged before this court. What happens, it seems, speaking very broadly (and I refer always to the judgment for the relevant facts without re-stating them), is that water is collected

(3) The test, it seems, formulated by LORD DUNEDIN in *Morton* v. *William Dixon, Ltd.*, 1909 S.C. at p. 809; the test is stated in a footnote to *Cavanagh* v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E.R. at p. 746.

A at the filter house from springs and streams and held there in a tank (the dimensions of which we have not been given) and, whilst there, it is cleaned, or, perhaps, as it enters there it is cleaned, by filtering, and also altered, in that it is purified by a process of adding chlorine to the water. The argument that was advanced under s. 151 (1) (b) was that, although that might well be true, it was not the altering or cleaning " of any article " because it was said that " article " was B not an appropriate word to use in connexion with water, or water which was dealt with in that way coming in from springs and other sources.

LORD PARKER, C.J., in dealing with this matter, cites (4) the observations of SCOTT, L.J., in this court in *Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* (5). The substance in question there was not water but gas, and certainly in the course of SCOTT, L.J.'s judgment—and I do not repeat it; it is set out in the C judgment (4) which is the subject of appeal—gas was treated as something which would come under the word " article " in this section. It is a difficult matter. In some circumstances water in bulk—in the ocean, for example—might well not normally be referred to as an " article ", but this particular provision does relate to a substance which is being treated in some way: it is the subject of a " process "; and in this case we are dealing with an amount of D water which has been accumulated in a given space—that is, the extent of the container underneath the tank—and treated in that way. While I have appreciated the argument of counsel for the defendants to the contrary, I do not feel satisfied that I would take a different view from that expressed by the learned Lord Chief Justice, having considered such authority on the question as there is. It may well be that the point will arise more essentially for con- E sideration at some other time, and that, in my view, would be a more appropriate time to consider this more fully than is necessary now. The Lord Chief Justice, having found that the filter house was a " factory ", went on to consider whether, nevertheless, the pump house was a " factory ". He came to the conclusion (6) that it was not, and again I accept the view that the judgment takes on that matter. Therefore, one can assume for the purposes of this case that which F has been found by the Lord Chief Justice—that the filter house would be a " factory "—without conclusively deciding it.

The pump house calls for consideration under s. 151 (6):

> " Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried G on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

There is no question here that it would not be deemed to be a separate factory. The question is whether the pump house, not contiguous to, but only adjacent to, this filter house in the way that has been described, is " solely used for some H purpose other than the processes carried on in the factory ", and the purpose which was set up in order to bring the pump house under sub-s. (6) is that it was used (as its name would imply) to pump water and for the pumping of water under pressure so that the water is taken and distributed, in the way I have already indicated, to the reservoir and to certain houses or consumers on the way to it. Putting water under pressure, and pumping it in that way, I think, I could not (as the learned Lord Chief Justice held) (7) be held to be altering or cleaning or adapting it. It is not a factory process at all; it is mere distribution. It has been argued that it is so closely associated with the filtering that it ought not to be regarded as " solely used for some purpose other than the processes . . ." I think that that again is a narrow point, but I am not prepared to take a different view from the learned Lord Chief Justice. Dealing with this very

(4) [1960] 1 All E.R. at p. 58.
(5) [1948] 2 All E.R. at p. 667.
(6) See [1960] 1 All E.R. at pp. 59, 60.
(7) See [1960] 1 All E.R. at p. 60.

shortly, I would uphold the judgment appealed from on the grounds which brought the learned Lord Chief Justice to that decision.

That would conclude this appeal against the plaintiff; but I must say that, if the decision so far had been to the contrary, other questions would have arisen. There would have been not only the question how the accident happened and the question of causation, but also how the matter would stand as to any breach of s. 13 of the Factories Act, 1937, which it is alleged had to be considered. The court has had its attention drawn to the observations of SOMERVELL, L.J. (they were agreed to by COHEN, L.J. (8)) in *Burns* v. *Joseph Terry & Sons, Ltd.* (9), and to the observations in the speeches in the House of Lords, particularly the speech of VISCOUNT SIMONDS, in *John Summers & Sons, Ltd.* v. *Frost* (10). Applying those authoritative statements to such facts as one could affirmatively derive from the evidence in this case, it might be very difficult to answer the question whether (as there was a fence here) such fence as was provided was a secure fence. That aspect of the case, if my view as to the decision of the Lord Chief Justice had been otherwise, certainly would have been one which would have required very careful consideration.

Out of respect to the argument of counsel for the plaintiff, I ought to add one matter, although it was not dealt with in the court below and it was not the subject of a notice of appeal. Counsel for the plaintiff urged before this court that he could bring the pump house within the description of a " factory " in another way than that with which I have already dealt. He referred to s. 151 of the Factories Act, which provides, in sub-s. (1):

> " And (whether or not they are factories by reason of the foregoing definition) [which I read earlier (11)] the expression ' factory ' also includes the following premises in which persons are employed in manual labour, that is to say . . . (iii) any premises in which the business of washing or filling bottles or containers or packing articles is carried on incidentally to the purposes of any factory."

I understand the argument to be that, in the pumping house, the water was put into a container in that it was put into the pipe in order to be pumped up to the reservoir and that that falls under that particular provision. It would be a straining of that subsection to the extreme so to hold and, having stated the argument, I reject it.

I would dismiss the appeal.

PEARCE, L.J.: I agree and I have nothing to add.

DEVLIN, L.J.: I agree with the decision of LORD PARKER, C.J., on the meaning and effect of s. 151 (6) of the Factories Act, 1937. On the assumption that the filter house is a factory, or rather that the filter house makes the premises a factory, I agree that the pump house falls within sub-s. (6).

I should like to say, however—because, as my Lord has indicated, the point must be one of considerable importance to water undertakings—that, if I had been sure that I was not constrained by authority to decide otherwise, I should have decided this case on the simple ground that the premises were not a " factory " at all, since water is not an " article " within the meaning of sub-s. (1) of s. 151. The test to be applied is that which is set out by SCOTT, L.J., in the case to which my Lord has referred—*Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* (12)—where he says that the word " article ", not being defined in the Act itself, must be given " its ordinary meaning in the English language ". To my mind, an " article " is something that is articulated—that is, separated from an amorphous mass and given shape and form. I do not think that anything

(8) [1950] 2 All E.R. at p. 992; [1951] 1 K.B. at p. 465.
(9) [1950] 2 All E.R. at pp. 989-991; [1951] 1 K.B. at pp. 461-465.
(10) [1955] 1 All E.R. at p. 873; [1955] A.C. at pp. 751-753.
(11) See p. 668, letters G and H, ante.
(12) [1948] 2 All E.R. at p. 667.

A can be called an " article ", either in strict terminology or in ordinary language, unless it has shape and form. Certainly in ordinary language no one talks of the elements, water, air, gas or fire, as " articles " unless they are confined; and then, together with their container, they may become an " article ". I say " may ", because I think it depends on the container. I should not regard gas within the four walls of a room, or water in pipes or in a tank, as an " article ".

B I agree that water is a commodity which can be bought, sold, or stolen. But I do not agree that all commodities, in all states, are " articles ". Grain in bulk is a commodity, generally bought and sold; but I do not think that, in ordinary language, it would be called an " article ". If it is, the ordinary cleaning and drying plant on a farm would appear to be a " factory ". It may be that the reason why farm premises are not generally regarded as a factory is because they

C are handling wheat, straw, milk and other commodities which, at the farm stage, are not " articles " within the meaning of the section, or made into articles. However this may be, I think that, in the ordinary use of language, water is not an article while it is being cleaned in a filter house or retained in an underground tank or other form of reservoir.

The Lord Chief Justice has decided otherwise, following the authority provided

D by *Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* (13). I recognise, of course, that the judgment of SCOTT, L.J., even if it does not carry with it the ratio decidendi of the case, is of high, persuasive authority. Nevertheless, if I were satisfied that it were only an obiter dictum, I feel—though with diffidence—sufficiently clear in my view to express my disagreement with SCOTT, L.J., but I am not sure whether SCOTT, L.J.'s dictum is part of the ratio decidendi or not.

E As the Lord Chief Justice rightly pointed out (14), his observations about water are obiter, because the case was concerned with gas. I could not distinguish the case on that ground, because his reasoning in relation to gas defeats, if it is correct, the reasoning which I have endeavoured to express. The question whether his reasoning is obiter or not depends, first, on the extent to which it was implicitly adopted by the other two members of the court (for they do not expressly agree

F with that passage in the judgment of SCOTT, L.J.), and, secondly, if it was so adopted, on the extent to which it was essential to the decision of the court. In view of the fact that I am (though not with great certainty, because the point is a difficult one) prepared to agree with the Lord Chief Justice's decision on the application of sub-s. (6), I do not think it is necessary or desirable for me to take up time by examining whether *Cox* v. *Cutler & Sons, Ltd. & Hampton*

G *Court Gas Co.* (13) concludes for this court the question whether water is an " article ".

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Darracotts* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

(13) [1948] 2 All E.R. 665.

(14) [1960] 1 All E.R. at p. 58.

DAVIES *v.* ELSBY BROTHERS, LTD.

[COURT OF APPEAL (Pearce and Devlin, L.JJ.), November 1, 2, 1960.]

Practice—Parties—Adding persons as parties—Defendant—Amendment of writ to change defendant "E.B. (a firm)" to "E.B., Ltd."—Whether a correction of a mere misnomer—Amendment sought after limitation period expired.

Until 1955 the plaintiff had been employed by a firm called Elsby Brothers. In 1955 the business of this firm was taken over by a company called Elsby Brothers, Ltd., which continued the plaintiff's employment. On Mar. 20, 1956, the plaintiff was injured in an accident which he alleged was due to the negligence of his employers, and on Mar. 18, 1959, the plaintiff's solicitors issued a writ for him against "Elsby Brothers (a firm)" claiming "damages for injuries and loss sustained by the plaintiff while an employee of the defendants by the negligence of the defendants and/or their servants". The date when the injuries were sustained was not stated on the writ. On Mar. 17, 1960 [i.e., after the period of limitation had expired*] the plaintiff's solicitors applied for and were granted leave to amend the writ by changing the name of the defendants from "Elsby Brothers (a firm)" to "Elsby Brothers, Ltd.". The amended writ was served on Mar. 19, 1960.

Held: the amendment involved the addition of a new defendant, the limited company, and was not merely the correction of a misnomer, for there had been two different entities, the firm and the company, the writ correctly described the firm and, the date of the accident not being given, did not show that the company must have been intended (see p. 675, letters B to E, and p. 676, letter G, post); therefore, the amendment should not have been granted, since, analogously to the position where leave to add a plaintiff was sought, leave to add a defendant should not be granted after the expiry of the period of limitation (see p. 674, letter C, p. 675, letter G, and p. 676, letter I, post).

Re Nos. 55 & 57, Holmes Road, Kentish Town ([1958] 2 All E.R. 311) and *Mabro* v. *Eagle Star & British Dominions Insurance Co., Ltd.* ([1932] All E.R. Rep. 411) applied.

Appeal dismissed.

[As to the disallowance of amendments which would defeat defences under the Limitation Act, 1939, see 24 HALSBURY'S LAWS (3rd Edn.) 201, para. 358, text and note (t), and 30 HALSBURY'S LAWS (3rd Edn.) 34, para. 72, text and note (e); and as to adding parties, see ibid., 394, para. 735; and for cases on the subject, see 32 DIGEST 534-537, *1873-1897* and SUPPLEMENTS.]

Cases referred to:

Challinor v. *Roder*, (1885), 1 T.L.R. 527, 528; Digest (Practice) 107, *927*.

Finnegan v. *Cementation Co., Ltd.*, [1953] 1 All E.R. 1130; [1953] 1 Q.B. 688; [1953] 2 W.L.R. 1015; 3rd Digest Supp.

Hill & Son v. *Tannerhill*, [1944] K.B. 472; 113 L.J.K.B. 456; 170 L.T. 404; 2nd Digest Supp.

Holmes Road, Kentish Town, Re Nos. 55 & 57, [1958] 2 All E.R. 311; [1959] Ch. 298; [1958] 2 W.L.R. 975; 3rd Digest Supp.

Horton v. *Stamford* (*Inhabitants*), (1833), 1 Cr. & M. 773; 2 L.J.Ex. 274; 149 E.R. 611; 32 Digest 535, *1880*.

Lakin v. *Watson*, (1834), 2 Cr. & M. 685; 149 E.R. 936; sub nom. *Lakin* v. *Massie*, 3 L.J.Ex. 203; 32 Digest 535, *1875*.

Mabro v. *Eagle Star & British Dominions Insurance Co., Ltd.*, [1932] All E.R. Rep. 411; [1932] 1 K.B. 485; 101 L.J.K.B. 205; 146 L.T. 433; Digest Supp.

* The plaintiff's cause of action would have become statute-barred on Mar. 20, 1959, three years after it accrued, by virtue of the Limitation Act, 1939, s. 2 (1), as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (1).

A *Tetlow* v. *Orela, Ltd.*, [1920] 2 Ch. 24; 89 L.J.Ch. 465; 123 L.T. 388; Digest (Practice) 267, *50*.

Interlocutory Appeal.

The plaintiff appealed, by leave of ELWES, J., from the order of ELWES, J., dated July 5, 1960, setting aside the plaintiff's writ against the defendants. The facts are stated in the judgment of PEARCE, L.J.

B

M. A. B. King-Hamilton, Q.C., and *J. H. R. Newey* for the plaintiff.
G. G. Baker, Q.C., and *F. Blennerhassett* for the defendants.

PEARCE, L.J.: This is an appeal, by leave, from an order of ELWES, J., in chambers, setting aside a writ on the ground that the present defendants were C substituted as defendants after the claim against them had become statute-barred. The writ was issued against Elsby Brothers (a firm) and states that

> " the plaintiff's claim is for damages for injuries and loss sustained by the plaintiff while an employee of the defendants by the negligence of the defendants and/or their servants."

D It was issued in respect of an accident that happened to the plaintiff in the course of his work on Mar. 20. 1956. The plaintiff's right of action would therefore become statute-barred on Mar. 20, 1959. The plaintiff did not consult his solicitors until March, 1959, and they issued the writ on Mar. 18. They were told by the plaintiff that his employers were Elsby Brothers of Sneyd Hill, Burslem, Stoke-on-Trent, and confirmed the name of the employers by looking up the current telephone directory, which contained an entry in the name of E " Elsby Brothers " (a firm) at Sneyd Hill. They therefore issued the writ against Elsby Brothers at that address. In 1955, before the accident, the business of the firm [for whom the defendant then worked] had been taken over by a limited company, Elsby Brothers, Ltd.; but the entry in the telephone book had not been altered. The writ was not served immediately. Just before the end of the period of one year during which the writ remained effective, it was discovered F that the name on the writ was incorrect. The writ was therefore amended on Mar. 17, 1960, by striking out the words " (a firm) " and adding the word " Ltd." to " Elsby Brothers ". The amended writ was served on the last day of the time allowed—Mar. 19, 1960. The defendants then applied to set aside the writ. The registrar refused that application, but on appeal the learned judge set the writ aside. He held that he had no discretion to allow an amendment that would G deprive the defendants of a defence that had accrued under the Limitation Act, 1939.

The judge was largely guided by *Re Nos. 55 & 57, Holmes Road, Kentish Town* (1). There tenants, the applicants, had named in their counter-notice under the Landlord and Tenant Act, 1954, the company which had been, and not the company which was, the landlord of the premises. The learned judge held that H he had no discretion where a proposed amendment would constitute a substitution of a party in respect of a counter-notice under the Landlord and Tenant Act which was out of time. The mistake was, in his opinion, more than a mere misnomer, since an existing, separate company was properly described on the original counter-notice and the substitution of another company was desired; and therefore he could not depart from the settled rule that an amendment should I not be allowed if it interferes with the defendant's vested rights under the Limitation Act, 1939.

Mr. King-Hamilton, who has given us the benefit of a careful and forceful argument on behalf of the plaintiff, distinguishes that case in that there were there two co-existing companies and the wrong company was sued: while here there was only one company, which took over the business of the firm. Moreover, the plaintiff expressly by his writ was suing his employers as such at the correct

(1) [1958] 2 All E.R. 311; [1959] Ch. 298.

address. He merely misdescribed them as a firm when he should have described them as a limited company. Counsel referred us to *Horton* v. *Stamford* (*Inhabitants*) (2) and *Lakin* v. *Watson* (3), where amendments had been allowed; but they do not seem to me to help because they were decided on the basis that amendments should be allowed in order to prevent the plaintiff losing his remedies through their becoming statute-barred. That was apparently the view held at that time. But a different point of view emerged in *Challinor* v. *Roder* (4) which caused the two learned judges to differ. GROVE, J., held that it was wrong to allow the plaintiff to amend ex post facto if that would deprive the defendant of the benefit to which he had become entitled as of right under the statute of limitations. That latter view prevailed in the later cases, and has been clearly laid down in this court, so far as the addition of a plaintiff is concerned, in *Mabro* v. *Eagle Star & British Dominions Insurance Co., Ltd.* (5).

In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff. Therefore the principle of *Mabro's* case (5) prevents the amendment in this case if the amendment involves the addition of a party and not the mere correction of a misnomer. That principle also applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed. Moreover, if, contrary to that principle, a party were added or substituted, then the final words of R.S.C., Ord. 16, r. 11, would defeat the purpose of the addition or substitution since the new defendant could still rely on the statute against the party so added. Those words are:

> ". . . and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

If, however, the addition of the word " Ltd." is not the addition or substitution of a party but the mere correction of a misnomer, we can properly allow it, if the merits justify that course. Is this the mere correction of a misnomer? Counsel for the plaintiff argues that the real question is: who did the plaintiff intend to sue? There was, he argues, only one party in existence at one time, since the two parties concerned, namely, the firm and the company, were mutually exclusive and were consecutively engaged in carrying on the same business; and he relied on the words of HARMAN, J., in *Re Nos. 55 & 57, Holmes Road, Kentish Town* (6): " It is not as if the other title were that of a non-existing person, or as if the tenants were under any misapprehension ".

Counsel for the defendants relies on a dictum of DU PARCQ, L.J., in *Hill & Son* v. *Tannerhill* (7), where a writ in the firm name " W. Hill & Son " was amended to read " W. Hill trading as W. Hill & Son ". DU PARCQ, L.J., said (7):

> " If the writ had been issued in the name of ' W. Hill & Son, Ltd.' the case would have been very different, because ' W. Hill & Son, Ltd.' indicates a legal entity and a person."

Similarly, counsel for the defendants argues, the amendment in this case is a substitution and not a misnomer; the writ must contain the actual entity of the defendant, and here the entity of the defendant, namely, the limited company, is not set out. He also relies on *Tetlow* v. *Orela, Ltd.* (8) where an action was commenced in the name of a dead man and the court refused to allow substitution of his executor as a plaintiff, and on *Finnegan* v. *Cementation Co., Ltd.* (9) as showing how strict this court has been about amendments in such circumstances as these. In the latter case, a widow sued in respect of a fatal accident as " the widow and administratrix " of the deceased, suing " for the benefit of the dependants of the deceased " and his estate. It turned out that her administration only ran in Southern Ireland and so she could not be regarded as administratrix in England; and although, had she omitted the words " and

(2) (1833), 1 Cr. & M. 773. (3) (1834), 2 Cr. & M. 685.
(4) (1885), 1 T.L.R. 527. (5) [1932] All E.R. Rep. 411; [1932] 1 K.B. 485.
(6) [1958] 2 All E.R. at p. 316; [1959] Ch. at p. 304. (7) [1944] K.B. at p. 475.
(8) [1920] 2 Ch. 24. (9) [1953] 1 All E.R. 1130; [1953] 1 Q.B. 688.

A administratrix ", she would have been covered by the description of " widow " and her action would then have been good, yet her action was brought in her capacity as administratrix. This court refused to allow her to amend by deleting the words " and administratrix ", holding that she had brought her writ in a different capacity from that in which she desired to continue her action. SINGLETON, L.J., there said (10) that the court was very reluctant to insist on a B technicality but it was compelled to do so.

The case before us is not easy, but I am persuaded that counsel for the defendants is right in arguing that the entity of the limited company is not contained on the writ, and that to add the word " Ltd." would be to add a new party to this action. It is not correct to say that the company has taken the place of the firm. The firm no doubt assigned its business to the company; but it co-existed C with the company, as the two companies in *Re Nos. 55 & 57, Holmes Road, Kentish Town* (11) co-existed. After the company had taken over its business the firm could have been sued in respect of an accident that happened while the firm was still carrying on the business. If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible D for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company.

E I arrive at that conclusion reluctantly, because it is based on a technicality; but so far as merits are concerned, the plaintiff has brought the matter on himself. He waited for three years. There was no correspondence or bargaining to justify the delay. Moreover, the writ, when issued just within the statutory period of three years, was not served until the three hundred and sixty-fourth day of the following year—that is to say, one day before it would finally expire. When F plaintiffs delay in that way it becomes very difficult for actions to be properly tried. And if, having left the matter so late, they get into any technical difficulties (as this plaintiff did) they are liable to find that they have no opportunity to set the matter right.

For those reasons, in my opinion the learned judge was right; and the appeal must be dismissed.

G **DEVLIN, L.J.:** For the reasons which my Lord has given, the issue in this case is simply whether or not the description of the defendants on the writ can be regarded as a mere misnomer. If it can, it can be corrected without the addition of a party: the entity remains the same. If it cannot, if it refers to an entity which is not the intended defendant, Elsby Brothers, Ltd., then the only H way of putting the matter right is to substitute another entity, and, as my Lord says, that involves the addition of a defendant and, for the reasons which he has given, that cannot, in the circumstances of this case, be done. Therefore the question is: Is it a mere misnomer or is it not?

Counsel for the defendants has argued that, when the distinction is between an entity such as a person or a firm and an entity such as a limited company, the I omission of the word " Ltd." is fatal: it ceases to be a mere matter of description, he says: it is not like a case where one of the Christian names of the defendant has been got wrong: without the word " Ltd." a company cannot be identified as an entity at all. That means (as my Lord pointed out in the course of the argument) that, in the case of a very well known concern such as Harrods, if it were sued as " Harrods " and the word " Ltd." was left out, the correction could not be made as the correction of a misnomer, notwithstanding that everybody

(10) [1953] 1 All E.R. at p. 1136; [1953] 1 Q.B. at p. 699.
(11) [1958] 2 All E.R. 311; [1959] Ch. 298.

would be aware that it was Harrods, Ltd. that was intended. I assume for this purpose (as I think we all assumed for the purpose of the illustration) that Harrods had been a limited company for a very long time and there was, therefore, nothing but the limited company that could be intended to be meant by the use of the word " Harrods ". That argument seems to me to be rather extreme. I do not have to decide whether it is right, because I think that counsel for the defendants can succeed putting his case less high than that. I therefore do not want to be taken to be acceding to that proposition. It is a matter which may have to be determined hereafter.

The argument of counsel for the plaintiff, on the other hand, is that this is a misnomer because there can be no doubt that the person whom the plaintiff intended to sue was his employer, and his employer at the time of the accident was the company. I think that that is going to the opposite extreme on the other side and I could not assent to that. It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many continental systems. In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer—which may embrace a number of other situations apart from misnomer on a writ, for example mistake as to identity in the making of a contract. The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: " Of course it must mean me, but they have got my name wrong ", then there is a case of mere misnomer. If, on the other hand, he would say: " I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries ", then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer. To take an example which counsel for the plaintiff put, if there had never been a firm of Elsby Brothers, if no business had been carried on before the company was formed, then it might well be that there would be no possibility of confusion: there would be only one entity which, under the description of " Elsby Brothers ", could be meant, and the description of it as a firm would be an obvious misnomer. It would be like the case of Harrods which we discussed in the course of the argument. Here, as it seems to me, there are two entities, one of which is correctly described as " Elsby Brothers (a firm) ", the other of which is not; and there is nothing to show on the document that it was clearly intended to be addressed to the entity that was not within the description. As my Lord has pointed out, there is no date for the accident given on the indorsement of the writ. Therefore when counsel for the plaintiff says that the plaintiff intended to sue his employers the question arises: " yes, but his employers at what time? " If the accident occurred before 1955, when the company was formed, then his employers were Elsby Brothers (a firm). If the accident occurred after that date, then his employers were Elsby Brothers, Ltd. No person receiving this document could know who was intended to be the defendant unless inquiries were made to ascertain the date of the accident, and possibly other relevant material.

In my judgment, therefore, and taking in counsel for the plaintiff's favour the less rigid test than the one that counsel for the defendants proposed, this is not a case of misnomer; and I agree with my Lord that we have no power to amend the writ and that therefore the appeal must be dismissed.

I agree also with what my Lord has said on the question of technicality in relation to the fact that this writ was issued and served at the last possible moment. I do not believe that the dangers of that course are as apparent to litigants or to their solicitors as they ought to be. It may not be merely a question

of misnomer. The cause of action may not be correctly described on the writ, and if it is not, then instead of an amendment being easily made according to the ordinary principles by which the court endeavours to allow amendments wherever it can without injustice, the plaintiff may find himself in a technical difficulty. This much at least is certain, that anybody who wants to sail so close to the wind ought to take the most extreme care to see that the names of the parties and the cause of action are properly described and defined on the writ.

I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Hawley & Phoenix*, Longton, Staffordshire (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

OLIVER AND OTHERS *v.* ASHMAN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), November 2, 3, 1960.]

Negligence—Damages—Personal injury—Measure of damages—Loss of amenities of life—Loss of future earning capacity—Child aged twenty months—Mental defective as result of injury—Expense of home help and of child's entering private institution in the first instance—Probability that child would spend most of his life in state institution—Total award unlikely to be used by or on behalf of child.

The infant plaintiff, a boy aged twenty months, sustained in February, 1958, severe injuries in a road accident for which the defendants admitted liability. These injuries damaged his brain and, as a result, he became mentally defective, unable to talk or to understand what was said to him. He did not, apparently, have sustained feeling, and so did not have prolonged pain and suffering in consequence of the accident. The medical evidence was that a slight improvement in his condition might occur and that education of a very limited character might be possible, but that for the rest of his life he would require constant care and attention. For some three or four years his parents might have to employ a nanny to look after him. Though the infant plaintiff might go into a private institution in the first instance, yet in a few years' time he would probably have to go into a state institution for mental defectives. He would never be able to earn his living. His expectation of life was now a good deal less than normal. He had a younger brother who was normal and who would progress in advance of him. The father of the infant plaintiff was an executive earning £1,250 a year. The damages of the infant plaintiff were assessed at £11,000.

Held: in assessing the damages awarded to the infant plaintiff

(i) the following factors should be taken into account—

(a) the infant plaintiff should be compensated for such expenditure as would have to be incurred on his behalf for extra help in the home and in sending him to a private institution in the first instance,

(b) the infant plaintiff was entitled to compensation for loss of the amenities of life, e.g., loss of opportunity to marry, to earn a livelihood and to enjoy life, whether he knew or did not know that he had lost those amenities, though the amount of such damages might be less than in the case of a person who had enjoyed life and its amenities and knew that he had lost them (*Benham* v. *Gambling*, [1941] 1 All E.R. 7, distinguished), and

(ii) the following factors should be ignored—

(a) the reduction in the infant plaintiff's expectation of life as a result of his injuries (*Pope* v. *D. Murphy & Son, Ltd.*, [1960] 2 All E.R. 873, followed),

(b) the probability that a large part of the award of £11,000 would never be expended by or on behalf of the infant plaintiff. A

[As to the measure of damages for personal injury, see 11 HALSBURY'S LAWS (3rd Edn.) 255, para. 427; as to damages for loss of earnings, see ibid., 258, para. 430; and for cases on the measure of damages for personal injury, see 36 DIGEST (Repl.) 200, *1053-1057*.] B

Cases referred to:

Benham v. *Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 36 Digest (Repl.) 231, *1227*.

Pope v. *D. Murphy & Son, Ltd.*, [1960] 2 All E.R. 873; [1960] 2 W.L.R. 861.

Action.

In this action the plaintiffs Robin Oliver, an infant suing by his father and next friend William Oliver, William Oliver suing on his own behalf and Anthea Oliver, his wife, claimed damages for personal injuries sustained by them in a collision on Feb. 24, 1958, between a car driven by the plaintiff William Oliver, in which his wife and child were passengers, and two cars driven by the first and second defendants, Allan George Ashman and Samuel Staton. The defendants having admitted liability, the sole issue before the court was the amount of damages. The case is reported only on the award of damages made to the infant plaintiff, Robin Oliver, who sustained serious brain injuries. C D

The facts were as follows. At the time of the accident the infant plaintiff was aged twenty months. He was sitting on his mother's knee and in the collision was thrown forward and hit his head on the instrument board and door of the car. He was taken to hospital where an X-ray showed a head injury of a wide fissure fracture passing from the right parietal region across the frontal bones to the left side and severe cerebral laceration and bruising. In March, 1958, his limbs, especially on the right side, became spastic but over the next two months he made slow, satisfactory progress and by May, 1958, was able to sit up and partly feed himself but could not stand without support. The infant plaintiff left hospital in May or June, 1958. His condition then deteriorated and he gradually lost all power of speech. In December, 1958, he developed epileptic fits which, to a certain extent, were now controlled by drugs. At the present time the infant plaintiff was aged four years four months but was unable to do anything for himself and required constant attention. He was highly emotional and very easily upset when he would cry for long periods and it was difficult to stop him crying. He did not respond to commands or instructions from his mother. The medical evidence, which in effect was agreed, was that the infant plaintiff had suffered permanent damage to the frontal region of the brain leaving him a low-grade mental defective. He was now, and probably always would be, incapable of talking, and for practical purposes had no understanding of what was said to him. While some further improvement might occur he would always remain of gravely diminished intelligence and for the rest of his life would need constant care and attention. He was virtually ineducable, and would never be able to earn his living. In a few years' time he might prove impossible to control at home especially as there was a younger child in the family and he would have to go into an institution for mental defectives. His expectation of life was a good deal less than normal. E F G H

N. R. Fox-Andrews, Q.C., and *J. D. Stocker* for the plaintiffs. I

Ryder Richardson, Q.C., and *E. W. Eveleigh* for the defendants.

LORD PARKER, C.J., having referred to the medical evidence concerning the infant plaintiff, continued: The prognosis as I find it is that it is unlikely that the infant plaintiff will be able to regain anything for practical purposes, at any rate in speech, and that as far as education is concerned it can only be of a very, very limited character. All the doctors agree that what this child needs is affectionate care and control all the time; secondly, constant medical supervision,

in particular for the epileptic fits; thirdly, such attempts as can be made towards re-education. There is some conflict of evidence how that can best be achieved. All are agreed, at any rate, that as long as it is possible to retain him in the home under the constant care of his mother, the better, but the parents, who are very sensible people, have now resigned themselves to the fact that the child will have to leave home at some time in the future. He will be getting too big to be properly controlled by his mother and, in addition, there is the difficulty of bringing him up with the younger brother, a perfectly normal child.

When he does leave home, the parents very naturally at the moment are against the idea that he should go to a state institution, a hospital for mental defectives or backward children under the national health scheme. They think that he will get better treatment and care in some private institution and they have in mind a Rudolph Steiner school. Sir Russell Brain (1) in particular feels that today, provided that the child goes to a first-class state institution, the chances are that he will have better care and better medical attention and education than in a private establishment. He agrees, naturally, that some regard must be had to the parents' wishes and quite clearly, if the Rudolph Steiner schools will take the child—and it is too early to tell that yet—or some other private institution, it would no doubt be right to try that first, but Sir Russell Brain is clearly of the view that sooner or later this child will have to go to a state institution and what is more, that there he will remain for the rest of his natural life, subject to visits home.

In these circumstances, the question that has to be answered is to what damages this child is entitled. Certain things are clear. He must be compensated in money for such expenditure as will have to be incurred on his behalf by having some extra help in the home so long as he remains at home. It looks, on that basis, as if his parents on his behalf will have to employ a nanny for some moderate number of years, say three or four years. Also it looks as if they will have to expend, and rightly expend, money in sending him to some private institution in the first instance, if any private institution will take him. And when he goes to a state institution, they may well require extra help in the home in the periods when he comes out of the state institution and comes home. In respect of these matters, the child is clearly entitled to compensation.

So far as damages for pain and suffering are concerned, any award must be small and possibly nil because the general view is that this child really does not feel pain and suffering. If he does, it is purely momentary. He has no sustained feeling or recollection and, indeed, if I understand it right, counsel on his behalf does not claim compensation in this case under the heading of pain and suffering.

The more difficult question is what the child is entitled to receive as a result of what he has lost through his injuries. He has lost the opportunity, to use quite general terms, of living, marrying, having children and enjoying life. He has also lost the opportunity of earning a living and obtaining such amenities as his earnings could buy. As against this, he will be kept, on one view, for the rest of his natural life at the expense of the state. Now, as to the loss of opportunity to enjoy life, this is not the case of a person who has known the enjoyment of life and has been deprived of it. It is true that there is some evidence from the father that the child is beginning to realise that he is different from others. The father thinks, and it is all rather problematical, that the presence of the younger child makes him frustrated, that he realises in some way that his young brother is going ahead of him, but I am quite satisfied that if he does have these thoughts and feelings they are again of a fleeting, momentary nature and that he has no sustained feeling. At the same time, I am quite unable to accept the contention put forward by counsel for the defendants that this is purely what I may call a *Benham* v. *Gambling* (2) case. The infant plaintiff is, I think,

(1) Sir Russell Brain gave evidence for the defendants at the trial of the action.
(2) [1941] 1 All E.R. 7; [1941] A.C. 157.

entitled to something for what he has lost, whether he knows he has lost it or not, albeit that the amount may well be less than in the case of a person who has enjoyed life and amenities and knows that he has lost them. The trouble, however, is to put that into money. There are so many imponderables, especially in the case of such a young child. As far as loss of earnings is concerned, the considerations involved again cannot easily be put into pounds, shillings and pence. Here again, there are imponderables. What education would the parents have been able to give the child? If one or other of them died, would the education have been interrupted? If not, how far would the child succeed? What trade or profession would he take up and what would he have earned? There is no conceivable clue to that. The only guide, if it be any guide at all—and I do not think it is—is that his father is working in an executive capacity making, I am told, £1,250 a year. In addition, there are questions of taxation and other matters, but whatever view one takes as to eventual earnings, the figure must in the case of such a young child be heavily discounted.

Doing the best I can in all the circumstances, I would award to this child a sum of £11,000. In awarding such a sum, I am conscious of the fact that it may well be—indeed, I think that the overwhelming probabilities are—that a large part of this money will never be expended by or on behalf of the infant plaintiff. It will, I think, to a large extent remain untouched and left to his next of kin, or it may well be that the parents, if a receiver were appointed, might obtain some use of the money, but I think these considerations are entirely irrelevant. It seems to me entirely irrelevant to the damages whether the plaintiff will ever be able to use the money. Of course, on the view that it may be that he can and will live at any rate for a time in a private institution, then that sum will enable him to do so.

I would also like to say that in awarding this sum I have followed the decision of STREATFEILD, J., in *Pope* v. *D. Murphy & Son, Ltd.* (3) and in making this assessment have ignored the undoubted fact that in this case the expectation of life has been reduced.

Judgment for the infant plaintiff for £11,000.

Solicitors: *G. Howard & Co.* (for the plaintiffs); *L. Bingham & Co.* (for the first defendant); *Joynson-Hicks & Co.* (for the second defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

(3) [1960] 2 All E.R. 873, in which STREATFEILD, J., based the assessment of damages for loss of future earnings on the plaintiff's expectation of working life apart from the accident, not on his shortened expectation of life as a result of the accident, and did not follow the decision of SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.

DAWRANT *v.* NUTT.

[STAFFORD ASSIZES (Stable, J.), June 30, 1960.]

Road Traffic—Negligence—Collision between motor car and unlighted motor cycle combination in which plaintiff a passenger—Plaintiff's knowledge that motor cycle combination had no lights—Lack of reasonable care by plaintiff for her own safety—Contributory negligence.

Highway—User—Duty owed to other users.

The plaintiff was a passenger in the side-car of a motor cycle combination driven by her husband on a dark stretch of road after lighting-up time, when a collision occurred between the combination and a motor car which was being driven by the defendant in the opposite direction. The plaintiff was injured and her husband was killed. At the time of the accident, the motor cycle combination was not showing any lights in front, because the lighting system of the combination had been damaged shortly before the accident and the headlight on the motor cycle was broken. The plaintiff was aware of this before the accident occurred. Liability for the accident was apportioned equally between the defendant and the plaintiff's husband. In an action by the plaintiff claiming damages against the defendant for the personal injuries which she had suffered as a result of the defendant's negligence,

Held: any person using the highway owed a duty to other users of the highway to take reasonable care of himself, and the plaintiff, in travelling in the motor cycle combination knowing that it was not showing any lights in front, was in breach of this duty and was, therefore, guilty of contributory negligence; her measure of responsibility for her injuries was one-quarter, and the damages recoverable would be reduced accordingly.

Dann v. *Hamilton* ([1939] 1 All E.R. 59) considered.

[As to the knowledge of the plaintiff in relation to contributory negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 92, para. 96; and for cases on the subject, see 36 DIGEST (Repl.) 177-180, *938-970*.]

Case referred to:

Dann v. *Hamilton*, [1939] 1 All E.R. 59; [1939] 1 K.B. 509; 108 L.J.K.B. 255; 160 L.T. 433; 36 Digest (Repl.) 155, *813*.

Actions.

These were two actions arising out of the same set of facts and between the same parties. In the first action the plaintiff, Sarah Dawrant, claimed damages against the defendant, James Peter Nutt, for personal injuries caused to her by the negligent driving of a motor vehicle by the defendant on Aug. 30, 1958. In the second action, the plaintiff claimed, as administratrix of the estate of her husband, Albert Weldon Dawrant, deceased, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and, as the widow of the deceased, damages under the Fatal Accidents Act, 1846, in respect of her husband's death as a result of the negligent driving of the defendant's motor vehicle on Aug. 30, 1958. The facts are stated in the judgment.

H. J. Garrard for the plaintiff.

Douglas Draycott for the defendant.

STABLE, J.: These two actions, which have been tried together, raise a rather interesting point, and one of some interest to lawyers, in particular, and, perhaps, to the public in general. In the first action, the plaintiff, suing in her own right, claims damages for the injuries which, she says, she sustained at the hands of the defendant. The second action, which arises out of exactly the same set of facts, was brought by the plaintiff as the administratrix of the estate of her late husband, under the Law Reform (Miscellaneous Provisions)

Act, 1934, s. 1, for the loss of expectation of life, and, as the widow of the deceased, under the Fatal Accidents Act, 1846. A

The facts of the matter are as follows. The defendant was driving his motor car down the Uttoxeter Road from the direction of Blythe Bridge towards Meir. The time was shortly after 9 p.m. on Aug. 30, 1958. The weather was dry, the sky was clear; the moon was up and practically at the full. The stretch of road where the accident took place was more or less straight for something like two hundred yards on each side of the point of impact. There was no street illumination that had any effect whatever, so far as is material to anything which I have to decide, and, owing to the overhanging trees and the hedges, the road was—and was known to everybody concerned to be—a particularly dark stretch of road. Travelling in the opposite direction were Mr. and Mrs. Dawrant, who had been for a short drive on a motor cycle combination which was being driven by Mr. Dawrant with Mrs. Dawrant as a passenger in the side-car. When Mr. and Mrs. Dawrant arrived at Barlaston, they stopped and Mr. Dawrant ascertained—and Mrs. Dawrant knew—that apparently, owing to some rather rough road over which they had been, the lighting system of the motor cycle combination had been damaged. The light on the combination side was completely out of action; the bulb had come out. I have no doubt that the tail-light was intact. As regards the front light (i.e., the headlight on the motor cycle), which was the only other light on this vehicle, I have no doubt whatever that the headlight itself was broken and was completely out of action. Had it not been, it would have been perfectly obvious to the plaintiff that there was a beam of light being projected from this lamp. I have come to the conclusion that, at the time of the impact, the motor cycle combination was not showing any light in front at all, and that the plaintiff was aware, and had been aware for some time, that that was the true state of affairs. To drive a vehicle in that condition after lighting-up time is the clearest possible breach on the part of the driver of his duty of care in relation to other users of the highway. The interesting question is whether a passenger, who is aware of this and in that knowledge continues to ride as a passenger, is also in breach of her duty to other users of the road. B C D E F

I was referred to *Dann* v. *Hamilton* (1), a decision of ASQUITH, J. In that case a passenger in a motor car was suing the personal representative of the driver of the car. The defence was that, at the time when the passenger was injured, the driver was not strictly sober and that the passenger knew it, and that, therefore, the doctrine of volenti non fit injuria applied. ASQUITH, J., held that it did not. In the LAW QUARTERLY REVIEW, Vol. 55, at p. 184, and Vol. 65, at p. 20, there were articles which indicated that the driver had a cast-iron defence of contributory negligence. I think that at that time contributory negligence was a hundred per cent. defence (2). Subsequently, in the LAW QUARTERLY REVIEW, Vol. 69, at p. 317, LORD ASQUITH OF BISHOPSTONE wrote a note indicating that contributory negligence had not been pleaded in *Dann* v. *Hamilton* (1); that he, as the judge, suggested that the pleadings should be amended, but that counsel for the defendant, for some reason or other, declined the suggestion. G H

I have come to the conclusion that, in relation to the highway, it does not matter whether one is in a motor car or a dog-cart, whether one is on a bicycle or whether one is a pedestrian. Whether one is a passenger or a driver, one owes the same duty to other users of the highway to take reasonable care of oneself. The jay-walking pedestrian who is run over and then sues the driver of a motor car may fail, and will fail, unless he succeeds in establishing some breach of duty on the part of the driver of the motor car. Whether the pedestrian owes a legal duty to the driver in that context does not matter. The I

(1) [1939] 1 All E.R. 59; [1939] 1 K.B. 509.

(2) The law relating to contributory negligence was amended by the Law Reform (Contributory Negligence) Act, 1945; 17 HALSBURY'S STATUTES (2nd Edn.) 12.

A action fails because the plaintiff has not succeeded in establishing any breach of duty on the part of the person from whom he is claiming damages. The matter can be disposed of quite shortly by saying " Well, it was all your own fault "—a not very legal, but a rhetorical phrase, which we all understand. That problem does not arise where some measure of negligence on the part of the motor driver is established, and then any defence of contributory negli-
B gence must involve that something was done or omitted, or permitted, by the plaintiff which was a breach of the legal duty to, among other persons, the defendant.

In the present case, it is insufficient to say that it was unwise of the plaintiff to travel in a motor vehicle which she knew to be improperly lighted. That does not amount to a defence unless there was a legal duty imposed on the
C plaintiff, vis-à-vis other possible users of the highway, not to do so; in other words, a legal duty to take reasonable care for her own safety. I think, having regard to *Dann* v. *Hamilton* (3) and the reason behind it, that the plaintiff did owe a duty, and that she was in breach of that duty in knowingly travelling in the unilluminated motor cycle combination.

The next problem which arises is this. Given that the state of knowledge
D of the driver and the state of knowledge of the passenger are identical, does it follow that, vis-à-vis a third person (in this case, the defendant), the proportion of negligence that must be laid at the door of each of them (the driver and the passenger) is identical. I have come to the conclusion that it is not. It may be, of course, identical, but it does not follow that it is or that it is not. I think that each case has to be judged on its facts. For example, to take the case
E where a driver was very reluctant to drive and practically refused to do so, and finally succumbed to the urgent entreaties, and possibly the bribe, of the passenger, I think that one could very properly attribute a far greater measure of responsibility to the passenger.

I think that Mr. Dawrant and the defendant must accept an equal measure of responsibility for the accident, and, as regards the measure of the plaintiff's
F responsibility, I shall attribute three quarters of the blame to the defendant, and only one quarter to the plaintiff. The result is that I shall award the plaintiff a gross figure of £508 in relation to her personal claim, and, reducing that by £127, there will be judgment for her for £381. As regards the claim as administratrix, I should have awarded her £3,900 general damages, with an additional £182 12s. 6d., the agreed special damages. One half of that sum is £2,041 6s. 3d.,
G and there will be judgment in the second action for that amount, of which £1,900 is under the Fatal Accidents Act, 1846, and £141 6s. 3d. is under the Law Reform (Miscellaneous Provisions) Act, 1934.

Judgment for the plaintiff in both actions.

Solicitors: *R. W. Beswick*, Hanley, Stoke-on-Trent (for the plaintiff); *Abberley & Walker*, Burslem, Stoke-on-Trent (for the defendant).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

---

(3) [1939] 1 All E.R. 59; [1939] 1 K.B. 509.

THOMSON (INSPECTOR OF TAXES) *v.* MOYSE.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Cohen and Lord Denning), May 30, 31, June 1, October 5, 6, 10, November 22, 1960.]

Income Tax—Foreign possessions—Income arising from possessions out of United Kingdom—Income arising from securities out of United Kingdom—Taxpayer's life interest in American estates—Income credited in New York bank account—Cheques drawn by taxpayer in dollars on account—Cheques purchased by English banks—Proceeds credited to taxpayer's English bank account—Whether sums received by taxpayer in United Kingdom—Income Tax Act, 1918 (8 & 9 *Geo.* 5 *c.* 40), *Sch. D. Case IV*, *r.* 2, *Case V*, *r.* 2.

The taxpayer was a British subject domiciled in the United States of America but resident in the United Kingdom. He was in receipt of income in the United States, part of which arose from " securities out of the United Kingdom " within the meaning of Case IV of Sch. D to the Income Tax Act, 1918, and the remainder of which arose from " possessions out of the United Kingdom " within Case V of that Schedule. The income was credited to him in the Bank of New York. In the relevant years of assessment, the taxpayer drew cheques on the Bank of New York in favour of one or other of his two English banks and sold them to those banks for the sterling equivalent which he was paid immediately. The English banks sent the cheques to New York and cashed them, collecting the dollars there. The Special Commissioners found that the English banks acted as principals and not as the taxpayer's agents in cashing the cheques and collecting the proceeds. The taxpayer was assessed to income tax in respect of the sums with which he was credited as being sums received in the United Kingdom (a) within Case IV, r. 2, of Sch. D to the Act of 1918, and (b) within Case V, r. 2, of Sch. D to that Act.

Held: income of the taxpayer arising abroad had been received as sums of money in the United Kingdom, for the taxpayer, by parting with the right to income in New York had obtained corresponding resources in the United Kingdom, and thus had effected a transmission of his income to the United Kingdom for the purposes both of Case IV and Case V, it being immaterial that no money was actually brought into the United Kingdom in the course of, or in connexion with, the transaction; therefore, the assessments had been rightly made.

Scottish Widows' Fund Life Assurance Society v. *Farmer* ((1909), 5 Tax Cas. 502) and *Gresham Life Assurance Society* v. *Bishop* ([1902] A.C. 287) distinguished.

Inland Revenue Comrs. v. *Gordon* ([1952] 1 All E.R. 866) and *Hall* v. *Marians* ((1935), 19 Tax Cas. 582) not followed.

Decision of the COURT OF APPEAL ([1959] 1 All E.R. 660) reversed.

[Editorial Note. The Income Tax Act, 1918, has been repealed and replaced by the Income Tax Act, 1952. For Sch. D, Case IV, r. 2, and Case V, r. 2, to the Act of 1918, see now s. 132 (2) and (3) of the Income Tax Act, 1952.

As to what constitutes a remittance for the purposes of Case IV and Case V of Sch. D, s. 123 of the Income Tax Act, 1952 (replacing corresponding provisions in the Income Tax Act, 1918), see 20 HALSBURY'S LAWS (3rd Edn.) 269, 270, para. 489; and for cases on the subject, see 28 DIGEST (Repl.) 201-213, *841-904*.

For the Income Tax Act, 1952, s. 132, see 31 HALSBURY'S STATUTES (2nd Edn.) 128.]

Cases referred to:

Carter v. *Sharon*, [1936] 1 All E.R. 720; 20 Tax Cas. 230; 28 Digest (Repl.) 202, *846*.

A *Foulsham* v. *Pickles*, [1925] All E.R. Rep. 706; [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; sub nom. *Pickles* v. *Foulsham*, 9 Tax Cas. 261; 28 Digest (Repl.) 249, *1103.*

Gresham Life Assurance Soc. v. *Bishop*, [1902] A.C. 287; 71 L.J.K.B. 618; 86 L.T. 693; 66 J.P. 755; 4 Tax Cas. 464; 28 Digest (Repl.) 201, *841.*

Hall v. *Marians*, (1935), 19 Tax Cas. 582; 28 Digest (Repl.) 210, *889.*

B *Inland Revenue Comrs.* v. *Gordon*, [1952] 1 All E.R. 866; [1952] A.C. 552; 33 Tax Cas. 226; 28 Digest (Repl.) 212, *894.*

Inland Revenue Comrs. v. *Paget*, *Paget* v. *Inland Revenue Comrs.*, [1938] 1 All E.R. 392; [1938] 2 K.B. 25; 107 L.J.K.B. 657; 158 L.T. 187; 21 Tax Cas. 677; 28 Digest (Repl.) 340, *1511.*

Scottish Mortgage Co. of New Mexico v. *McKelvie*, (1886), 2 Tax Cas. 165;
C 28 Digest (Repl.) 206, *537.*

Scottish Provident Institution v. *Inland Revenue*, 1912 S.C. 452; 6 Tax Cas. 34; 28 Digest (Repl.) 206, *540.*

Scottish Widows' Fund Life Assurance Soc. v. *Farmer* (*Surveyor of Taxes*), (1909), 5 Tax Cas. 502; 28 Digest (Repl.) 206, *539.*

Timpson's Executors v. *Yerbury*, [1936] 1 All E.R. 186; [1936] 1 K.B. 645;
D 105 L.J.K.B. 749; 154 L.T. 283; 20 Tax Cas. 155; 28 Digest (Repl.) 202, *845.*

Appeal.

Appeal by the Crown from an order of the Court of Appeal (JENKINS, ROMER and PEARCE, L.JJ.), dated Mar. 9, 1959, and reported [1959] 1 All E.R. 660, affirming (except on one point) an order of WYNN-PARRY, J., dated July 22,
E 1958, and reported [1958] 3 All E.R. 225, on an appeal by the Crown by way of Case Stated from a decision of the Special Commissioners of Income Tax. The respondent taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax made on him in the sums of £2,335 for 1949-50, £2,500 for 1950-51 and £2,500 for 1951-52 under Case IV, and of £3,457 for 1949-50, £3,500 for 1950-51, and £3,500 for 1951-52 under Case V of Sch. D to
F the Income Tax Act, 1918. The question for determination was whether the taxpayer was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country. The facts are stated in the opinion of LORD REID, infra.

J. G. Foster, *Q.C.*, *A. S. Orr* and *M. Heald* for the Crown.

G *F. N. Bucher*, *Q.C.*, and *P. J. Brennan* for the respondent taxpayer.

Their Lordships took time for consideration.

Nov. 22. The following opinions were read.

VISCOUNT SIMONDS: My Lords, at the conclusion of the argument in this case, I was clearly of opinion that the appeal must succeed. I wrote my
H opinion accordingly, but, having had the privilege of reading the opinion which my noble and learned friend, LORD RADCLIFFE, is about to deliver, I have decided to withdraw it. For I am in complete agreement with his reasoning and conclusions and think it on the whole desirable in this difficult branch of the law that the same result should not be reached by the use of slightly different words. I shall, therefore, content myself with moving that the appeal should
I be allowed and the assessments of the respondent to income tax restored. The order in the courts below in regard to costs will not be disturbed and there will be no order as to costs in this House.

LORD REID: My Lords, the respondent was born in the United States of America; he is now a British subject resident in this country but he retains his American domicil of origin. He was in receipt of income in the United States, part of which arose from " securities out of the United Kingdom " within the meaning of Case IV and the remainder of which arose from " possessions out of

the United Kingdom " within the meaning of Case V of Sch. D to the Income Tax Act, 1918. During the years 1949-50, 1950-51 and 1951-52, he held money derived from income from those sources in the Bank of New York in New York. On some sixteen occasions he drew cheques on the Bank of New York and sold these cheques in London to Seligman Bros. or the Midland Bank, Ltd., whereupon he was paid immediately the sterling equivalents of the number of dollars in the cheques. Thereafter the English banks sent the cheques to New York, and cashed them and collected the dollars there. I accept the finding of the commissioners that these transactions were sales of the cheques so that the English banks acted as principals and not as collecting agents in cashing the cheques and collecting the proceeds. But if any of the cheques had been dishonoured, the banks would have had recourse against the respondent. The final result of each transaction was that the amount of accrued income held by the respondent in New York was diminished by the number of dollars in the cheque, and that the respondent had in his hands in London a sum in sterling equivalent to that number of dollars. The question in this case is whether the sums which he received in London by these transactions come within the scope of Cases IV and V of Sch. D. If they do, there is no dispute about the allocation of these sums between the two Cases.

The respondent not having been domiciled in the United Kingdom, the relevant provisions of the Income Tax Act, 1918, are r. 2 of the Rules applicable to Case IV:

> " The tax in any such case shall be computed on the full amount, so far as the same can be computed, of the sums which have been, or will be, received in the United Kingdom in the year of assessment without any deduction or abatement ",

and r. 2 (as amended) of the Rules applicable to Case V:

> " The tax in respect of income arising from possessions out of the United Kingdom, other than income to which r. 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed."

By reason of s. 29 (1) of the Finance Act, 1926, the computation directed by the latter rule must be made in respect of the year preceding the year of assessment and not on a three years' average. At first sight it would seem that the requirements of these provisions are satisfied. As regards Case IV, the respondent undoubtedly received in the United Kingdom the sums paid to him as the price of the cheques and in each case, by virtue of the contract under which he received the sum, the amount of accrued income held by him in New York was diminished by a corresponding amount. And as regards Case V, again he undoubtedly received such sums and they would appear to be money arising from property not imported, i.e., his accrued income in New York which he assigned in order to get these sums. But obviously this case cannot be disposed of as easily as that. There is a wealth of authority about these provisions, and on the strength of that authority the commissioners, WYNN-PARRY, J., and the majority of the Court of Appeal all held that the facts of this case do not satisfy the statutory provisions.

The main ground of judgment in each case was that the sums paid to the respondent had not been brought into the United Kingdom, and that there is nothing to show that any money was ever brought into the United Kingdom in connexion with these transactions. That is quite true. But there is nothing

A in Case IV requiring that money should be brought into the United Kingdom, and this requirement is only attached to one head of Case V which does not apply to the present case. The views of these learned judges do, however, receive much support from a number of authorities if statements made in them are really of general application. Before considering these authorities, I think it well to see what the effect would be if this view were right. I take a case which no one has B ever even suggested would not be within the scope of these provisions—the case of a bank acting as a collecting agent. If a customer hands to an English bank for collection a cheque drawn on a foreign bank, the English bank will send the cheque abroad for collection and, when notified that the money has been collected, it will give to the customer in this country the equivalent in sterling at the current rate of exchange. If all the money held by the foreign bank was C accrued income of the customer, no one would doubt that he must pay income tax on the sum which he receives in this country. But it does not in the least follow that any money will have been remitted from the foreign country or brought into the United Kingdom in connexion with the transaction. If, when the cheque was handed to it for collection, the bank required to send say £100,000 abroad either physically by exporting cash or bullion or, by buying D here, a right to receive that sum in that country, the cheque when collected would provide, say, £10,000 worth of the foreign currency which the bank wants and now the bank would only have to send out £90,000. So collecting the cheque abroad and giving the customer sterling here would not involve bringing anything at all into the United Kingdom; it would only involve less being sent out than would otherwise have been necessary. But it would be quite absurd to suggest E that the customer escapes paying income tax merely because of the accident that in his particular case collecting his cheque did not involve anything being brought into the United Kingdom.

With such a case in mind I turn to the authorities. The first which I need consider is *Gresham Life Assurance Society* v. *Bishop* (1). There no sum had in fact been received by the society in the United Kingdom. The argument for F the Crown was that "received in the United Kingdom" is not confined to physical receipt, and that it was enough that the society's foreign income had been used to pay foreign debts which would otherwise have had to be paid out of money here. No one appears to have had in mind a case where a sum was in fact received in this country although nothing had been brought into this country; it seems to have been assumed that, if a sum being or representing foreign income G is received in this country, it must have been brought in, but any such assumption was quite unnecessary for the decision at which this House arrived. It is true that LORD MACNAGHTEN said (2):

> "I do not understand what is meant by constructive receipt in such a case as this, or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or H unless there has been a remittance 'payable in the United Kingdom'... "

But I cannot infer from that that, if a method had been pointed out to him by which a sum of income could be received in the United Kingdom without anything being brought in, he would have held that the sum so received was not taxable. I think that the same applies to the other noble and learned Lords whose speeches I are reported. The subsequent application of what was said in the *Gresham* case (1) seems to me a good example of the danger of applying judicial pronouncements literally to situations which cannot have been in mind when they were made. Then in *Scottish Widows' Fund Life Assurance Society* v. *Farmer* (3), LORD DUNEDIN, the Lord President, said (4) that the word in the statute

> "is 'receipt,' and nothing less than actual receipt will do. Now, actual

(1) 4 Tax Cas. 464. (2) 4 Tax Cas. at p. 473. (3) 5 Tax Cas. 502.
(4) 5 Tax Cas. at p. 508.

receipt of money, it seems to me, can only be effected in one of two ways. Either the money itself must be brought over in specie, or the money must be sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance." A

I would agree that there was no remittance in the present case because the whole of the money in New York was still there at, and after, the time when the respondent received the price of the cheques here. But again the point in the *Scottish Widows'* case (5) was that no money was in fact received here, and LORD DUNEDIN'S statement that there were only two ways was obiter. A third way has now appeared. In *Foulsham* v. *Pickles* (6), the point decided by this House was that the sums received were not income from a foreign possession. What the respondent founds on is a passage from the speech of VISCOUNT CAVE, L.C., in which he said (7) that the sum there in question was not a remittance and that the other branches of r. 2 of Case V B C

"... all refer to property, money, or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here."

There was no question in that case of the sum received here being or representing foreign income, and again I do not think that VISCOUNT CAVE'S words should be applied literally to a case so far removed as the present from the case which he was then considering. D

Many other cases were cited which contain statements similar to those which I have quoted, but I do not think that it would be useful to multiply citations. In all except two, the facts were far removed from the facts of this case; there was no question of a sum being actually received by the taxpayer in this country with a corresponding diminution of the amount of the taxpayer's accrued income abroad. There are several cases where a sum derived from the taxpayer's income was received in this country by someone other than the taxpayer himself. I see no reason to doubt these decisions, but they do not appear to me to help in the present case because in this case the sums in question were actually received by the taxpayer himself. E F

The two cases which I must deal with are *Hall* v. *Marians* (8) and *Inland Revenue Comrs.* v. *Gordon* (9). The latter is a decision of this House. In it an arrangement was made whereby the taxpayer did receive money in this country with a consequential reduction of the amount of his accrued income in Ceylon. He borrowed money in this country from a bank and arranged that the bank should be repaid in Ceylon. *Hall's* case (8) was somewhat similar. These cases would have caused me considerable difficulty were it not for the fact that, by reason of the provisions of the Finance Act, 1953, s. 24, they are no longer good law. They do not add much to the general statements in the earlier authorities, but they do apply those statements to facts which, though distinguishable, are not very far removed from the facts of the present case. The fact that the decisions are no longer valid in my view diminishes the authority of the rationes decidendi, but if I had been sitting in a lower court I would have hesitated before reaching the decision which I think I ought now to take. First I return to the case of a banker collecting a cheque for a customer but bringing nothing into this country. A survey of the authorities has satisfied me that they contain nothing which precludes me from holding that, in every case where a customer employs a banker to collect, by means of his foreign cheque, money abroad which is part of his income, the sum which the customer receives in this country is a " sum received " within the meaning of Cases IV and V, and that it is immaterial that no money was in fact brought into this country in the course G H I

(5) 5 Tax Cas. 502. (6) [1925] All E..R. Rep. 706; 9 Tax Cas. 261.
(7) [1925] All E.R. Rep. at p. 710; 9 Tax Cas. at p. 288. (8) 19 Tax Cas. 582.
(9) [1952] 1 All E.R. 866; 33 Tax Cas. 226.

of or in connexion with the transaction. Indeed, I think it most improbable that any of those learned judges whose judgments have been cited by the respondent would have disagreed with that view. From the point of view of the taxpayer, his income has been brought into the United Kingdom. He had, but no longer has, money in a bank abroad; he now has an equivalent amount of money in his hands in this country. How that was achieved is no concern of his, and I cannot read the statutory provisions as making his liability to tax depend on the method which his banker employed.

Then I turn to see in what respect the transactions in this case differ from the case of a banker collecting a cheque for a customer. If, in this case, the respondent had handed each of these cheques to his bank for collection instead of selling it to the bank, everything might, and probably would, have happened in just the same way with one exception; the respondent would in each case have received his money in London a day or two later. For the respondent, this is said to make all the difference between liability and non-liability to tax; where the bank collects the cheque, the amount of his income in the New York bank is diminished before he gets his money here, and so what he gets here can be regarded as being part of his income; but in the present case the whole of his accrued income was still in New York when he received the price of the cheque here, so what he got here cannot be part of his income. The flaw in this argument is in regarding the sum at his credit in New York as being still truly at his disposal during the interval between his selling the cheque here and the cheque being presented for payment in New York. By selling his cheque here, he assigned his right to the money in New York. It is true that he could have defeated this assignment by stopping payment of the cheque or drawing the money out of his New York bank before the cheque which he had sold had been presented for payment. But this would have been dishonest, and would have entitled the English bank to recourse against him. So I see no difficulty in regarding the sums which the respondent received in London as being received in place of corresponding sums at his credit in New York which then ceased to be at his disposal.

That is sufficient to satisfy Case IV. Case V requires further consideration; under it, not only must a sum be received, it must be received in one of the four ways specified in the rule. These four ways seem to comprehend all possible methods, but if a case should ever happen in which a sum is received, but not in one of these four ways, then Case V would not apply; to that extent it is narrower in scope than Case IV. I do not think that the first, second or fourth heads apply in the present case but, in my opinion, the third does apply—"money or value arising from property not imported". The money arising is the price of the cheques received here by the respondent, and it arose from the respondent's property in New York—his right to the sums at his credit there which he assigned by means of the cheques. But it was argued, both on authority and on the construction of the rule itself, that we must read into this third head a requirement that the "money or value" must itself have been imported or brought into the United Kingdom. With regard to authority, I think that the same considerations apply as those which I have set out in dealing with the more general question whether all "sums received" within the meaning of Cases IV and V must be brought into the United Kingdom. On the construction of the statute, I would say that the words sought to be read in are not there and they are not necessary to make the provision workable; on the contrary, if they were read in, the third head would add nothing to the other three, and there would be created an obvious opportunity for avoidance of tax. The history of Case V is set out by PEARCE, L.J., in his judgment in this case (10). It goes back to 1803, and is said to have been introduced to deal with profits from plantations in the West Indies. Originally it did not contain what is now the fourth head.

(10) [1959] 1 All E.R. at p. 686; [1959] Ch. at p. 519.

It appears to have been based on the view that there were three ways in which an owner could enjoy his profits in this country; by a remittance of money from the colony, by bringing say his sugar to this country and selling it here, or by selling the sugar here for delivery in the colony and receiving the price here. If it were right to insert the words now sought to be read in, the latter method would never have been caught by the provisions of Case V, and there would always have been a rather obvious method of avoiding liability to tax. The difficulty has been created by the addition of the fourth head, which I think goes back to 1805. It deals with money or value received on credit or on account in respect of anything covered by the first three heads and it is governed by the words " brought into the United Kingdom ". It would be anomalous, so it is said, that these words should apply where money is received on credit or account in respect of say sugar sold for delivery in the colony but not to the actual proceeds of the sale. I cannot help suspecting that the original draftsman of this fourth head did not fully understand the scope of the other three heads, and, if I have to choose between holding that there is this anomaly and holding that the words " brought into the United Kingdom " must be read into the third head, I feel bound to hold that the existence of this anomaly is not a sufficient reason for reading those words into the third head. I am, therefore, of opinion that the provisions of Case V do apply to this case. Accordingly, I would allow this appeal.

LORD RADCLIFFE: My Lords, I do not need to travel again over the facts of this case which have been stated already. It is a straightforward story of a resident of this country selling dollars in his bank account in New York in exchange for sterling which the bankers in London were ready to provide. The American bank account was fed only by the receipt of income arising from his American securities or possessions. I should say that, in the plain meaning of language, the sterling credits were sums received by him in this country out of his American income, which had pro tanto been used to acquire them, and that in this sense he had " brought over " his American income to the United Kingdom. That being so, the sums so received are, in my opinion, properly computed in assessing his tax under Case IV and Case V of Sch. D.

What has puzzled me throughout is to see how or why the banking transactions for effecting the remittance of his money from America to which the respondent resorted should be regarded as insufficient to constitute the sterling proceeds received as assessable sums for the purpose of these two Cases. He did not, of course, invest his American income in bullion or commodities to be shipped over here and sold or in United States dollar bills for similar realisation; but then nobody says or supposes that assessability is confined to such transactions. Nor did he instruct his bankers or agents to use his dollar income in buying a bill on London which could have been discounted or presented here for payment. These would have been possible methods of " bringing " the money here, and, no doubt, have all been resorted to in their time. But what he did do seems to me to have been in all essentials a similar transaction, and to have amounted just as much to a " bringing " in the relevant sense. He wrote out his cheques on his New York bankers directing them to hand over his dollars to or to the order of his United Kingdom purchasers, and these purchasers in return acknowledged a sterling debt to him calculated at the current rate of exchange between New York and London. He parted with his dollars; he got his sterling. He emptied one pocket of dollars in order to fill another pocket with sterling. It is true that the cheques in question were written out and signed in London and, if you please, sold here, so that the instruments themselves did not cross the Atlantic until he had made this sale and even then only in the outward direction; but what importance can there be in the actual place of making the instrument or in its physical movements if the direct result of the mechanism employed was to turn the taxpayer's income in one country into money or value in the

other country to which he had decided to transfer it? Yet up to now three courts in succession have rejected the idea of the respondent being assessable in respect of these sterling sums, and it is evident to me, when I study the language of the judgments given, that they all proceed on the basis that the " bringing in " which they regard as necessary to liability involves some operation that was lacking from the transactions that were here carried out. Thus the Special Commissioners (Case Stated, para. 7) rest their conclusion on the view that " no remittances of American income had been brought into the United Kingdom ". I do not know whether that is supposed to be a finding of fact or a conclusion of law; the latter, I think. In either event, the conclusion of finding shirks the test of liability propounded by the statute. WYNN-PARRY, J., in the High Court, founds himself (11) on the proposition that " for Case V to operate the dollars in question in this case must be shown to have been brought into the United Kingdom ", and dismisses the appeal of the Revenue on the ground (12) that ". . . no dollars representing the income of the taxpayer were brought into the United Kingdom over the material period ". In the same way, JENKINS, L.J., makes it his determining point (13) that it was no part of the bargain when the respondent sold his cheques that the dollars taken over by the purchasers " should be brought into the United Kingdom " and there is no evidence that they were so brought. The sterling credits he received (14) " lacked the essential character of a sum brought to the United Kingdom from New York "; and ROMER, L.J., proceeds on just the same line of reasoning. He even commits himself to what is to me the startling statement that (15):

> " There is no reason to suppose that the taxpayer ever intended that his American income should be transmitted to him in this country at any time . . ."

It is evident, therefore, that the judgments below have proceeded according to some conception of the meaning of these words " bringing in ", which is altogether different from that which I attribute to them. As I have indicated, I am clearly of opinion that this conception is a mistaken one, and served only to obscure the significance of the true statutory test, whether income arising abroad has or has not been received as sums of money in the United Kingdom. Out of respect for the contrary view, I would gladly offer my comments on it in detail, but I am in the difficulty that I have not found it possible to discover from the expressions employed what it is that is regarded as missing from the transactions under review that so prevents them being treated as remittances of foreign income. I must, therefore, confine myself to one or two observations which will, I hope, at least make clear what is my own reading of the words of the statute.

The second rules under Case IV and Case V are concerned with the turning of income which has arisen in one country into the expendable resources of its owner in another. To effect that, the owner parts with the resources that represent his income in the country of origin in order to obtain in exchange resources in the country where he desires to spend them. He would spend his dollars, let us say, that is his right to be paid dollars by his bank in New York, in order to obtain through a bill payable, let us say, in London or a bank credit in London the right to sterling, that is the right to be paid sterling by his London debtor. The thing that he would not do in order to " bring " his American money into this country would be to bring his dollars here. In fact, that is just the reverse of what he would or could do; first, because he has to part with the dollars to acquire the sterling, and, secondly, because, that apart, there is, generally

(11) [1958] 3 All E.R. at p. 231; [1959] Ch. at p. 477.
(12) [1958] 3 All E.R. at p. 232; [1959] Ch. at p. 478.
(13) [1959] 1 All E.R. at p. 667; [1959] Ch. at p. 489.
(14) [1959] 1 All E.R. at p. 667; [1959] Ch. at p. 490.
(15) [1959] 1 All E.R. at p. 677; [1959] Ch. at p. 506.

speaking, no use for dollars in the United Kingdom, except in the very limited sense that dollar bills could be sold here for sterling to those who might wish to hold them as reserve or take them back to spend in the United States. It is plain, therefore, that the " bringing in " of a person's income in this context means nothing more than the effecting of its transmission from one country to the other by whatever means the agencies of commerce or finance may make available for that purpose. If that transmission takes place, it is neither here nor there to ask whether anything, items of property or instrument of transfer, has actually been brought into the country or not. No more is it relevant to know what has happened to the taxpayer's money in the country where the income arises. Ex hypothesi, he has transferred it, in this case the dollar credit, to the purchaser who is to provide him with sterling. What use the purchaser may make of the dollars has no bearing on the question whether the taxpayer has received sums of sterling through remittance of his American income. Subject to exchange control regulations, with which I do not deal, the purchaser may retain the dollar credit undrawn on or he may draw on it for expenditure in America; or he may, as was done here, transfer it against sterling to the Bank of England or an authorised purchaser of dollars. None of that is of any relevance to the present issue.

I appreciate, of course, that the views expressed by WYNN-PARRY, J., and the Court of Appeal were regarded by them as founded both on the wording of Cases IV and V and on what has been said in earlier judicial decisions dealing with other points arising under these two Cases. My opinion is that neither the words of the Income Tax Act nor these earlier decisions, properly understood, do support these views. But I have no right to dispose of the matter quite as summarily as that.

To take the Act first. There is nothing in Case IV about bringing anything in. When r. 2 is invoked, the computation in respect of income from foreign securities depends simply on the question what is the amount of sums which have been or will be received in the United Kingdom in the year of assessment. No doubt proper construction of those words requires that the sums computable must be sums " of " the income, by which I would understand " sums of money derived from the application of the income to achieving the necessary transfer ". But that is all. If sterling sums are received and are so attributable, that is enough for liability.

Case V is, in my view, similarly conceived. The formula for liability under its r. 2 is the same, the full amount of the actual sums (of the income) received in the United Kingdom. Since there seems to be no good reason for applying a different standard to income from foreign possessions from that applied to income from foreign securities, it would be strange if there were in fact a different formula. It is true that the rule then goes on to list a number of sources from which the sums to be computed may have been received; and this additional wording has, I think, been the origin of some of the mystification which has crept into this branch of the law. There has been a tendency to treat these several instances of the way in which income may be remitted as if they were limiting the generality of the phrase " actual sums . . . received in the United Kingdom ", and it may be said in defence of such a reading that the strict grammar of the sentence does so suggest. In my view, however, it would be wrong to give any weight to this; for I cannot think that it was ever the intention of the legislature to say, in effect, that whereas under Case IV all sums of foreign income were to be computable if received in the United Kingdom, under Case V only those sums of income received were to be computable which were attributable to the specified operations or sources. There could be no reason for such a distinction. I think, therefore, that these four sub-heads, as they have been called, should be treated as illustrations, no doubt intended to form a comprehensive list of illustrations, of the way in which, when foreign income is transmitted to this country, the transmission can be effected and the sterling

sums obtained. These sub-heads, which are not all very clearly phrased, should, accordingly, be construed according to their general sense and without too much nicety of language. For instance, " remittances payable in the United Kingdom " is a phrase capable of applying to the instrument employed to effect the transfer, to the credit arising from the transfer and, I think, to the whole operation of remitting money to be paid here. I draw attention to this because one or two of our authorities have treated these and other words with more semantic scruple than is appropriate to the context; and from that have come some of our present troubles. The point is of no practical significance in the case now under review, since, even if the respondent's sterling credit was not a sum received from remittances payable in the United Kingdom, as I think that it probably was, it was certainly money or value arising from property not imported, that is the dollar credit in New York which he sold.

I have searched the authorities on the meaning of the two Cases to see whether they invite us or require us to take a different view. If it is not disrespectful to say so, I cannot see what influence, apart from a few sentences which need mention, they are supposed to have on what is now before us. For instance, reliance has been placed on the well-known decision of this House in *Gresham Life Assurance Society* v. *Bishop* (16), which settled that a taxpayer did not receive sums of money here from his foreign income merely by taking that income into account in his yearly statement of profits. Well, of course, he did not. Drawing up an account of your income does not in itself involve any operation of transmitting money at all nor was the taxpayer, as in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (17), under what was treated as a statutory prohibition of denying that in fact he had transmitted money. The House pointed out that there was no such thing as a constructive receipt for this purpose. But then there is nothing constructive about the respondent's receipt of his sterling sums in the present case. There they were to his credit in his London bank. It is said, as if it had a bearing on our decision, that those sterling sums arose within the United Kingdom from a sale made here. In that limited sense, I have no doubt that they did. But what has that to do with liability? If, having foreign income, I invest it in property, import the property, and then sell it here, the sterling proceeds arise in the United Kingdom from a sale made here; yet the proceeds are certainly computable: see, for instance, *Scottish Provident Institution* v. *Inland Revenue* (18).

There is *Paget* v. *Inland Revenue Comrs.* (19), the circumstances of which were that, interest payments on certain foreign bonds being in default, the taxpayer sold her coupons in this country and received the proceeds here. What she sold was not a right to take over any existing credit—she had never had her income—but " the right to receive such income in the future " as well as the right to get what could be got from the defaulting debtors. There was in fact no income to transmit. The decision was that the sum so received by her was not her income at all for the purposes of the Income Tax Acts. I do not see what light that can throw on the present case. Equally, I find nothing of assistance in either *Timpson's Executors* v. *Yerbury* (20) or *Carter* v. *Sharon* (21), which were deployed before us, counsel on each side finding in them comfort and support. Nor, I think, did the two members of the Court of Appeal who were in favour of the respondent. In both cases, ordinary means of transmitting money from one country to another had been employed. That was not in dispute. What was in issue was whether what was received in this country had been received by the taxpayer at any stage. The decisions turned on the rules of English law as to the effectuating of voluntary dispositions of property.

---

(16) 4 Tax Cas. 464. (17) 2 Tax Cas. 165. (18) 6 Tax Cas. 34.
(19) [1938] 1 All E.R. 392; 21 Tax Cas. 677.
(20) [1936] 1 All E.R. 186; 20 Tax Cas. 155.
(21) [1936] 1 All E.R. 720; 20 Tax Cas. 230.

Then there is *Foulsham* v. *Pickles* (22). This again was a case, like the *Gresham Life Assurance Society* case (23), in which no operations at all had taken place for transferring income; the income in question, the respondent's salary, had been paid into his bank account in the United Kingdom and remained there. All that was in dispute was whether it arose from a foreign possession, an oversea employment, so as to justify the assessment that had been made under Case V. What was decided was that the source of the income was not a foreign possession. That does not help us. The only difficulty is caused by some words used by VISCOUNT CAVE, L.C., in his speech in which he sets out his version of the language of Case V, r. 2, and says (24), no doubt correctly, that the word " remittances " refers to money remitted into the United Kingdom from outside. He then adds (24):

> " The other branches of the rule all refer to property, money, or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the rule, and so is not taxable under Case V at all."

I can attach no value to this passage as an attempted interpretation of r. 2 of Case V, and I have not been able to satisfy myself whether it has any intelligible meaning. It is not an accurate recital of the language of the various " branches "; and, if it really means that " money arising and payable here " cannot in any circumstances constitute a receipt under the rule, it is contrary to the obvious meaning of, for instance, the second branch itself, and, for that matter, to the decision in *Scottish Provident Institution* v. *Inland Revenue* (25). The passage is not in any way relevant to the decision that the source of income was not a foreign possession and is not of any authority. For myself, I think that all that VISCOUNT CAVE intended to say was that, if money arises in the United Kingdom as the original form of someone's income, as Mr. Pickles' had, so that there is never at any time any foreign income that can go through the process of transmission, there is nothing to which r. 2 of Case V can apply. I agree with that.

That leaves the two cases under the fourth " branch ", *Hall* v. *Marians* (26), and *Inland Revenue Comrs.* v. *Gordon* (27). They were cases of peculiar difficulty, depending on the relationship between loans made in this country and the foreign income out of which they were ultimately paid off. In essence, the decisions adopted the view that you could, as it were, take the debt over to the income instead of bringing the income to the debt. Whether that is the right way to treat the facts when the creditor is a bank with London and overseas branches is not now of any importance, since the legislature has intervened (28) after the *Gordon* case (27) to reverse the consequences of that decision and to bring such operations within r. 2 of Case V for the future. It would be a mistake in those circumstances to build any principles on the basis of those two decisions. The courts' reasoning was, I think, conditioned by the findings of fact made by the Special Commissioners, and I can only say that, in the *Gordon* case (27), I should have found it very difficult to treat the finding of fact as one which ought to be accepted by the court. Nor do I need to say anything about the passage in the speech of my noble and learned friend, LORD COHEN, which has been quoted in the judgments below (29). It was obiter, and plainly formed no part of the decision of the House. It was probably an echo of what VISCOUNT CAVE has said in *Foulsham* v. *Pickles* (24) and, as expressed, I would not be ready to agree with it, but, like other passages on this subject, the meaning remains uncertain until it

(22) [1925] All E.R. Rep. 706; 9 Tax Cas. 261. (23) 4 Tax Cas. 464.
(24) [1925] All E.R. Rep. at p. 710; 9 Tax Cas. at p. 288. (25) 6 Tax Cas. 34.
(26) 19 Tax Cas. 582. (27) [1952] 1 All E.R. 866; 33 Tax Cas. 226.
(28) See the Finance Act, 1953, s. 24.
(29) See [1958] 3 All E.R. at p. 232; [1959] 1 All E.R. at pp. 673, 688; [1959] Ch. at pp. 477, 500, 522.

A is expanded to show in what sense those ambiguous words " brought or to be brought into the United Kingdom " are meant to be taken.

In the result, I see no difference in this case between the sterling credit which the respondent received against the cheque drawn by the United States Treasury on its dollar account, which is admitted to be computable, and the sterling credits which he received against the dollar cheque drawn by him on his own account.
B I would allow the appeal.

LORD COHEN: My Lords, I agree that this appeal should be allowed for the reasons given by my noble and learned friend, LORD RADCLIFFE. I only desire to add a few words since the decision in the court below was based in part at least on an obiter dictum of mine in *Inland Revenue Comrs.* v. *Gordon* (30).
C The facts in that case were very different from those now before your Lordships. In that case, the taxpayer had obtained loans by way of overdraft from the head office in London of the National Bank of India. He had also an account with the Colombo branch of the bank which was fed in part by transfers of business profits from the accounts of a firm carrying on business in Ceylon in which the taxpayer was senior partner. The taxpayer never gave any security for the
D loans, and no part of the rupee balance to the credit of his account in Ceylon was ever remitted to London, but, by arrangement with the head office in London, the overdraft was transferred to Colombo whenever it reached £500. It was there converted into rupees and satisfied by periodic payments into his Colombo account from the respondent's firm. There was no doubt that those periodic payments represented income from possessions of the taxpayer out of the
E United Kingdom within Case V of Sch. D, and the Commissioners of Inland Revenue contended that the arrangement with the head office of the bank constituted a remittance of money to this country from Colombo within r. 2 of the Rules applicable to Case V. This argument was rejected by the Special Commissioners, and their decision was affirmed by the First Division of the Court of Session and by your Lordships' House. The ground of your Lordships' decision
F is, I think, clear from the penultimate paragraph of my speech on that occasion. This paragraph was accepted as correct by the other noble and learned Lords then present and reads as follows (31):

> "Applying this citation to the present case it is attractive to suggest that, as the respondent obtained and spent these loans in London and was, so
G far as the evidence goes, able to discharge them only from moneys in Ceylon, part at any rate of which was income, and as the loan was, in fact, discharged, the money he received in England must have been received at least in part from remittances of income from Ceylon. Attractive though this may be, it seems to me quite impossible to bring what happened within the compass of the rule. It is plain that the income receipts of the respondent
H were all received in Ceylon. It is plain that the moneys he received in London were advances of capital. There is no finding that those advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary, the parties expressly agreed that the debt should be discharged in Ceylon, it was so discharged, and there is no evidence that the rupees which the bank received
I in Ceylon were ever remitted to London."

In the course of my speech I had set out (30) the four specified sources from which the sums received in the United Kingdom must have been received to bring r. 2 of the Rules applicable to Case V of Sch. D into operation. The third of these sources was " money or value arising from property not imported ". In relation

(30) [1952] 1 All E.R. at p. 870; 33 Tax Cas. at p. 237.
(31) [1952] 1 All E.R. at p. 874; 33 Tax Cas. at p. 242.

to an argument that the sums sought to be charged fell within that source, I said (32):

> " I incline, therefore, to the view that to suceed under the rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom."

My noble and learned friend, LORD NORMAND, concurred in this dictum but the other noble and learned Lords reserved the point for consideration if and when it should arise.

The actual decision in *Gordon's* case (33) is now of no importance since the law was amended by the Finance Act, 1953, s. 24, but the dictum for which I was responsible was relied on by WYNN-PARRY, J., and by the majority of the Court of Appeal in the case now before your Lordships. My Lords, I do not think the dictum does justify their conclusion. Counsel for the respondent relied on it as supporting the view that a sum of money must actually be brought into this country from abroad, and that as, in the present case, no dollars and no equivalent of dollars were brought into this country, the Crown must fail. I do not think the dictum justifies this conclusion. If it does, it must be wrong, for it would ignore the ordinary commercial practice prevailing among business men. I think that the basis of the decision in *Gordon's* case (33) was that, in that case, the money or value received in England was a receipt on capital account and that there was no nexus between it and the income receipt in Ceylon. In the present case, on the contrary, the true view of the transactions may, in my opinion, be summarised as follows—(i) The respondent received income in New York from his father's estate and from his mother's estate. This was income arising from securities out of the United Kingdom within Case IV or, as the case might be, income from possessions out of the United Kingdom within Case V. (ii) This income was paid into the respondent's bank account in New York. The balance to the credit of that account was property outside the United Kingdom. (iii) When the respondent drew a cheque on that account and sold it for sterling to Seligman Bros. or the Midland Bank, Ltd., the sterling credited to his account was money or value in the United Kingdom arising from the property in the New York bank account and, accordingly, the Crown is entitled to tax on the full amount of it. So far as Case V is concerned, this liability arises because the sterling is, as I have said, money or value arising from property not imported. Under Case IV, the sterling is a sum of income which was received by the respondent in the United Kingdom in the relevant year of assessment and it arose from securities out of the United Kingdom. If there is anything in my dictum in *Gordon's* case (34) which conflicts with the above summary of the position in the present case, I can only express the hope that the dictum will receive from your Lordships as sudden a death as was given to the decision in *Gordon's* case (33) by s. 24 of the Finance Act, 1953.

LORD DENNING: My Lords, the question in this case is what tax is payable by the respondent on his New York income. He lives in England but is domiciled in the United States. At all material times he was entitled to an income in the United States of some $17,000 a year. It was credited to his account at the Wall Street branch of the Bank of New York. Some of this income (about $7,000) arose from " securities " in the United States. The rest (about $10,000) from " possessions " in the United States. He is not liable to pay income tax here on this income except in so far as it is " received " in the United Kingdom. The United Kingdom tax payable by him is chargeable under two Cases of Sch. D: (i) In so far as the income arose from " securities ", it is to be computed on the full amount of " the sums which have been, or will be, received in the

(32) [1952] 1 All E.R. at p. 870; 33 Tax Cas. at p. 238.
(33) [1952] 1 All E.R. 866; 33 Tax Cas. 226.
(34) [1952] 1 All E.R. at p. 870; 33 Tax Cas. at p. 237.

A United Kingdom ": see Case IV, r. 2; and (ii) In so far as the income arose from " possessions ", it is to be computed on the full amount of " the actual sums annually received in the United Kingdom " from certain sources: see Case V, r. 2 and r. 3.

Let me first consider the tax chargeable under Case IV. Clearly tax is only to be computed on the sums received in England. These sums must be directly B referable to the respondent's New York income, in this sense, that they must come out of his New York income or be deductible from it or be traceable to it, so that, in the end, his New York income is seen to be the provider of the sums received in England. If the respondent receives the sums out of that income in England himself, he must, of course, pay tax on those sums. But he need not receive them himself. It is sufficient if the sums are received in England by some C third person by his authority. Thus, if the respondent, instead of receiving the money himself, tells his New York banker to send a remittance direct to his butcher or baker or candlestick-maker in England, he is chargeable with tax on it; for the simple reason that he was " entitled " to the income which has been used to pay the debt, and he must pay tax on it when it is received in England, no matter by whom it is received, so long as it is received by his authority: see D r. 1 of the Miscellaneous Rules applicable to Sch. D and *Timpson's Executors* v. *Yerbury* (35). Nor is it necessary that the respondent or the third party should receive the sums in coins or dollar notes or treasury notes. It is sufficient if he or the third party receives the sums in England in any of the other forms of money recognised by commercial men such as bills of exchange, cheques, promissory notes or cash at bank; see *Gresham Life Assurance Society* v. *Bishop* (36) by E LORD LINDLEY. Thus, if the respondent, while in New York, draws a cheque in dollars on his New York bank in favour of his butcher or baker or candlestick-maker in England, and brings the cheque over himself—or sends it over by post—and hands it to the tradesman in payment of the debt, then the respondent is chargeable with tax on it. So much is conceded. But the reason is not because the respondent brought the cheque over from New York, or posted it in New F York. It is because the tradesman received it here in payment of his account on the authority of the respondent himself. The position would be just the same if the respondent, with Treasury permission, wrote out the same cheque in England and handed it over himself to the tradesman here. For the dollar cheque itself would be a " sum received " in England by the tradesman on the authority of the respondent; and, as it was payable out of his New York income, the respond- G ent is chargeable with tax on it.

My Lords, I have just said that the dollar cheque itself would be a " sum received " in England by the tradesman; and this is, I think, a cardinal point in the case. It is immaterial how the tradesman cashes the cheque. He may, with Treasury permission, cash the cheque in the United States and keep the dollars there; or he may sell the cheque to an authorised dealer in England and H receive the proceeds in sterling; or the cheque may be stolen from him and cashed by a wrongdoer; in which case he may sue the wrongdoer in conversion. None of that concerns the man who pays by cheque; for he has got the goods and paid his debt. True it is that the payment is conditional on the cheque being met, but that is only a condition subsequent. If the cheque is met, it ranks as an actual payment from the time it was given and not a conditional one. If the I cheque is not met, the tradesman can have recourse to the debtor, because then there has been no payment. But, subject to it being defeated by that condition subsequent, the payment is complete at the time when and the place where the cheque is accepted by the creditor.

Now how does this all apply in the present case? The commissioners were, of course, quite right in holding that

(35) [1936] 1 All E.R. 186; 20 Tax Cas. 155.

(36) 4 Tax Cas. at p. 476.

" neither Seligman Bros. nor the Midland Bank, Ltd. were acting as a collecting agent on the respondent's behalf but in every case acted as a principal ".

A bank acts as a collecting agent when a customer hands to the bank a cheque payable to him (the customer) and asks the bank to collect the amount and credit it to his account when received. But the cheques in this case were not made payable *to* the customer. In every case a cheque was drawn *by* the customer, the respondent, and made payable to the bank itself, Seligman Bros. or the Midland Bank, Ltd., as the case may be; and the customer received sterling in exchange for it. In short, the customer, the respondent, bought sterling from the bank and paid for it by a dollar cheque. It is just the same as if the respondent, instead of buying sterling, had bought anything else in England, a diamond or whatever else you please, and paid for it, with Treasury permission, by a dollar cheque on his New York bank account. The bank which sold sterling was in no different position than a tradesman who sells goods. It received payment by dollar cheque. The cheques were " sums received " in England by the bank with the authority of the respondent; and, as they were payable out of his New York income, they must be brought into the computation of tax. There is another way of reaching the same result. Instead of saying that the dollar cheque was the sum received, it can be said that the sterling which the respondent received from the bank was a " sum received " by him in the United Kingdom. And he used his New York income to produce that sum; for it was only received by means of a cheque which depleted his New York income by a corresponding amount. So it was directly referable to his New York income and must be brought into the computation of tax accordingly. But I prefer to regard the dollar cheque received by the bank as the " sum received ". If the respondent gave the dollar cheque to a relative here as a gift, it would come into the computation of tax, even though he himself got nothing in return. So it is not the receipt of the sterling which is the crucial thing, but the receipt of the dollar cheque.

Let me next consider the tax chargeable under Case V. It is plain that here, as under Case IV, the tax is to be computed on such part of the income as consists of " sums . . . received in the United Kingdom ". Thus far all I have said about Case IV applies to Case V also. The dollar cheques were sums received by the banks in England. But, in addition, under Case V the sums must be received— (a) from remittances payable in the United Kingdom, (b) or from property imported, (c) or from money or value arising from property not imported, (d) or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom. My Lords, I do not think these four sources render Case V very different from Case IV. The four heads comprehend almost every conceivable way in which the income can be used to produce sums which are received in the United Kingdom. But if a choice has to be made, I put this case under head (c). The New York bank account of the respondent was " property not imported " into the United Kingdom. When the respondent drew a dollar cheque on that account and used it to pay his English banker, he brought into existence " money or value arising from property not imported ". And when the banker received in England the dollar cheque in payment of his debt, he received a sum from that source. And as he received it by the authority of the respondent, it is to be brought into computation under Case V.

Counsel for the respondent conceded that, if the cheques had been drawn by the respondent in New York and then brought by him into England or sent by

A post to England, they would have to be brought into computation to tax under Case V; but he said that, as they had been drawn in England and handed over in England, they were outside Case V. He said that the money or value must be brought *into* the United Kingdom. I cannot accept this contention. The money or value must be received in the United Kingdom, but it need not be imported here. Thus, in the old days, if the owner of a sugar plantation in America sold B the sugar to an English buyer for delivery abroad, but received the price in England (as he might well do), he would be chargeable with tax on it, so far as it represented income, under Case V, head (c), of the Income Tax Act, 1803. The sugar would not be imported into England. Nor would the money or value be imported into England. But the price would be received here. And that would C suffice. And there is no material difference between the wording of the Act of 1803 and the Act of 1918 on this point. I find myself in full agreement with what PEARCE, L.J., said on this point (37).

It all comes back, therefore, to the question whether these dollar cheques were " sums received " in the United Kingdom. I think that they were. They D were sums received by the banks on the authority of the respondent and must, therefore, be taken into computation for tax under Case IV and Case V. I need not say much about *Hall* v. *Marians* (38) and *Inland Revenue Comrs.* v. *Gordon* (39). The decisions in those cases have been reversed by Parliament in s. 24 of the Finance Act, 1953, and they can no longer be regarded as of binding authority; nor can the reasons on which they were based.

E I would, therefore, allow the appeal and hold that the respondent is liable to assessment as claimed by the Crown.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Vandercom, Stanton & Co.* (for the respondent taxpayer).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(37) [1959] 1 All E.R. at pp. 686, 687; [1959] Ch. at pp. 519-521.
(38) 19 Tax Cas. 582. (39) [1952] 1 All E.R. 866; 33 Tax Cas. 226.

ALMOND (VALUATION OFFICER) *v.* HEATHFIELD LAUNDRY (BIRMINGHAM), LTD. CUSHING (trading as FAKENHAM STEAM LAUNDRY) *v.* WEBBER (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), October 21, 24, 25, 26, 27, 1960.]

Rates—De-rating—Industrial hereditament—Laundry—Retail shop—Accommodation for public resort—Customers leaving articles in basket and collecting at office—Customers leaving and collecting articles on slab—Delivery by van—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5 *c.* 44), *s.* 3 (1), (4).

Two laundries which were factories within the meaning of the Factory and Workshop Act, 1901, cleaned articles for members of the public. Most of these articles were collected from and delivered to the customers by the occupiers' vans, including in one case those under a large contract with the United States Army Air Force. There was no shop on the premises in either case and no invitation to the public to resort to them, but eighteen per cent. of the customers in one case left their laundry in a basket on the premises and collected it at a passageway from an office, and 7.8 per cent. of the customers in the other case left it at, and collected it from, a concrete slab on the premises.

Held: the laundries were not occupied and used primarily for the purposes of a retail shop and so were industrial hereditaments within the meaning of s. 3 (1), as extended by s. 3 (4), of the Rating and Valuation (Apportionment) Act, 1928, for the following reasons:—

(i) there was no retail shop on the premises, neither the basket and the passageway and office nor the concrete slab constituting a retail shop or premises of a similar character where retail trade or business was carried on.

Toogood & Sons, Ltd. v. *Green* ([1932] All E.R. Rep. 309) applied.

(ii) even if the facilities provided did constitute such a retail shop, the hereditament was not primarily occupied and used for the purposes of that shop, the bulk of the business not being dealt with in, or in connexion with, it.

Finn v. *Kerslake* ([1931] All E.R. Rep. 242) and *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee* ([1937] 2 All E.R. 368) distinguished.

Appeals allowed.

[As to a hereditament occupied as a factory not being an industrial hereditament because it is primarily occupied as a retail shop, see 32 HALSBURY'S LAWS (3rd Edn.) 146, para. 195; and for cases on the subject, see 38 DIGEST (Repl.) 520-522, *272-284*.

For s. 3 (1) and (4) of the Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

Cases referred to:

Bailey (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; *revsd.* H.L. sub nom. *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1930] All E.R. Rep. 63; [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 38 Digest (Repl.) 517, *257*.

Barton (*Stepney Revenue Officer*) v. *Twining* (*R.*) *& Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 38 Digest (Repl.) 517, *259*.

Dolton Bournes & Dolton, Ltd. v. *Osmond*, [1955] 2 All E.R. 258; 119 J.P. 380; [1955] 1 W.L.R. 621; 38 Digest (Repl.) 523, *283*.

Finn (*Wimbledon Revenue Officer*) v. *Kerslake*, [1931] All E.R. Rep. 242; [1931] A.C. 457; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 38 Digest (Repl.) 520, *272*.

Kaye (*Barnsley Revenue Officer*) v. *Eyre Bros., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 451; 100 L.J.K.B. 1; 145 L.T. 73; 95 J.P. 115; 38 Digest (Repl.) 520, *276.*

Luton Revenue Officer v. *Deeley*, [1931] 1 K.B. 386; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 38 Digest (Repl.) 520, *274.*

Meriden R.D.C. v. *Standard Motor Co., Ltd.*, *Paver* (*Valuation Officer*) v. *Standard Motor Co., Ltd.*, [1957] 3 All E.R. 222; 121 J.P. 543; [1957] 1 W.L.R. 958; 38 Digest (Repl.) 522, *284.*

Moon (*Lambeth Revenue Officer*) v. *L.C.C.*, [1930] All E.R. Rep. 63; [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 38 Digest (Repl.) 515, *256.*

Pritchard (*Cardiff Revenue Officer*) v. *William Lewis & Sons*, [1931] 1 K.B. 386; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 38 Digest (Repl.) 523, *286.*

Ritz Cleaners, Ltd. v. *West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; [1937] 2 K.B. 642; 106 L.J.K.B. 398; 157 L.T. 423; 101 J.P. 307; 38 Digest (Repl.) 521, *280.*

Sedgwick (*Camberwell Revenue Officer*) v. *Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] All E.R. Rep. 242; [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 38 Digest (Repl.) 523, *288.*

Toogood & Sons, Ltd. v. *Green*, [1932] All E.R. Rep. 309; [1932] A.C. 663; 101 L.J.K.B. 453; 147 L.T. 201; 96 J.P. 249; 38 Digest (Repl.) 520, *272.*

Turpin v. *Middlesbrough Assessment Committee & Bailey*, [1931] All E.R. Rep. 242; [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 38 Digest (Repl.) 520, *275.*

Wilkinson (*Taunton Revenue Officer*) v. *Sibley & Donovan*, [1931] All E.R. Rep. 187; [1932] 1 K.B. 194; 101 L.J.K.B. 26; 146 L.T. 1; 95 J.P. 208; 38 Digest (Repl.) 521, *278.*

Cases Stated.

The respondent ratepayers in the first case appealed by way of Case Stated against a decision of the Lands Tribunal (Erskine Simes, Esq., Q.C.) given on Sept. 21, 1959, and reported at (1959), 5 R.R.C. 326, in which it held (allowing the appeal of the valuation officer) that a hereditament comprising a laundry and premises, 15a, Finch Road, Handsworth, Birmingham, occupied by the ratepayers and assessed at £215 net annual value, £54 rateable value in the valuation list for Birmingham City under a decision of a local valuation court, was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The ground of the decision was that the hereditament was primarily occupied and used for the purposes of a retail shop. The ratepayers contended that the tribunal misdirected itself and was wrong in law in arriving at its decision and in particular in holding that the trade or business carried on at the hereditament was a retail trade or business within the meaning of s. 3, that there was a retail shop on the hereditament, that the hereditament was occupied and used and was primarily occupied and used for the purposes of a retail shop within that section, and that the factory on the hereditament was ancillary to the retail shop.

The hereditament comprised a laundry which was admittedly a factory within the meaning of s. 149 (1) of, and Sch. 6 to, the Factory and Workshop Act, 1901, as amended by the Factory and Workshop Act, 1907, s. 1. The percentages of total turnover attributable to the different ways of dealing with goods dealt with at the hereditament were as follows: Collected and delivered by vanmen, sixty-five per cent.; received from customers calling at a receiving office at Handsworth, seventeen per cent.; received from customers calling at the hereditament, eighteen per cent.

The appellant ratepayers in the second case appealed by way of Case Stated against a decision of the Lands Tribunal (Sir William FitzGerald, Q.C., President) given on Nov. 9, 1959, and reported at (1959), 5 R.R.C. 332, in which it held (dismissing the appeal of the ratepayers), that a hereditament comprising a laundry, garage and premises, 54-56, Holt Road, Fakenham, occupied by the ratepayers and assessed at £184 gross value, £150 rateable value in the valuation list for Walsingham Rural District, was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The ground of the decision was that the hereditament was primarily occupied and used for the purposes of a retail shop. The ratepayers contended that the Lands Tribunal misdirected itself and was wrong in law in holding that the hereditament was not an industrial hereditament, that the trade or business carried on at the hereditament was retail trade or business and in holding that the hereditament was occupied and used and was primarily occupied and used for the purposes of a retail shop.

The hereditament was occupied as a laundry and was a factory within the meaning of the Factory and Workshop Act, 1901, s. 149 (1) and Sch. 6, as amended by the Factory and Workshop Act, 1907, s. 1. The percentage turnover of each of the three departments into which the business of the hereditament was divided was as follows: United States Army Air Force contract 46.8 per cent.; van collection 45.4 per cent.; dry cleaning and customers' collection 7.8 per cent.

P. R. E. Browne, Q.C., for the ratepayers.

J. R. Willis, Q.C., and *J. R. Phillips* for the valuation officer.

LORD EVERSHED, M.R.: These two cases have raised questions of difficulty which I hope I may not unfairly describe as in some respects artificial. But, although the difficulties are there, we have reached a clear conclusion and have therefore thought that we could with advantage deliver our judgments at once.

Both cases relate to laundry businesses, the one at Handsworth, Birmingham, the other at Fakenham, Norfolk. The problem arises of applying the language of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, which provides:

> " In this Act the expression ' industrial hereditament ' means a hereditament . . . occupied and used . . . as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for . . . (b) the purposes of a retail shop."

Subsection (4) of the same section amplifies the meaning of the words " retail shop ":

> " In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:—. . . ' Retail shop ' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

Applying, therefore, the expansion of sub-s. (4) to the original language of sub-s. (1), one is left with this, that a hereditament which is used and occupied as a factory will cease to be an industrial hereditament for the purposes of the Act if it is primarily used for the purposes of a retail shop, including premises of a similar character where retail trade or business, including repair work, is carried on. This rather elaborate formula is not the same as if the subsection had said " if it is primarily occupied for the purposes of retail trade or business ", a point which is emphasised, as will later appear, by Lord Thankerton in *Toogood & Sons, Ltd.* v. *Green* (1). If that had been the intention, nothing would have been easier than to say so.

(1) [1932] All E.R. Rep. 309; [1932] A.C. 663.

A In order to discover what is meant by a factory or workshop one turns to the Factory and Workshop Act, 1901. Schedule 6 to that Act contains language which beyond any doubt covers premises used for a business such as this, viz., laundry work. It is therefore conceded that each hereditament is occupied and used as a factory or workshop. That, of course, is not conclusive: it still remains to be decided whether, being so occupied, the hereditament none the less is B primarily occupied and used for the purposes of a retail shop, etc.

Not long after it was passed the Act of 1928 gave rise to a great number of cases, a group of which came before the House of Lords in 1931. We have been referred to many of these cases and to passages from the speeches, particularly of VISCOUNT DUNEDIN. I take some comfort as a premise to what follows from two observations which VISCOUNT DUNEDIN made in those cases, the first in C *Sedgwick* (*Camberwell Revenue Officer*) v. *Camberwell Assessment Committee & Watney, Combe, Reid & Co.* (2):

> " Certain decisions will, it is hoped, prove of very general application, and so be of service to the local rating authority. But after all, the question is an individual one as to each particular hereditament."

D The other, from *Turpin* v. *Middlesbrough Assessment Committee & Bailey* (3) is an expression of an oft-cited principle:

> " The matter seems to me simply a question of attributing an everyday meaning to the words used in the definition ";

E LORD DUNEDIN is there referring to the definition that is here in question. Those citations do not carry the matter much further but they do at least justify what I suggest is the right approach, viz., first to consider these cases on their own facts and in deciding them to apply everyday meanings to everyday words, so far as one is not prevented by some previous decision.

Counsel for the appellant ratepayers has conceded in this court (though I F think I am right in saying he may wish to reserve the right to take another view hereafter) that the conduct of this laundry business is a retail trade or business. That is not the end of the matter, however, for I have already indicated that the definition contains two qualifications: first, the hereditament must be or contain a retail shop so called and understood, or premises of a similar character thereto, and, second, the hereditament must be primarily occupied and used for the pur- G poses of a retail shop. In these cases, I think, it is plain that there has at times been a conflict between what has been said to be a question of fact and what has been said to be a matter of law.

An instance where that conflict was referred to is *Wilkinson* (*Taunton Revenue Officer*) v. *Sibley & Donovan* (4). That case quarter sessions had decided as one purely of fact by saying that the hereditament consisted in part of a workshop and H in part of a shop properly so called; that as a fact the former was preponderant in scope and dimensions and, therefore, that the premises were not used primarily for the purposes of a retail shop. It was the view of this court, as expressed by SCRUTTON, L.J., that the decisions in the cases to which I have already alluded had made it necessary for the court in the circumstances of that case to hold, not as a matter of fact but as a matter of law, that there was one business carried on I on the hereditament and that it was what I will call a shop business, the workshop being ancillary to the shop premises more strictly so described. When the facts are found, it is a question of law to say whether or not they fall within the definition. But it still remains a question of fact to decide what is the nature of the business which is being carried on. It may be that had *Toogood's* case (5) been

(2) [1931] All E.R. Rep. at p. 251; [1931] A.C. at p. 465.
(3) [1931] All E.R. Rep. at p. 255; [1931] A.C. at p. 473.
(4) [1931] All E.R. Rep. 187; [1932] 1 K.B. 194.
(5) [1932] All E.R. Rep. 309; [1932] A.C. 663.

decided by the House of Lords before and not after SCRUTTON, L.J., delivered the judgment, he might somewhat have qualified his language.

I assume that the general nature of a laundry business will be commonly understood. With the Birmingham laundry two-thirds of the business conducted was done by way of vans with roundsmen, who called at the premises of the customers, collected the dirty laundry and in due course called again with the clean articles. However, a certain part of the business was done by customers calling personally at the laundry premises, leaving their belongings to be washed and later collecting them. It is the arrangements in relation to this last part of the business that constitute, if at all, a retail shop within the meaning of the definition. The burden of the argument for the respondent valuation officer is that, if the arrangements from the physical characteristics and the premises connected therewith qualify as a retail shop, then, since this is a single unified business, we cannot dissect it, as is said in some of the cases, and we must conclude that the whole laundry is really part of the shop business; i.e., one shop business.

The facts as regards the customers calling personally at the Birmingham laundry are illustrated for us both on a plan and by photographs. The laundry, though set back somewhat from the adjacent dwelling-houses, is situated in an area which is substantially residential. In the road, Finch Road or Gordon Road or at the junction of the two, there is a gateway and, against what appears to be a dwelling-house on the left as one approaches the gateway there is a small wooden lean-to structure on which are written in large and legible letters the words " Heathfield Laundry ". Proceeding through the gateway some little way up a drive or private approach and passing beyond a dwelling-house to the right one eventually comes to a space or passage where there is a basket up against the wall. Dirty laundry is thrown into the basket or, if the basket is full, one does the next best thing. When collecting it one follows the same route but turns to the left before reaching this yard and comes to a doorway with " Registered Office " written on it. In a passage on the right is a sliding window. If one knocks it will be opened and within it is a room occupied by a lady whose main function appears to be that of a book-keeper. In addition to the books which she is keeping she will commonly be encumbered by parcels from which the customer's parcel will be handed through the open window in return for a cash payment for services rendered.

That is a fair description of what is available to a customer wishing personally to call with his laundry and personally to retrieve it. The decision says (6):

> " The total staff employed at the laundry number twenty-three of whom one only is employed in the office numbered 3 [the office described]. She acts as book-keeper for the whole business but is also required to hand out clean laundry and collect money there from customers who call. She has nothing to do with the dirty laundry left by them, which is collected by the laundry staff from the basket where it is left and goes straight to the receiving office in the laundry. After washing, the laundry is packed and checked in the laundry and taken to the office numbered 3 to await collection by the customer."

Though the decision is not entirely precise on this matter, I understand (and I feel confident that I rightly understand) that the bulk of the laundry brought by vans is dealt with without the intervention at any stage of the lady in the office numbered 3, though no doubt as she keeps the books she has something to do with the accounts when delivered and paid.

At the Fakenham laundry, the arrangements for customers who wish to leave their laundry personally are even more casual. No basket is provided but, if one proceeds into the premises and knows the way, one will get to a room or office numbered 7 where there happens to be a concrete slab. One will not find

(6) (1959), 5 R.R.C. at p. 329.

A anybody there, but one will cast one's bundle on the concrete slab. On returning one goes to another adjoining room numbered 6, which in the plan is called "racking and packing". There will be no lady whose duty it is to deal with requests as in the Birmingham case, but, if fortunate, one will in due course be able to attract the attention of someone on the laundry staff who will probably find the clean bundle and one will take it away. The Case Stated says:

B

> "The appellant did not welcome the calling of customers at the hereditament, because of difficulties arising from lack of lists and names and from insecure bundling, and would have preferred to collect and deliver by van, but felt bound to accept this work, especially as his was the only laundry in or near Fakenham and some of these customers were unable to be at home when the vans called. Some of the customers also had special reasons for calling at the hereditament, e.g., that they had been out when the van called",

C

and therefore the laundry had not been collected. Previously the Case also states:

> "No receiving office was provided on the hereditament for customers who brought their laundry . . . such customers did not go to the office numbered 1",

D

and then the Case describes the operation of the casting of one's bundle on the cement slab.

> "No member of the appellant's staff supervised the intake of this laundry and no receipt or acknowledgment was given to these customers . . . Customers calling to collect clean laundry had to attract the attention of some member of the appellant's staff in the adjoining room (No. 6 on the plan) and ask her to find their bundles for them, and then pay her for the work done. It was not the duty or function of any particular member of the appellant's staff to collect this dirty washing from room No. 7 or to hand out this clean washing or to receive payment for it. There were not at any material time any notices or other directions indicating where customers should leave or collect laundry."

E

F

Another special aspect of the Fakenham laundry's work is described in para. (d) of the Case Stated. Not far from Fakenham there is a United States Army Air Force establishment of some considerable size, of which it is stated:

G

> "The United States Army Air Force base at Sculthorpe is about four miles from Fakenham, and in 1952 the appellant was granted a concession by the United States Air Force authorities to operate at the base, a building there was put at his disposal. The American personnel deliver their laundry and dry cleaning work to the appellant's staff in this building [i.e., at the air force base]. The appellant provides at the base a valet service and a quick-washing service for shirts and maintains there the necessary staff and machinery for these services; this, however, represents a small proportion of the work from the base, and the bulk of such work is brought by the appellant's vans to the hereditament for washing or cleaning. After washing or cleaning, the articles are taken back in the appellant's vans to the base and redelivered there to the customers."

H

I Then it is stated that payments are made by the American personnel in a particular way and I do not think that I need pursue that aspect of the matter.

In both the Birmingham and Fakenham cases the part of the business done for customers who personally call and leave and later collect their laundry is a small though not a purely minimal part of the whole. Arrangements of that kind are also done as a matter of practical business necessity. Not everyone can leave their house with staff in it to deal with the laundry van when it comes but, equally plainly (and as expressly found in the Fakenham case), I would

say that, though a business necessity, it is not something which the laundry welcome or encourage, or make any sort of attempt to expand.

Those are the relevant facts and the question which remains is twofold. The first problem is: can it be said that any part of the premises of these two laundries is being occupied and used for the purposes of a retail shop as those words have been expanded? In *Dolton Bournes & Dolton, Ltd.* v. *Osmond* (7), it was pointed out by this court that, although it was not necessary that the premises should look like a shop as that phrase is used when applied to premises in an ordinary shopping street, still there must be the characteristic that the public do resort to it and are invited so to do (see the judgment which I delivered (8)). That case (7) was perhaps an extreme one because it was made plain that the occupier discouraged the public from coming to the premises though the necessities of business prevented him from making it impossible that they should. The premises here, applying LORD DUNEDIN'S phrase "the everyday meaning" of ordinary words (9), would not be thought by anybody to be in the least like a shop. Indeed, so far as the tribunal is concerned, it concluded the matter in the way I have indicated in very plain terms. I take the Birmingham case where Mr. ERSKINE SIMES, Q.C., said this (10):

> "There is no doubt that in this case, as in *Dolton Bournes & Dolton, Ltd.* v. *Osmond* (7), applying the ordinary use of words and looking merely at the physical characteristics and appearance of the premises and their size no one would say that the hereditament was a shop or of the character of a shop."

But he then went on to say that he felt bound by authority, and particularly by *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee* (11) to conclude not only that it was a shop but that this was a case in which the premises were occupied and used primarily for the purposes of a retail shop. There is no doubt that the addition in the definition of the words "including repair work" has necessarily expanded the meaning of the word "shop" so as to cover premises which are not at all like the ordinary shop in a shopping street where one goes in to buy cigarettes or books or whatever it may be.

The group of cases which came before the House of Lords in 1931 included *Turpin* v. *Middlesbrough Assessment Committee* (12), which related to a hereditament used for the repair of motor cars, and the language used by VISCOUNT DUNEDIN in that case showed that the words "retail shop" must include premises where such repair work was done and where the public were invited to come and did come with their motor cars for repair. VISCOUNT DUNEDIN said (13):

> "I do not pause to inquire whether a person who does such repair work could not properly be said to be carrying on a retail trade or business. It may be that in strictness the words 'retail trade or business' are only applied with complete accuracy to cases of selling goods . . ."

Then he said that in the case before the House all doubt is removed by the express inclusion of the repair work, and he went on thus (13):

> "Nor do I agree with the view that has prevailed as to the effect of the words 'of a similar character'. For myself I am unable to state what are the physical features, the existence of which are essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows, but I am equally familiar with retail shops where no such

(7) [1955] 2 All E.R. 258. (8) [1955] 2 All E.R. at p. 263.
(9) [1931] All E.R. Rep. at p. 255; [1931] A.C. at p. 473.
(10) (1959), 5 R.R.C. at p. 330. (11) [1937] 2 All E.R. 368; [1937] 2 K.B. 642.
(12) [1931] All E.R. Rep. 242; [1931] A.C. 451.
(13) [1931] All E.R. Rep. at p. 255; [1931] A.C. at p. 473.

A features exist. In my opinion, it is not possible to say that the words ' of a similar character ', even if they include, are limited to, physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now, if we compare the hereditament here in question with a retail shop, do we find any common characteristics? I B think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein."

I have read that passage because it has been much relied on by the valuation officers to support a proposition put sometimes as broadly as this; that, if on C the premises in question there is a place to which the public can resort for the purpose of having particular services rendered, then there is there a retail shop. I venture to recall what VISCOUNT DUNEDIN had said only a few pages previously (14), that you must treat these decisions as relating to the particular facts of the particular cases. It is no doubt established in *Turpin's* case (15) (and has been followed recently in this court in *Meriden R.D.C.* v. *Standard Motor Co., Ltd.* (16)) D and it is now clear that premises where the public are invited to go and do go with their motor cars for repair will be treated as a retail shop. But I am unwilling and quite unable as a matter of the sense of the statutory language to say that it follows that, if once one finds on a hereditament a place, room, open space or what you will, to which the public can resort for services rendered, it therefore follows of necessity that there is a shop.

E Having referred to what LORD DUNEDIN said in *Turpin's* case (15), it will be convenient to refer to *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (17) decided at the same time, the speech in which shortly follows that which I have just read. That is undoubtedly of more direct importance to this case. The precise facts in *Finn* v. *Kerslake* (17) remain, to my mind, still a little obscure and it seems to me that judges in later cases have not always taken entirely the same view of F what the facts were. Broadly this much is clear. The hereditament was that of a baker. He had on the hereditament and as part of it a baker's shop well set up—a baker's shop in the ordinary everyday acceptance of that word. He also had behind it a bakery where he baked his bread and cakes, and it appears from what is stated in the lower courts that there was no direct access between the bakery and the shop. The question which we are now debating arose in that case: G Was this hereditament primarily used for the purposes of a retail shop? The House of Lords, reversing the view taken in this court, said that it was and again (because this is so much relied on by the valuation officers) I shall read a short passage from VISCOUNT DUNEDIN'S speech (18):

" In the present case, the hereditament is all occupied and used for the one trade or business, namely, a retail trade or business in bread and con- H fectionery "

—then LORD DUNEDIN continues with a phrase which, with the utmost possible respect, somewhat surprises me—

" for it cannot be doubted that the sale to hotels, clubs, restaurants, etc., is typical retail trade, and these sales, as also the orders given to roundsmen, I are just part of the ordinary business of a retail shop. Similarly, the bake-house at the back of the shop, which makes the goods for the retail business, is an ordinary part of a retail baker's shop, and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt,

(14) See [1931] All E.R. Rep. at p. 251, letter I; [1931] A.C. at p. 465.
(15) [1931] All E.R. Rep. 242; [1931] A.C. 451. (16) [1957] 3 All E.R. 222.
(17) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(18) [1931] All E.R. Rep. at p. 261; [1931] A.C. at p. 487.

on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop, and that there is no need to pray in aid any extended meaning given to 'retail shop' by the special definition in s. 3 (4)."

I have read that passage and I shall return to make a reference to it hereafter. In my judgment it cannot be said as a matter of law to follow from it, or that we are bound in this case to hold, that the mere fact of the presence on these two laundries of places to which the public can and in some degree do resort leads to the conclusion that all the laundry in each case is a retail shop within the expanded definition. I think, without in any way qualifying what LORD DUNEDIN said in the passage I have just read, that there is a question of fact to be decided, viz.: Is any part of this laundry at Heathfield used as a retail shop at all, and to pose and answer the same question as regards Fakenham.

As regards the Fakenham case, I feel in my mind no doubt at all that no part of the Fakenham laundry can, with any justice to the language used, be described as used for the purposes of a retail shop. From the passages which I have read it is plain, not only that the laundry proprietor by no means welcomes customers calling, but that there is nothing whatever which could be called an invitation to the public. One could only acquire the means of having one's laundry dealt with by personally calling as a result of experience or of being told by somebody how to do it. In my judgment, the same is true of the Heathfield laundry, though I agree in that case that there is perhaps a little more to be said for the view that the basket plus the passage and the window, which is opened by a particular lady on being called, has some of the characteristics which would be similar to a retail shop. But again I find a singular absence of anything which could be reasonably or sensibly called an invitation. I should have thought that one would inevitably have to inquire from somebody else in order to find out how one went about it if one wanted to leave one's laundry and later to collect it. I therefore take the view that nothing in the passages which I have read from the 1931 cases, nothing indeed in any of the authorities cited before us, compels us to hold that in either case here any part of the hereditament is used for the purposes of a retail shop. Applying the ordinary sense of ordinary language I do not think any part is so used.

If that is right, it is conclusive of the case. But if I am wrong there still remains the second problem posed by the definition: Are the premises *primarily* occupied and used for the purposes of a retail shop? And since the matter has been fully argued I think it right that I should also express my conclusion on the second problem.

Let me take now the Birmingham case; and if in truth the right answer is that this little passageway and its adjuncts should properly be treated, being part of the hereditament, as occupied and used for the purposes of a retail shop, still the exclusion from de-rating benefit applies only if the hereditament as a whole is primarily occupied and used for the purposes of a retail shop. The argument for the valuation officer has gone the length of saying this. When there is, as there is here, a single unified business (viz., that of a laundry) and when on part of the premises there is a shop or its equivalent, then one can no longer dissect the subject-matter being dealt with; the conclusion is inevitable as a matter of law that the whole hereditament is occupied and used for the purposes of a retail shop. It is submitted that, even though the conclusion appears entirely to make nugatory the use of the adverb " primarily ", still the decisions which bind this court compel the conclusion. Particularly it is suggested that the result follows from the *Ritz Cleaners* case (19) to which I have briefly alluded already, and further reliance is placed on *Finn's* case (20) which I have also mentioned, and the tailors' case, *Wilkinson* v. *Sibley & Donovan* (21).

(19) [1937] 2 All E.R. 368; [1937] 2 K.B. 642.
(20) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(21) [1931] All E.R. Rep. 187; [1932] 1 K.B. 194.

A It is true that in those cases one does get statements which at first blush seem to support the argument. SCRUTTON, L.J., said (22) that once there is a single business you cannot dissect it and that the workshop must, to use his language, be treated as ancillary to the trade or business. My first qualification on the prima facie effect of those words will be based on the later decision—that is later than *Wilkinson* v. *Sibley & Donovan* (23)—of the House of Lords in *Toogood* B *& Sons, Ltd.* v. *Green* (24). It related to a business, admittedly a retail business, of selling seeds which had to be prepared in various ways before sale. The bulk of the business was done direct with the customer by correspondence, the seeds being despatched through the post; but there was an arrangement and a place at which customers could call and buy their seeds from the hereditament and it was said that one or two such persons called every week. Nevertheless, the House C had no difficulty in concluding that, looked at sensibly, broadly and according to the facts of the case, it could not properly be said, notwithstanding the presence of this place of public resort, that the business, this single business, was conducted on premises which were primarily used and occupied for the purposes of a retail shop.

Reliance was placed on *Finn's* case (25) and on the conclusion expressed in the D passage in VISCOUNT DUNEDIN'S speech which I have read (26). But LORD THANKERTON, who delivered the leading opinion in the House, in the presence and with the assent of LORD DUNEDIN, said this (27):

> " I may pause here to point out, first, that the test, as laid down in *Moon* (*Lambeth Revenue Officer*) v. *L.C.C.* (28) [another of the 1931 cases] is as to what is done on the hereditament in question, irrespective of what is done E outside the hereditament, and, secondly, that the test is not whether the hereditament is mainly occupied and used for the purpose of ' a retail business ', but whether it is mainly occupied and used for the purposes of a ' retail shop '."

Then a little later (29) he takes up the argument presented on *Finn's* case (25):

F > " I observe a tendency in certain of the judgments in the courts below to put a wider construction than is justified on the views expressed in this House in *Finn's* case (25) whereas those views—e.g., as to dissection of a unified business—are expressly confined to the facts of that case. Admittedly, there was a retail shop on the hereditament in that case through which the whole production was disposed of."

G I think that, if that passage is read in conjunction with the passage in *Finn's* case (25) from LORD DUNEDIN'S speech, the conclusion is clear. There a retail baker's shop was being dealt with, what LORD DUNEDIN called an ordinary retail baker's shop, and once that conclusion had been reached it followed that the place where the bread was actually baked was part of the shop, an ancillary part of it. One applied the ordinary standard and said: Here is an ordinary H retail baker's shop and, as pointed out by LORD DUNEDIN, through that shop the whole production was disposed of. The fact that the greater part of the bread was sent by van to the customers and not actually disposed of over the counter of the shop no more derogated from the general proposition than would the fact, e.g., that goods ordered from Harrods Stores will be sent in Harrods' van to one's premises derogate from the fact that the whole of the business of I Harrods in Knightsbridge is that of a retail shop. I think that is fundamental

(22) [1931] All E.R. Rep. at p. 190; [1932] 1 K.B. at p. 200.
(23) [1931] All E.R. Rep. 187; [1932] 1 K.B. 194.
(24) [1932] All E.R. Rep. 309; [1932] A.C. 663.
(25) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(26) [1931] All E.R. Rep. at p. 261; [1931] A.C. at p. 487.
(27) [1932] All E.R. Rep. at p. 316; [1932] A.C. at p. 671.
(28) [1930] All E.R. Rep. 63; [1931] A.C. 151.
(29) [1932] All E.R. Rep. at p. 316; [1932] A.C. at p. 672.

to the conclusion in *Finn's* case (30) and the deductions which ought to be drawn from it, and it does not mean and cannot involve the result that the mere presence on the hereditament of a place to which the public may resort inevitably converts the whole of the hereditament into a retail shop or its equivalent, although the business is a single business.

It is not in doubt that the Birmingham laundry is one single unified business, a laundry in the ordinary sense. I should have thought, however, that it would be an absurdity and an offence against the language to say, when the facts of this laundry are borne in mind, that there is here an ordinary laundry " shop ". It is true that there is a place where the public can, if they are instructed or find out, personally call and leave their laundry. But it seems to me that that does not make this at all analogous to the ordinary baker's shop, which is what LORD DUNEDIN said was the subject-matter in *Finn's* case (30). In the passage already read from SCRUTTON, L.J. (31), there is left for consideration the case where there is a single business which may have on part of the hereditament and as an adjunct of the business a retail shop in the sense of being a place to which the public can go and buy goods or services if they want; but, as he said, what the result would be if the facts were as I have stated them is a question for further decision when it arises. Unless one is going to disregard and treat as no longer present the word " primarily ", one must, so it seems to me, in a case such as this still ask the question: Is the presence of this place of public resort, this so-called shop, such as to give the shop colour and character to the whole premises or is it a case in which you can fairly ask: Looking at the business as a whole, is it primarily one conducted for the purposes of that shop or is it not? And in my judgment on the facts of this case the answer plainly is: It is not primarily conducted as a retail shop and it is quite wrong to suggest that all that goes on on these premises, the laundry work and the rest of it (and particularly in the Fakenham case the United States Army Air Force work) is ancillary in any sort of sense to those parts of the premises where the public can call and can leave and collect their washing.

It only remains for me to refer, as I should do, to the *Ritz Cleaners* case (32), because it was so much relied on. It is stated as one of the facts (33):

> " The respondents, Ritz Cleaners, Ltd., were cleaners and dyers, and they had entered into occupation of the hereditament situate at No. 48, High Street, Uxbridge, on July 14, 1934, under a lease for twenty-one years from Mar. 25, 1934, at a yearly rental of £215. The hereditament in question was situated in a busy shopping street in Uxbridge and had the external appearance of a shop."

The Divisional Court concluded that quarter sessions had been justified in finding as a fact that what I will call the shop part of the business conducted through these premises in High Street, Uxbridge, was the less part of the business as a whole and therefore that the hereditament was not primarily used for the purposes of a retail shop. This court came to a different conclusion and there is undoubtedly to be found in the judgments in this court some support for this view, that once there is a unified business it cannot be dissected. But to my mind, when the case and the judgments are studied, it is fundamental to the decision of this court that the subject-matter, the business, was a shop business in its totality and that, if asked what business Ritz Cleaners, Ltd., were carrying on at 48, High Street, Uxbridge, one would say a dyers' and cleaners' shop; and that was supported by the view that apparently all the dyeing and cleaning material, the subject-matter of the business, the clothing which had to be dyed and cleaned, which had to be collected by vans (and it was a considerable proportion), still

(30) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(31) [1931] All E.R. Rep. at p. 190; [1932] 1 K.B. at p. 200.
(32) [1937] 2 All E.R. 368; [1937] 2 K.B. 642. (33) [1937] 2 K.B. at p. 643.

went through the shop in the ordinary sense of that word in 48, High Street, Uxbridge. GREER, L.J., in the leading judgment said (34):

> "The essential fact which, in my opinion, determines this appeal in favour of the assessment committee lies in the statement that the respondent company deals direct with members of the public, and does not work for any other firm. It seems to me immaterial whether the customers' goods come direct to the shop in the respondent company's vans, or whether they are delivered in depots or agencies on their way to the shop. The determining fact is that the order comes from a customer, and not from any merchant or distributing firm, and the delivery is made to the customer."

That passage was relied on by the tribunal as compelling it, in spite of its own conclusion of fact, to hold that here there was the same result—a place for the public to come, a retail business, a unified business and therefore one incapable of dissection. But, as is apparent from what follows, what GREER, L.J., was considering was whether this was retail trade or business at all; because he goes on (34):

> "I think this is just as much a retail trade or business as was the business of the baker's shop in *Finn's* case (35)."

Then later he said (36):

> "In *Finn's* case (35), it was decided that the fact that the vans in many cases took the products of the ancillary factory direct from that part of the hereditament which was a factory within the Factories Acts did not cease to make it merely ancillary to the work of the baker's shop . . . As they found that part of the premises constituted a retail shop, they ought to have gone on to consider whether the factory was used for any purposes other than supplying the cleaned and mended goods to the shop, for re-delivery to the customers."

He concluded that the answer was—that was exactly what and only what the factory did; it was used for no other purpose than supplying the cleaned and mended goods to the shop. That test, if applied to the present case, could not possibly be satisfied. It would be quite untrue to say that the laundry premises as a whole were used for no other purpose than supplying the cleaned laundry to that part of the premises where customers could, if they wished and had been directed, go and collect it.

Similarly as I think, SLESSER, L.J., said (37):

> "So in the present case, on the facts, seeing that all the goods to be treated by way of cleaning or repair are brought to and despatched through the shop, either by or to customers direct, or by the agency of vanmen, as in *Finn's* case (35), and receiving stations, the business of cleaning and repairing is as much ancillary to the purposes of the shop as was the cleaning and repairing in the case of the garage in *Turpin's* case (38)."

GREENE, L.J., in a useful passage, after citing the language of the section, says (39):

> "It is not sufficient that retail business is carried on upon the premises, if the premises are not a shop, or similar to a shop. Now, the essential element in a shop is that people can shop in it. If a concern conducts its business entirely by mail-order, and does not invite the public to come to

---

(34) [1937] 2 All E.R. at p. 372; [1937] 2 K.B. at p. 664.
(35) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(36) [1937] 2 All E.R. at p. 373; [1937] 2 K.B. at p. 665.
(37) [1937] 2 All E.R. at p. 375; [1937] 2 K.B. at p. 669.
(38) [1931] All E.R. Rep. 242; [1931] A.C. 451.
(39) [1937] 2 All E.R. at p. 377; [1937] 2 K.B. at p. 671.

its premises to buy, or provide accommodation for them, the premises from which its business is conducted are not a shop, even though its business be entirely retail in character . . ." A

Then he refers to *Toogood's* case (40). He later proceeds (41):

" This is not a case where a defined portion of the hereditament is allocated to one user exclusively. The user of the whole hereditament is user for the purposes of a retail shop, since every part of it is used for those purposes." B

Finally, at the very end (42):

" The whole of the business is shop business, conducted from and by the shop, and that, in my judgment, disposes of the matter." C

So, as I read the real ratio of this court's decision in the *Ritz Cleaners* case (43), it can be stated thus; that, when one looked at the facts found as to how the business was done, the truth was that the hereditament was a hereditament used only for the purposes of a retail dyers' and cleaners' shop, just as the hereditament in *Finn's* case (44) was used exclusively as an ordinary bakery shop. If that is right, then it follows no doubt that the dyeing and cleaning machines become D necessarily ancillary to the main purpose, viz., that of the shop. In this case those tests cannot by any possibility be sensibly applied in the same sense. On the facts of the case it would appear to me quite impossible to say that either of these laundries could be sensibly described as laundry shops and that their business could be so called. The most that you can say is that there is available means for the public at some part to resort, though without any real invitation. It is no E less clear to my mind that the laundry business carried on is not carried on as part of a shop conducted from and by the shop or, in the language of GREER, L.J., in that case, used for no other purpose than supplying cleaned goods to what I will assume to be the shop part of the laundry premises.

For those reasons in my judgment this appeal succeeds, and with all respect to the Lands Tribunal—I refer now particularly to the decision of ERSKINE F SIMES, Esq., Q.C. (45)—I do not think he was compelled by the *Ritz Cleaners* case (43) and the other cases to hold contrary to his own expressed view that here the hereditament was used primarily and indeed exclusively for the purposes of a retail shop.

HARMAN, L.J.: The practice of these two laundries is typical of the normal G type of business of their kind; they send out vans which collect washing from householders up and down the neighbourhood, convey it to the laundry and deliver it again when washed. In modern conditions, however, people are not always in their houses nor do they have any domestic help, and therefore each of the laundries found it as a matter of business necessary to suffer such persons to come to the laundry premises and, so to say, dump their washing there instead H of putting it on the van, and similarly, instead of receiving it by the van when clean, to go to the premises and find someone to let them have their washing back.

I cannot see that there was any invitation to the public in either case. Business conducted as last described was merely a commercial necessity, but this fact has been seized on by the valuation officers in the two cases to suggest that I though these laundries are on the face of them industrial hereditaments, being workshops within the meaning of the Factory and Workshop Act, 1901, as they

(40) [1932] All E.R. Rep. 309; [1932] A.C. 663.
(41) [1937] 2 All E.R. at p. 378; [1937] 2 K.B. at p. 673.
(42) [1937] 2 All E.R. at p. 379; [1937] 2 K.B. at p. 674.
(43) [1937] 2 All E.R. 368; [1937] 2 K.B. 642.
(44) [1931] All E.R. Rep. 242; [1931] A.C. 457. (45) (1959), 5 R.R.C. 326.

clearly are, yet they are excepted by the proviso as being primarily used for the purposes of retail shops. As the member of the tribunal who decided the Heathfield case observed, no one would say that the hereditament was a shop or of the character of a shop, but then sliding slowly down the slippery path of authority, though well aware that the hereditament is not of the character of a shop, still less primarily used for that purpose, he feels constrained to reach a conclusion which his common sense tells him is ridiculous.

Now this is an abuse of authority. I do not say we have not all found ourselves constrained by authority to come to conclusions which we distrust, but, when authority leads a man to such a conclusion, he ought to pause and say: Is there not something wrong? The law cannot, as Serjt. Snubbin said, be such a hass as that. Of course all these cases in the end depend on facts which are slightly different. None of them, therefore, should be used as a kind of bed of Procrustes into which you thrust the facts and, if some facts do not fit, you lop them off. Authority is not meant to be that kind of instrument; it is meant to be a guide. Get the facts right and you will usually find that the law fits in.

The essential difference between this case and the two authorities which are said to point the other way, so it seems to me, is one which in the end depends entirely on the facts. Both in *Finn* v. *Kerslake* (46) and in *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee* (47) the court reached this conclusion in the end, that on the facts of the case the whole hereditament was used for the purposes of a retail shop. If that were so, the fact that there were parts of it behind which had no immediate connexion with the shop in front, but which existed for supplying the needs of the shop, did not, of course, make the whole hereditament an industrial rather than a commercial hereditament, and the question about the word " primarily " did not arise, because there was only one business, viz., a shop business to which the whole hereditament was devoted.

I do not venture on the dissection of the authorities which my Lord has made. I agree with his analysis, but I do enter my small protest against the artificiality which seems to afflict particularly rating cases where amongst a sandstorm of authorities words may be found which can be marshalled to support almost any broad proposition. What one needs to do, if I may say so, is to look very carefully at the particular facts of the particular case, and the result will usually, though not perhaps always, be found consonant with the dictates of common sense. JENKINS, L.J., in *Dolton Bournes & Dolton, Ltd.* v. *Osmond* (48) after stating what the question was and citing the definition of retail shop said (49):

> " The question therefore is whether the hereditament is primarily used for the purposes of a retail shop or for the purposes of any premises of a similar character where retail trade or business is carried on. These words, relatively simple and ordinary words as they are, have been the subject of much judicial discussion, and various attempts have been made to arrive at definitions or expositions of their meaning; but I hope I will not be disrespectful to the learned authors of various observations on the meaning of this language if I say that to my mind the most helpful observation, in all the wealth of authority to which our attention has been directed, appears in the speech of LORD DUNEDIN in *Turpin's* case (50), in the passage to which my Lord has already referred, where he said (51): ' My Lords, the

(46) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(47) [1937] 2 All E.R. 368; [1937] 2 K.B. 642. (48) [1955] 2 All E.R. 258.
(49) [1955] 2 All E.R. at p. 266. (50) [1931] All E.R. Rep. 242; [1931] A.C. 451.
(51) [1931] All E.R. Rep. at p. 255; [1931] A.C. at p. 473.

matter seems to me simply a question of attributing an everyday meaning to the words used in the definition '. One must therefore consider the facts and apply an everyday meaning to the words used in the definition, and see whether that everyday meaning, applied to those facts, results in the conclusion that the hereditament is being ' primarily occupied and used for the purposes of a retail shop ', including in that expression what is included by the definition clause."

In that case the court reached a conclusion on the facts which, if I may say so, was consonant with reason. The Lands Tribunal in these cases, in my judgment, has reached conclusions contrary to reason and I am glad to think that the authorities do not compel any such lamentable upshot. I would allow the appeals.

DONOVAN, L.J.: I agree. In the case of a unified retail business (which I take to mean the same thing as a single retail business) where the whole of such business is physically done in the shop or otherwise done through the medium of the shop, it is easy to see that no question can arise whether the hereditament is primarily occupied and used for the purposes of a retail shop. Ex hypothesi it will be wholly so occupied and used. This hypothesis in my opinion is the foundation of the decision in *Finn* v. *Kerslake* (52) and *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee* (53). It does not exist here because, even assuming there was a " shop " in either of these two cases, only a small fraction of the business is done in the supposed shop or otherwise done through the medium of it. I think these two cases are of the kind that SCRUTTON, L.J., envisaged in *Wilkinson* v. *Sibley & Donovan* (54) as still to be decided, namely, a factory where a small portion of the output is sold in a small shop on the same hereditament, but the bulk of it is disposed of otherwise. In such a case the primary purpose of the occupation and use falls to be determined, I think, as a question of fact. In both the present cases the answer would clearly be that the premises were not primarily occupied and used for the purposes of a retail shop. I, therefore, concur in the conclusion that these appeals should be allowed.

Appeals allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Linklaters & Paines* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

(52) [1931] All E.R. Rep. 242; [1931] A.C. 457.
(53) [1937] 2 All E.R. 368; [1937] 2 K.B. 642.
(54) [1931] All E.R. Rep. 187; [1932] 1 K.B. 194.

INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER) AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker, and Lord Denning), October 17, 18, 19, 20, November 22, 1960.]

Rates—Exemption—Scientific society—"Purposes of science . . . exclusively"—"Development of mechanical engineering"—"Annual voluntary contributions"—Subscriptions of members—Advantages of membership of organisation of professional men—Whether subscriptions were "voluntary" subscriptions—Scientific Societies Act, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.

By its charter, the object and purpose of the Institution of Mechanical Engineers was " . . . to promote the development of mechanical engineering and to facilitate the exchange of information and ideas thereon and for that purpose: (A) To encourage invention and research in matters connected with mechanical engineering and with this object to make grants of money or books or otherwise to assist such invention and research. (B) To hold meetings of the institution for reading and discussing communications bearing upon mechanical engineering or the application thereof or upon subjects relating thereto. (C) To print publish and distribute the proceedings or reports of the institution or any papers communications works or treatises on mechanical engineering or its application or subjects connected therewith. (D) To co-operate with universities, other educational institutions and public educational authorities for the furtherance of education in engineering science or practice. (E) To do all other things incidental or conducive to the attainment of the above objects or any of them". The institution was supported in part by the subscriptions of members who received the institution's publications free of cost. Members were entitled to use appropriate initials after their names, according to which grade of membership they belonged. The institution claimed exemption from rates as being a society falling within the Scientific Societies Act, 1843, s. 1*.

Held: the institution was not exempt from rates under s. 1 of the Scientific Societies Act, 1843, for the following reasons—

(i) the institution was not instituted for the purposes of science exclusively because (a) the object of promoting "the development of mechanical engineering" covered (per VISCOUNT SIMONDS, LORD RADCLIFFE and LORD TUCKER; LORD REID concurring) all activities which encouraged its growth as a science, an art, an industry or profession (see p. 718, letter I, p. 721, letter C, p. 725, letter E, p. 727, letter I, and p. 725, letter B, post); and (b) if regard were had to the present activities of the institution (as, per LORD DENNING, it must be had) the institution was much concerned with the profession and with professional standards of skill and integrity, with education, and with the industry of mechanical engineering (see particularly p. 730, letter D, and p. 727, letter F, post).

(ii) the institution was not supported wholly or in part by voluntary contributions because the professional and industrial advantages accruing to members at the present time from membership of the institution were sufficiently substantial in the present case (the question being in each case one of degree) to cause the subscriptions of members not to have the character of gratuitous payments, and there was nothing to show that the subscriptions were paid from disinterested motives (see p. 720, letters B to F, p. 725, letter A, p. 728, letter A, and p. 730, letter E, post).

Savoy Overseers v. *Art Union of London* ([1896] A.C. 296) applied.

Dicta of JENKINS, J., in *Battersea Metropolitan Borough* v. *British Iron & Steel Research Assocn.* ([1949] 1 K.B. at p. 457) and of SIR RAYMOND

* Section 1 is set out at p. 717, letter G, post.

EVERSHED, M.R., in *O'Sullivan* v. *English Folk Dance & Song Society* ([1955] 2 All E.R. at p. 853) approved. A

Inland Revenue Comrs. v. *Forrest* ((1890), 15 App. Cas. 334) considered.

St. Anne (Churchwardens) v. *Linnean Society* ((1854), 3 E. & B. 793) distinguished.

Per LORD RADCLIFFE and LORD DENNING: the word " instituted " in s. 1 of the Act of 1843 should be read as referring to the institutional purposes B of a society, not solely to the historic occasion of the society's foundation, so that the present purposes of the society could be considered (see p. 725, letter H, and p. 729, letter G, post).

Decision of the COURT OF APPEAL ([1960] 1 All E.R. 129) affirmed.

[Editorial Note. There was not a majority of opinions on the question C whether regard should be had solely to the written charter, or constitution, in determining whether an institution was instituted for the purposes of science, etc., exclusively. VISCOUNT SIMONDS and LORD TUCKER were of opinion that regard should be so limited, but LORD REID included also the circumstances when the charter was granted, and LORD RADCLIFFE expressed a preference for the reading of s. 1 of the Act of 1843 stated at letter B, above, and did not D state an opinion on this point. LORD DENNING took the view that, in the cases of a body incorporated by charter and of an unincorporated society, regard should be had to the present purposes of the corporation or society. On the second question, however, whether subscriptions were voluntary, there was a concurrence of opinion that the regard should be had to the current position, though not to the motives of individual subscribers as distinct from E the generality of members.

As to the exemption of scientific societies from rates, see 24 HALSBURY'S LAWS (3rd Edn.) 337, para. 666; and for cases on the subject, see 38 DIGEST (Repl.) 578, 588, *602-669.*

For the Scientific Societies Act, 1843, s. 1, see 14 HALSBURY'S STATUTES (2nd Edn.) 7.] F

Cases referred to:

Ashbury Railway Carriage & Iron Co. v. *Riche,* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; *varying* sub nom. *Riche* v. *Ashbury Railway Carriage Co.,* (1874), L.R. 9 Exch. 224; 13 Digest (Repl.) 269, *947.*

Battersea Metropolitan Borough v. *British Iron & Steel Research Assocn.,* G [1949] 1 K.B. 434; [1949] L.J.R. 646; 38 Digest (Repl.) 582, *627.*

Inland Revenue Comrs. v. *Forrest,* (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest (Repl.) 582, *626.*

Institute of Fuel v. *Morley (Valuation Officer),* [1955] 3 All E.R. 843; [1956] A.C. 245; 120 J.P. 39; [1956] 2 W.L.R. 64; 38 Digest (Repl.) 582, *623.*

O'Sullivan v. *English Folk Dance & Song Soc.,* [1955] 2 All E.R. 845; 119 H J.P. 484; [1955] 1 W.L.R. 907; 38 Digest (Repl.) 581, *622.*

Purvis v. *Traill,* (1849), 3 Exch. 344; 18 L.J.M.C. 57; 12 L.T.O.S. 379; 13 J.P. 219; 154 E.R. 876; 38 Digest (Repl.) 585, *634.*

St. Anne (Churchwardens) v. *Linnean Soc.,* (1854), 3 E. & B. 793; 118 E.R. 1338; sub nom. *R.* v. *Linnaean Soc. of London,* 23 L.T.O.S. 186; 18 I J.P. 504; sub nom. *Linnean Soc. of London* v. *St. Anne's, Westminster (Churchwardens & Overseers),* 23 L.J.M.C. 148; 38 Digest (Repl.) 580, *614.*

Savoy Overseers v. *Art Union of London,* [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; *revsg.* sub nom. *Art Union of London* v. *Savoy Overseers,* [1894] 2 Q.B. 609; 38 Digest (Repl.) 587, *653.*

Sutton Hospital Case, (1612), 10 Co. Rep. 23a; Jenk. 270; 77 E.R. 960; 8 Digest (Repl.) 502, *2223.*

Appeal.

Appeal by the Institution of Mechanical Engineers from an order of the Court of Appeal (HODSON and ORMEROD, L.JJ., and WYNN-PARRY, J.), dated Dec. 1, 1959, and reported [1960] 1 All E.R. 129, allowing the appeal of the respondents, the valuation officer and the rating authority, against a decision of the Lands Tribunal (SIR WILLIAM FITZGERALD, President), given on Mar. 11, 1958 ((1958), 3 R.R.C. 155). The appellant institution was the occupier of a hereditament described as " Professional institution offices and premises (including basement, ground, first and second floors of 2/4, Old Queen Street and second and third floors of 6, Old Queen Street) ", 1, Birdcage Walk and 5, Storey's Gate, Westminster, assessed at £6,000 gross value, £4,997 rateable value in the valuation list for Westminster City. It appealed to the Lands Tribunal against a decision confirming the assessment given by a local valuation court of Central London Local Valuation Panel on Aug. 9, 1956.

B. J. M. MacKenna, Q.C., F. A. Amies and *N. D. Banks* for the appellant institution.

Maurice Lyell, Q.C., and *P. R. E. Browne, Q.C.*, for the respondent valuation officer.

R. W. Bell for the respondent rating authority.

Their Lordships took time for consideration.

Nov. 22. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the question raised in this appeal is whether the appellants, the Institution of Mechanical Engineers, whom I will call " the institution ", are entitled in respect of their occupation of certain premises at 1, Birdcage Walk and 5, Storey's Gate in the City of Westminster to exemption from rating under s. 1 of the Scientific Societies Act, 1843. The Lands Tribunal (1), reversing a decision of the local valuation court, held that they were so entitled, but, on Case Stated, the Court of Appeal allowed the appeal of the valuation officer and the Corporation of the City of Westminster and restored the assessment to the valuation list. From the decision of the Court of Appeal which thus denied exemption, the institution appeals to this House. I entertain no doubt that the appeal must be dismissed, but it is not easy to formulate the grounds of dismissal without using language that may be applied to circumstances which I have not in mind and do not intend, at least without further consideration, to cover.

I will first set out the relevant section. It is as follows:

> " [1.] . . . No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate, as hereinafter mentioned."

On this section, two questions arise, (a) whether the institution was instituted for purposes of science, literature or the fine arts exclusively, and (b) whether, if it was so instituted, it is supported wholly or in part by annual voluntary contributions. If both these questions were answered in the affirmative, it would be necessary to consider also a third question, whether the premises are

(1) (1958), 3 R.R.C. 155.

in fact occupied by the institution for the transaction of its business and the carrying into effect of its purposes. It is not, however, necessary to decide this question and I abstain from doing so, for I am not satisfied that it has been fully considered in all its aspects.

On the first question, which can be reduced to asking whether the institution was instituted for purposes of science exclusively, it is the charter that must be looked at first and last. I see no reason to suppose that it is necessary or legitimate to look at subsequent conduct in order to construe its language. That language is plain enough, and I decline to apply the rule of contemporanea expositio to a royal charter of the year 1930. In the charter, the objects and purposes of the institution are thus stated:

> " 7. The objects and purposes for which the institution is hereby constituted are to promote the development of mechanical engineering and to facilitate the exchange of information and ideas thereon and for that purpose:
>
> " (A) To encourage invention and research in matters connected with mechanical engineering and with this object to make grants of money or books or otherwise to assist such invention and research.
>
> " (B) To hold meetings of the institution for reading and discussing communications bearing upon mechanical engineering or the application thereof or upon subjects relating thereto.
>
> " (C) To print publish and distribute the proceedings or reports of the institution or any papers communications works or treatises on mechanical engineering or its application or subjects connected therewith.
>
> " (D) To co-operate with universities, other educational institutions and public educational authorities for the furtherance of education in engineering science or practice.
>
> " (E) To do all other things incidental or conducive to the attainment of the above objects or any of them."

The charter also provided for the government of the institution and for membership of it. There were to be two classes, namely, members and associate members, to be known collectively as corporate members, and there were to be also honorary members, companions, associates, graduates and students, to be known collectively as non-corporate members. Members were to be entitled to the use after their name of the initials " M.I. Mech. E.", associate members of " A.M.I. Mech. E.", and so on through the grades. I need refer to nothing else in the charter, except to say that the corporate members were empowered to make bye-laws for the regulation, government and advantage of the institution, its members and property, and for the furtherance of its objects and purposes as therein mentioned.

I ask, then, at once whether this institution was instituted exclusively for purposes of science. It must first be noted that nothing could have been easier than to say so, but the vital word was not said; an omission the more noteworthy when it is observed that, in comparable institutions which have been before the courts, prominence has been given to the word. In the whole of cl. 7 of the charter which I have set out, the word " science " occurs once only, and then in the phrase " education in engineering science or practice ", where the collocation of " science " and " practice " indicates their distinction and the dual character of the education to be given. So far as " mechanical engineering " connotes scientific work, it must, since it can be described as applied science, involve art and practice also. It is necessarily experimental. But that does not mean that it is exclusively scientific. On the contrary, I think that, according to the ordinary use of language, the " development of mechanical engineering " is a phrase apt to cover all the activities which encourage its growth as a science, an art, an industry or a profession. It is at least satisfactory, though I do not invoke the conduct of the institution as an aid to the interpretation of its charter to find that no less wide a permitted range of activities would

justify all that it has done. A number of cases were cited to us. Some arising out of the Act we are now considering, others out of the relevant Income Tax Act, in which somewhat similar institutions have obtained the benefit of exemption from rates or income tax, as the case might be. I do not propose to burden your Lordships by a citation and examination of them as we are affirming the judgment of the Court of Appeal and I am content to adopt as my own that part of the judgment which dealt with them. Each case must be decided on the language of its constitutive instrument. Some cases must be near the line, and I should, myself, have found some difficulty in concurring in all the decisions that have been given. But the present case is not, I think, near the line but, on the contrary, is one in which the structure of the institution, its avowed purposes and its actual practice place it altogether outside the scope of the Act. I reject the idea that the legislature intended the neighbours of such a society to bear the burden of rates which it did not share.

There, my Lords, I might leave the matter, for the first condition of exemption is not satisfied. But your Lordships heard so much argument on the second question, viz., whether the institution is supported wholly or in part by annual voluntary contributions, that I ought not to neglect it altogether. If I say a few words, I do so with little hope of reconciling past pronouncements, some of them of the highest authority. In the present case, the Lands Tribunal dealt with the matter very shortly. It found as a fact that the income of the institution was some £168,000, of which about £138,000 represented annual subscriptions and that the cost of the issue to members of the publications " The Chartered Mechanical Engineer " and " Proceedings " represented about thirty per cent. of this amount and then proceeded (2):

> " In the numerous cases which have come before it, this tribunal has held that subscriptions do not cease to be voluntary because the subscribers obtain the publications of the society free or at a reduced rate unless the value of the publications approximates closely to the amount of the subscriptions. I do not regard thirty per cent. as anywhere near approaching the limit the tribunal has set as adequate to deprive the contribution of a claim to be voluntary, and I hold that the subscriptions here are voluntary within the meaning of the Act."

With great respect to the learned tribunal, I cannot regard this as a satisfactory way of dealing with this aspect of the case, though I can well understand the desirability of having some sort of yardstick. I doubt whether the judgment shows a correct appreciation of the value of the benefit derived by members from the free distribution of the publications. As I read the evidence, the average value to each member of the publications received free by him was a very small sum. But I do not think that the issue turns only on this factor. It is at this point that the matters which I disregarded for the purpose of construing the charter become relevant. At once there is seen to be a glaring distinction between this institution and such societies as the Linnean Society, which I take as typical because it was so much discussed in argument and was adjudicated on over one hundred years ago: see *St. Anne* (*Churchwardens*) v. *Linnean Society* (3). In that case, as in this, the members got free copies of the transactions, but in that case that was the only recorded benefit. It was clearly possible to regard the subscription of a member as voluntary, that is as gratuitous, notwithstanding that he got this incidental advantage, though it might be difficult to reconcile this view with every word that fell from LORD MACNAGHTEN and LORD WATSON in *Inland Revenue Comrs.* v. *Forrest* (4) and *Savoy Overseers* v. *Art Union of London* (5). In the former of these cases, it was not the Act of 1843 but the Customs and Inland Revenue Act, 1885, that was under review, and it was clearly the view of LORD MACNAGHTEN (6) that advantages that would

(2) (1958), 3 R.R.C. at p. 164.
(3) (1854), 3 E. & B. 793.
(4) (1890), 15 App. Cas. 334.
(5) [1896] A.C. 296.
(6) (1890), 15 App. Cas. at p. 354.

not count against exemption for the purpose of the latter Act would be a formidable objection under the earlier. I do not, however, think that it would be right in view not only of the *Linnean Society* case (7) but of the many other cases that were cited to us to regard the free distribution of the publications of the institution, at whatever sum that may be quantified, as by itself disentitling the institution to exemption.

But, my Lords, that is by no means the end of the matter, though the Lands Tribunal did not think any other benefit worth mentioning. If the question is asked: "Is a member's subscription a gratuitous contribution in the sense in which a subscription to a hospital can be so described?" or, put the other way round: "Is it from the material point of view worth while for a man who intends to pursue the profession of a mechanical engineer to become a member? Does he get any material benefit of it?", the answer seems quite plain. Here is a great professional organisation whose numbers in 1955, the last year for which I have seen the annual report, included approximately five thousand members, twenty thousand associate members, fifteen thousand graduates and five thousand students. Why did they join? It is this that matters. As LORD MACNAGHTEN pointed out in the *Art Union* case (8), the purpose of the society is one thing, the object of the members in joining it is another. What is that object? My Lords, it appears to me to strain credulity too far to claim that members, associate members, companions, graduates and students or any one or more of these classes of corporate or non-corporate members pay their annual subscriptions in a spirit of altruism and without regard to the advantages that they obtain from membership. "Do you not think," Professor Saunders (9) was asked, "the benefits are such that it is worth somebody's while to join the institution if he is a mechanical engineer?", to which he gave the only possible answer: "Yes". It is a question which can only be surveyed objectively; for it is clearly impossible to examine and cross-examine forty thousand persons about their motives in joining the institution. The benefits are largely intangible, for I am disregarding the receipt of free copies of publications. I will mention one advantage which alone seems to place the annual subscription outside the range of gratuitous offerings. I refer to the right to use the initials which indicate membership of the institution. There may well be societies, learned societies not connected with any particular profession, membership of which confers the right to the use of initials, yet no material benefit is thereby conferred. But where, as in the present case, the institution is associated with a particular profession and the use of initials indicates the attainment of certain qualifications, it is not to be believed that a material benefit is not derived from it. In the annual report for 1955, I find it said that

> "The correct use of the institute's initials of membership is a matter of grave concern to members and it is on their vigilance and co-operation that the institution must mainly depend for information concerning instances of misuse."

I do not think that this proper care for the privileges of members is inspired by any desire to protect the fair name of science. It recognises that members have paid for and won a valuable right which should not be depreciated by unauthorised use. It is, in fact, part of the professional equipment of a mechanical engineer; its acquisition is (to use a hackneyed phrase) a matter of business not of bounty. If I select this material advantage to discuss at some length, it is not because there are not many other advantages of membership, each one, perhaps, trivial in itself but the sum of them amounting to substantial benefit. I would again select one fact which, though truly it may be described

(7) (1854), 3 E. & B. 793. (8) [1896] A.C. at p. 313.
(9) Dean of Engineering and head of the department of mechanical engineering and Professor of Mechanical Engineering at the Imperial College of Science at the University of London.

(and was described by the tribunal) as a minor activity, yet indicates how far from the realm of pure science or even applied science the institution may travel and how carefully to their great advantage it regards the material interests of its members. I refer to the publication of a model form of conditions of contract, which it recommends to them. Considering this and other matters which were brought to our notice, I can come to no other conclusion than that the institution in a number of ways had regard to the material interests of its members, and that its efforts were recognised by them. I must altogether dissent from the contention urged on us by counsel for the institution that, if it can be assumed—a doubtful assumption—that its object was altruistic, the presumption must be made that its members were inspired by the same motive.

My Lords, I have said little of the numerous authorities that were cited to us. As I have already said, I wish to add nothing to what has been said by the Court of Appeal about those that bore on the first part of the case. The question can only be answered by reference to the constitutive document if there is one, as there invariably is, and the answer must depend on the construction of that document. I find in the authorities no principle of construction which impels me to say that this institution is instituted for scientific purposes exclusively.

On the second question, there is more difficulty. In *Savoy Overseers* v. *Art Union of London* (10), language was used in this House which was on one side interpreted as meaning that any benefit received by a member prevented his subscription being voluntary and on the other as meaning that it was voluntary unless the member received its full equivalent in money or money's worth. Both views depend on an unjustifiable detachment of words from their context. The truth lies between them and is not capable of scientific precision. It is, as SIR RAYMOND EVERSHED, M.R., said in *O'Sullivan* v. *English Folk Dance & Song Society* (11), a question of substance and degree. Saying this, he echoed what JENKINS, J., had said in *Battersea Metropolitan Borough* v. *British Iron & Steel Research Assocn.* (12). I will allow myself some further, perhaps desultory, observations on the authorities. Care must be taken to distinguish between cases on the Act of 1843 and those on the Customs and Inland Revenue Act, 1885. In the former but not in the latter the voluntary character of contributions is an expressly relevant consideration. It is, therefore, essential to regard observations in the latter class of case to the effect that the incidental advantages of members do not deprive an institution of its claim to exemption from income tax as irrelevant to the question whether the subscription of a member is voluntary. And I would observe in regard to *Institute of Fuel* v. *Morley* (13) (a rating case) that there the voluntary character of members' subscriptions does not appear to have been in issue. The sole question was whether the institute was instituted for the purposes of science exclusively. This House came to the conclusion that it was. It did so on a consideration of the institute's charter, and the decision no doubt is relevant to what I have called the first question in this appeal, so far at least as the construction of one document is relevant to the construction of another. But, for the reason that I have stated, it has no bearing on the question of the voluntary character of members' contributions.

The appeal should, in my opinion, be dismissed with costs.

LORD REID: My Lords, the appellants, the Institution of Mechanical Engineers, claim exemption from local rates under the Scientific Societies Act, 1843. Two questions arise, first, whether they are a scientific society within the meaning of that Act, and secondly, whether they satisfy the proviso to s. 1 of the Act. The latter raises a question of general importance. I agree with the decision of the Court of Appeal but on rather different grounds and I shall, therefore, state my own view. The proviso is in the following terms:

(10) [1896] A.C. 296.
(11) [1955] 2 All E.R. at p. 853.
(12) [1949] 1 K.B. at p. 457.
(13) [1955] 3 All E.R. 843; [1956] A.C. 245.

" . . . provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members . . ."

The argument turned on the meaning of " annual voluntary contributions ", and on the proper interpretation of the speeches in this House in *Savoy Overseers* v. *Art Union of London* (14). In that case, the contributions which were alleged to be " voluntary " were the subscriptions of the members who received in return a variety of pictures, busts and prizes. LORD HALSBURY, L.C., said (15):

" It hardly admits of debate that the Art Union gives to every subscriber full value for his money. The document published by the Art Union itself appears to establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to if not beyond the amount he has subscribed. I cannot therefore regard this as a voluntary contribution; it is a prudent and well-rewarded investment."

But the ratio decidendi is said to go far beyond that, and to establish that contributions are not voluntary unless they are given without receiving anything in return, as gratuitous offerings for the benefit of others. That would be a perfectly clear and very far-reaching decision. It would mean that members' subscriptions can rarely be regarded as voluntary contributions. There must be few societies instituted for purposes of science, literature or the fine arts and occupying rateable hereditaments in which members are entitled to no benefit beyond what can be regarded as negligible. One normally expects members at least to be entitled to use the society's premises, to attend discussions and to consult a reference library. These are not negligible benefits. The purpose of such a society is to increase and disseminate knowledge of the subject which it has been established to promote, and the increased knowledge which a member gains from membership may be his main reason for joining the society.

Before further examining the speeches in the *Art Union* case (14) I think it necessary to see what was said in the earlier case of *Inland Revenue Comrs.* v. *Forrest* (16), and also to see whether later authorities have regarded the *Art Union* case (14) as laying down so definite a rule. *Forrest's* case (16) arose under a somewhat similar provision in the Customs and Inland Revenue Act, 1885, and a good deal was said in this House about the Act of 1843. LORD HALSBURY, L.C., took one view and LORDS WATSON and MACNAGHTEN took a different view of it. LORD HALSBURY, L.C., said (17):

" I cannot concur with the argument which has found favour with one of your Lordships, that the condition under which a society obtained exemption under the Act of 1843 was that in some degree it partook of the character of a charitable institution. I think it would be a surprise to the members of, e.g. the Linnaean Society to hear their society so described."

Yet what LORD HALSBURY said in the *Art Union* case (15) is now said to mean the opposite of what he said in *Forrest's* case (17).

LORD WATSON said in *Forrest's* case (18):

" I do not think that the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided, after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due."

(14) [1896] A.C. 296. (15) [1896] A.C. at p. 306. (16) (1890), 15 App. Cas. 334.
(17) (1890), 15 App. Cas. at p. 340. (18) (1890), 15 App. Cas. at p. 348.

A What LORD WATSON said is precisely what is now alleged to have been decided by the *Art Union* case (19). But in the latter case none of their Lordships cited this passage, and none said anything resembling it, so I do not think that they can have agreed with it.

Later cases have generally turned on the nature of the purposes of the society, but in *Battersea Metropolitan Borough* v. *British Iron & Steel Research Assocn.* (20), B the question whether subscriptions were voluntary contributions was raised. JENKINS, J., said (21):

> " It is clear from the cases of *Inland Revenue Comrs.* v. *Forrest* (22) and *Savoy Overseers* v. *Art Union of London* (19), that in order to qualify as a voluntary contribution for this purpose a contribution must in substance be charitable or altruistic in character—a payment made in support of the C society for the sake of the public utility of its purposes, as opposed to a payment comparable to the subscription made by a member of a club for the sake of the private advantages of membership. In other words, the Act in effect stipulates that there must be members of the public prepared to put their hands in their pockets to support the society from motives of public spirit as opposed to private gain. This does not, however, mean D that a subscription is prevented from being a voluntary contribution merely because it carries with it membership of the society and certain incidental advantages are conferred by membership. The substance of each case must be looked at to see whether the payments claimed to be voluntary contributions are, in substance, made as a matter of business, or as a matter of bounty."

E Later he said (23):

> " Having regard to the obvious and important business advantages calculated to accrue to members from the promotion of the objects of the association as defined in its memorandum, I do not think their ordinary subscriptions could be classed as ' voluntary contributions ' . . ."

F I regard this as a valuable pointer to the true interpretation of the *Art Union* case (19), but it does not solve all the problems. For instance, are we to consider the motives of the various subscribers which it would be impossible to discover in practice, or the nature of the benefits available to them? And what if the benefits consist of the discovery and dissemination of scientific results which are of equal use or interest to the subscribers and many others ?

G The *Art Union* case (19) undoubtedly decided that the word " voluntary " is not used in the Act as the opposite of compulsory, and it undoubtedly decided that, where a member obtains full value in goods for his subscription to a society, that subscription is not a voluntary contribution. But how much further does it go? Their Lordships in that case had no need to consider, and they do not appear to have considered in any detail, cases where benefits to members, though H not negligible, are small in comparison with the amounts of their subscriptions, or cases where the main benefits to members consist in the dissemination to them of information which it is the object of the society to discover and disseminate. I find it difficult, therefore, to regard this case as laying down any hard and fast rule governing such cases. In LORD HALSBURY'S speech in the *Art Union* case (24) it is true that, in dealing with the meaning of the word " voluntary ", he I spoke of people giving their money " without receiving anything in return towards the encouragement of objects which the legislature approved." But I see nothing to indicate that he had altered the opinion which he had expressed in the passage that I have already quoted from *Forrest's* case (25) where he appeared to approve the decision in *St. Anne* (*Churchwardens*) v. *Linnean Society* (26), and clearly it is

---

(19) [1896] A.C. 296. (20) [1949] 1 K.B. 434. (21) [1949] 1 K.B. at p. 457.
(22) (1890), 15 App. Cas. 334. (23) [1949] 1 K.B. at p. 458.
(24) [1896] A.C. at p. 305. (25) (1890), 15 App. Cas. at p. 340.
(26) (1854), 3 E. & B. 793.

not true that the members of that society got nothing in return for their subscriptions. LORD HERSCHELL examined the earlier authorities without clearly indicating which of them he thought to have been wrongly decided. He expressed the view (27) that the " essential idea " conveyed by the words " supported by voluntary contributions " was " that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor." But he went on to stress the value of the advantages purchased by the members of the Art Union, and I do not think that he had in mind to exclude a case where subscriptions though not wholly gratuitous would not normally be called " the price of an advantage purchased ". If he had intended to overrule cases like the *Linnean Society* case (28), I think he would have said so. LORD MACNAGHTEN said (29) that the phrase " supported wholly or in part by annual voluntary contributions " is " an old and familiar acquaintance " and means that

> " the institution on whose behalf the statement is put forward depends for its support on freewill offerings—on the generosity of persons acting from disinterested motives, and not looking for any return in the shape of direct personal advantage."

But then he went on to say (29):

> " It is only natural to suppose that the enactment points to contributions partaking of a similar character and made in a similar spirit."

This is guarded language. He does not follow LORD WATSON'S opinion in *Forrest's* case (30), he only rules out " direct " personal advantage and only requires that contributions shall " partake " of a charitable character. LORD SHAND said (31) that the question

> " involves a consideration of the object and purpose which the persons who give the annual contributions have in view in becoming contributors."

He contrasted contributions " for the benefit of others "—he did not say the " sole benefit of others "—with " what is in substance a business transaction or investment."

I do not think that, on the authority of the *Art Union* case (32) it is sufficient to decide this case to say that members of the appellant institution receive some benefit from their membership; one must go on to ask what are the character and extent of the benefits which they receive. I do not doubt that the object and purpose of those who become members of this institution is, in part, an altruistic desire to promote the development of mechanical science. One cannot, of course, ascertain the precise object and purpose of each member; the question must generally be dealt with broadly and objectively. So regarding it, can one infer that this is their sole object and purpose or even that any other is of comparatively minor importance? LORD MACNAGHTEN said, in *Forrest's* case (33), with regard to the Institution of Civil Engineers:

> " It may be that the advancement of the interests of the profession of civil engineering is inseparably bound up with the advancement of mechanical science. Probably the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the same as that of the Act of 1843."

I will not delay your Lordships by reciting again the facts of the present case; I think that it is quite clear that LORD MACNAGHTEN'S words apply equally to this case. Membership of the appellant institution does carry with it substantial

(27) [1896] A.C. at p. 310. (28) (1854), 3 E. & B. 793.
(29) [1896] A.C. at p. 312. (30) (1890), 15 App. Cas. at p. 348.
(31) [1896] A.C. at p. 314. (32) [1896] A.C. 296.
(33) (1890), 15 App. Cas. at p. 354.

A professional advantages and a main object and purpose in becoming a member must be held to be the acquisition of such advantages. There is nothing to show that any substantial number of members are uninfluenced by this consideration. So, in my opinion, the members' subscriptions are not " voluntary contributions " and the appellants fail to satisfy the proviso to the Act.

On the other point, I agree with your Lordships that this appeal cannot B succeed. The purposes of the appellants are expressed in its charter in very general words which to my mind are not wholly free from ambiguity. I would, therefore, construe them in light of the circumstance of the appellants when the charter was granted. But taking these circumstances into consideration does not lead me to doubt the conclusion at which your Lordships have arrived. I desire to reserve my opinion whether or how far it is relevant to consider the present C activities of the appellants; taking those activities fully into account, I would still reach the same conclusion.

In my judgment, this appeal should be dismissed.

LORD RADCLIFFE: My Lords, I wish to say as little as I can about this case. The subject is one where it is difficult to find any fresh ground on D which to stand, so much has been trampled down by armies of conflicting words. And yet peace has not come to this poor section of the Scientific Societies Act, 1843. What I do say is only to make clear, without elaboration, my reason for agreeing that the appeal fails and to guard against being told later, when the next case on this section reaches the House, that I have indorsed some proposition which I do not, at any rate yet, accept. I concur fully in what has been said by E my noble and learned friend, VISCOUNT SIMONDS, as to the meaning of the words " the development of mechanical engineering "; and I do not wish to add to it. So far, then, as the issue of the institution's exemption depends on construing those governing words of its charter, it is not entitled to say that it is instituted exclusively for purposes of science. It would probably be a less effective body if it were. I do not think that these words are " ambiguous ", in the sense that the F interpretation of their meaning can be aided by an elaborate inquiry into everything that the institution does. Of course, the two parties do not agree in their arguments what the words mean; if I may say so, it is not their business that they should. They are certainly vague and general words, and people may legitimately differ as to what their interpretation is to be; but, if that in itself is enough to let in all this evidence of current practice for the purpose of interpreting G the original phrase, we might as well say outright that such evidence is always admissible in cases under this section.

Yet most courts, I believe, are conscious that there is something unsatisfactory about deciding a claim to exemption from a current year's rating merely by construing words in a charter, memorandum of association, etc., which may itself date back fifty or a hundred years. I would, myself, find it equally un- H satisfactory to have to deny exemption to a society which was, in fact, devoting itself to nothing but science, literature or the fine arts merely because its governing instrument authorised the possible pursuit of other purposes. I have always thought that these difficulties could be avoided if the word " instituted " were to be read not as referring solely to the historic occasion of the society's foundation, but as meaning in a more general way " having as its institutional purposes ". I So understood, the section would allow a direct inquiry as to what institutional purposes were being pursued by the society in the year when exemption was claimed; by which I mean activities of sufficient stability and substance in the context of the society's work as a whole to justify the view that it was really accepting them as part of its function. The answer to that sort of inquiry would be essentially a question of fact, to be found as such by the Lands Tribunal. Such an approach would remove the necessity for the unsatisfactory kind of argument to which counsel were forced to resort in this case (I do not criticise them in any way; they must do what judicial observations have encouraged

them to), in the course of which quite trivial circumstances—the heading of some learned paper read to some members of the society a year or so ago, the fact that the council of the society " took part in forming " an appointments bureau, to which they contributed neither premises nor money nor staff—are assembled before the appellate court, as they were before the Lands Tribunal, as if, by themselves, or even in association, they could determine any relevant issue one way or the other. A B

If " instituted for the purposes of " could be read in the way that I have suggested, it would also absolve the courts from throwing what I regard as mistaken emphasis on the words " occupied by it for the transaction of its business, and for carrying into effect its purposes ". I cannot believe that this was ever intended to open a second and independent inquiry as a result of which a society, though held to be instituted for the purposes of science, literature or the fine arts exclusively and in full occupation of its premises, could be nevertheless deprived of exemption for any part because some phase of its current activities did not altogether correspond with the purposes so found. The emphasis of the words seems to be on the point that the society must be in actual occupation of the whole of the premises for which exemption is claimed, and must not have turned them to some different use. The obvious example is that it must not have let off the premises or given some equivalent occupation to outside interests. This was, after all, the instance given in *Purvis* v. *Traill* (34), which seems to be the only direct authority on this point. I ought to add that, so far as for one purpose or another it is proper for us to inform ourselves as to what purposes the institution is currently pursuing, I agree with the view that those purposes are not exclusively scientific. C D E

I hope that our decision in this case is not going to be regarded as any final authority on the meaning of the words " voluntary contributions ". As at present advised, I do not at all agree with the way that this question is dealt with in the Court of Appeal's judgment (35). I think their attitude much too restrictive. As I understand the matter, the major effect of the decision of this House in *Savoy Overseers* v. *Art Union of London* (36) was to put an end to the controversy that had persisted until then whether the emphasis of the word " voluntary " turned on the distinction between " voluntary " and " compulsory ". It was held that that was not the point. Accordingly, any considerations that give weight to that distinction are now illegitimate. The House might have chosen to follow the view as to the meaning of the words " voluntary contributions " which had already been suggested, though obiter, by LORD WATSON in *Inland Revenue Comrs.* v. *Forrest* (37), when he said: F G

> " I do not think the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act." H

His observations must have been before them. It is clear that they did not adopt them. I see no reason to suppose then that either an obligation to subscribe or the benefit of participating in active management of a society is to be treated as a disabling element.

The House did lay down a test in the *Art Union* case (36) for determining whether a subscription is voluntary, and I do not at present see what further legal propositions can usefully be added to it. It does require, I think, that a comparison should be made between what a member or any class of members subscribes and what direct personal benefit the subscriber receives in return. When that comparison has been made, a " typical " subscriber has to be imagined and a decision made as to what should be supposed to be his object in making I

(34) (1849), 3 Exch. 344.
(35) [1960] 1 All E.R. at p. 139.
(36) [1896] A.C. 296.
(37) (1890), 15 App. Cas. at p. 348.

his subscription. No doubt, if he gets individual benefit of equal value to what he pays, his object is likely to be held to be not to make a voluntary subscription. That was the *Art Union* case (38). In my opinion, however, it would be a misuse of that authority to think that it lays down any rule to the effect that a subscription cannot be a voluntary subscription once any individual benefit is obtained. That would lead to the absurd result that, though the Act exempts a society despite the fact that it is only partly supported by voluntary subscriptions, a society would fail to get exemption even though all but a small portion of each of its members' subscriptions were attributable to no expectation of individual advantage and could be attributed only to the object of furthering the society's own purposes. Moreover, I think that it is a false antithesis to treat advantage to a member arising out of his membership as if it were necessarily opposed to the spirit of a voluntary subscription. Such an approach leads to the argument, which I regard as mistaken, that a member's right to have supplied to him, free of cost, the printed record of his society's proceedings and papers is a direct personal advantage which he buys with his subscription. If the knowledge or the pursuit of science or literature or the fine arts is to be developed or maintained at all, it is at least as likely, I would say a great deal more probable, that the members themselves will be vehicles of grace rather than some vague and unidentifiable entity known as the general public. I am not at all persuaded that it is right to equate such subscriptions with charitable doles at all. So far as I can see, the decision of this House in the *Art Union* case (38) has been understood as requiring that the decision what is or is not voluntary is a matter of degree, advantages obtained being weighed against the value of the subscription paid and, possibly, the responsibilities undertaken: see *Battersea Metropolitan Borough* v. *British Iron & Steel Research Assocn.* (39), per JENKINS, J., *O'Sullivan* v. *English Folk Dance & Song Society* (40), per SIR RAYMOND EVERSHED, M.R. This seems to me correct in principle and I do not see what further principle is needed.

Having regard to what we have found to be the purposes of the institution and what we have learnt as to the width of its current activities, I do not think that the question whether its members pay voluntary subscriptions properly arises. I do not say by any means that they do; but as what they are subscribing towards is primarily a professional association I regard the case as concluded by that consideration.

LORD TUCKER: My Lords, in order to qualify for exemption from rateability under s. 1 of the Scientific Societies Act, 1843, it is necessary for the society to prove (i) that it is instituted for purposes of science, literature or the fine arts exclusively; (ii) that the premises in question are occupied by it for the transaction of its business and for carrying into effect its purposes; (iii) that it is supported wholly or in part by annual voluntary contributions; (iv) that it shall not and by its laws may not make any dividend, gift, division or bonus in money to its members; and (v) that it shall obtain the necessary certificate.

Whether the first requirement is satisfied is, I think, to be determined solely from the terms of its charter or other document by which it is constituted; the second requirement is, in my view, distinct from the first, and evidence as to what the society is in fact doing during the relevant period of assessment is only admissible in order to determine the second requirement. In the present case, I am satisfied, for the reasons which have been stated by my noble and learned friend, VISCOUNT SIMONDS, that, on the proper construction of its charter, the appellant institution does not qualify for exemption under the first requirement and, consequently, the second requirement does not call for consideration.

I also agree with my noble and learned friend that the institution does not

(38) [1896] A.C. 296. (39) [1949] 1 K.B. at p. 457.
(40) [1955] 2 All E.R. at p. 853.

qualify under the third requirement as being supported wholly or in part by voluntary contributions. It may not be possible to frame a definition of the words " voluntary contributions " which will suffice in every case, but I have no doubt that the material, professional, and industrial advantages to be obtained from membership of this institution make it impossible to regard the members' subscriptions as voluntary contributions or as having the character of gratuitous payments, to use the paraphrase adopted in *Savoy Overseers* v. *Art Union of London* (41), the decision in which is binding on your Lordships.

I agree that the appeal should be dismissed.

LORD DENNING: My Lords, the first question is whether the Institution of Mechanical Engineers is a " society instituted for purposes of science . . . exclusively ". I do not think that this question is to be solved by looking at the royal charter alone and construing it as if you were sitting aloft in an ivory tower, oblivious of the purposes which the institution has, in fact, pursued. That would be proper enough if you had only to consider the purposes for which the society was *originally* instituted. But that is not the test. A society may be originally instituted for certain purposes and afterwards adopt other purposes. You then have to ask yourself this question; for what purposes is the society *at present* instituted? and it is only exempt from rates if it is at present instituted for the purposes of science exclusively. PARKE, B., made that clear in *Purvis* v. *Traill* (42):

> " The term ' institution ' does not mean merely the original institution or the first establishment of a society, since that may be altered, as many institutions have been, but the purposes to which it is applied at the present time."

When PARKE, B., used those words, he was considering an unincorporated society, a voluntary association of individuals called " The Greenwich Society for the Acquisition and Diffusion of Useful Knowledge "; and such a society is very different from a limited liability company. Nearly all the societies with which the courts have been concerned under this Act have started off as unincorporated societies; and some have remained such; others, when they have become well established, have been incorporated by royal charter. Very few have been incorporated under the Companies Acts. The Linnean Society, the Zoological Society, the Institution of Civil Engineers, the Art Union, the Royal College of Music, the Institute of Fuel and the Society of Chemical Industries were all of them societies incorporated by royal charter, just as is this Institution of Mechanical Engineers.

It is quite plain that when Parliament in 1843 passed the Scientific Societies Act, 1843, it only had in mind societies which were either voluntary associations of individuals or societies incorporated by royal charter. It was a dozen years or more later that limited liability companies, as we now know them, saw the light of day; and, even then, they were nearly all companies concerned with the acquisition of gain and, therefore, outside the scope of the Act of 1843. It is only in the last thirty years that we have seen the incorporation of limited companies—limited by guarantee—which do not seek to make profits for their members; and hence there have appeared in the books the cases of trade research associations and the like. There is very real difference in law between these various societies. If you are considering a limited liability company, such as the British Iron and Steel Research Association, you know that the purposes of the company are determined exclusively by its memorandum of association. No fresh purpose can in law be pursued, even with the assent of all the shareholders: see *Ashbury Railway Carriage & Iron Co.* v. *Riche* (43). So naturally enough you look at the purposes for which the company was *originally* instituted. But,

(41) [1896] A.C. 296.
(42) (1849), 3 Exch. at p. 349.
(43) (1875), L.R. 7 H.L. 653.

A when you are dealing with a voluntary association of individuals, the doctrine of ultra vires has no place. The purposes of such a society can be changed after its original institution, by the mutual assent of the members, without any record in the formal documents. If the society, without such assent, does in fact pursue a new or additional purpose, not fairly incidental to its original purposes, any member can object and take proceedings to stop it; but no one B else can. If no member objects, then you may assume that its new purposes are duly authorised; and, in order to see if it is exempt from rating, you look at the purposes which it in fact pursues. If these differ from its original purposes, it is, in effect, a new institution. That is how POLLOCK, C.B., put it in *Purvis* v. *Traill* (44): "If a society is instituted for literary purposes, it becomes a new institution when used for other and different purposes". So you look at the new C purposes for which it—the society—is used.

So, also, in the case of a society incorporated by royal charter, the doctrine of ultra vires has no place. Such a society, when duly created by the charter, has in law the self-same capacity as a natural person. The "divers clauses", as LORD COKE says, "are not of necessity, but only declaratory, and might well have been left out": see *Sutton Hospital Case* (45). If it should pursue D purposes other than those set out in the charter, its activities are perfectly valid. True it is that any member or any person who is injured by a violation of the charter can take proceedings in the name of the Crown to repeal the charter; but if the Crown takes no such steps, it does not lie in the mouth of the society to say that the purposes which it in fact pursues are ultra vires or beyond its powers: see *Riche* v. *Ashbury Railway Carriage Co.* (46) by BLACKBURN, J.

E In the case, therefore, of voluntary associations and chartered societies, the rating authority, like anyone else, is entitled to assume that the present purposes have been authorised by the members and to charge the society with rates accordingly. In short, no such society can get exemption from rates by saying that what it does is ultra vires.

There is also another way in which it may often be legitimate to consider F the *present* purposes of the society. The section requires not only that the society should be instituted for scientific purposes only, but also that the premises should be occupied for carrying out its purposes. This is a useful approach in the case of a limited liability company which carries on an ultra vires activity; for it means that even such a company cannot get exemption from rates by saying that what it does on the premises is ultra vires. But I prefer to put my G opinion on the broader ground that, in order to see whether a society is instituted for scientific purposes exclusively, it is legitimate always to consider the present purposes which the society in fact pursues; for I read the word "instituted" not as meaning "originally instituted", but as meaning "at present instituted", that is to say, "at present instituted" for purposes of science exclusively. This means that I read the word in much the same way as is suggested by my noble H and learned friend, LORD RADCLIFFE, and I would wish, if I may, to adopt the way he puts it.

Now I come to the next question. Are the annual subscriptions of the members "annual voluntary contributions"? Here I take as my guide the words of LORD MACNAGHTEN in *Savoy Overseers* v. *Art Union of London* (47) approving as he did the view of A. L. SMITH, L.J., (48): for it appears to me to express the I natural and ordinary meaning of the words. In order that a society should be supported wholly or in part by annual voluntary contributions, it must

> "depend for its support on freewill offerings—on the generosity of persons acting from disinterested motives and not looking for any return in the shape of direct personal advantage."

(44) (1849), 3 Exch. at p. 349.
(45) (1612), 10 Co. Rep. at p. 30b.
(46) (1874), L. R. 9 Exch. at pp. 263, 264.
(47) [1896] A.C. at pp. 312, 313.
(48) [1894] 2 Q.B. at p. 630.

Applying this test to annual subscriptions, it does not, I think, involve an inquiry into the motives of a few individual subscribers but into the motives of the generality of them. Nor would it be helpful to receive evidence from individuals after the issue was raised, concerned as they might be then to secure exemption for the society. The motives of the generality can best be found by asking, as most subscribers do—What does the society do? What are its purposes? What inducements does it hold out to subscribers? Few, if any, subscribers study the objects for which it was *originally* instituted. They look to see what it is doing *now* and is *proposing* to do; and—sometimes—what they are going to get out of it. So, on this head, it is certainly legitimate to consider the present purposes which the society in fact pursues; and I am glad to find that my noble and learned friend, VISCOUNT SIMONDS, takes this view.

So I turn to consider the present purposes of the appellants. The charter itself is so vague as to leave it open to the institution to pursue many purposes which may or may not be those of science exclusively. But, when I turn to the purposes which it in fact pursues, it is plain at once that it is not concerned exclusively with the *science* of mechanical engineering. It is greatly concerned with the *profession* of mechanical engineering, in that it seeks always to uphold proper standards of professional skill and integrity, and, for this purpose, it grants its own professional qualifications, coupled with the right to use the coveted letters "M.I.Mech.E.", and so forth. It is also much concerned with the *education* of mechanical engineers, not only on the professional side, but also the training of technicians and craftsmen. It is concerned, too, with the *industry* of mechanical engineering, as is shown by the model forms of contract which it issues. None of these can be disregarded as being merely incidental to the purposes of science. They are in their own right some of the main purposes of the society. And why do the members pay their annual subscriptions? Principally, I should think, in order to gain a professional standing which is recognised everywhere and to use the letters after their names. In addition, I expect, to receive the literature issued by the institution and to be able to attend its lectures and meetings. Some may pay for higher motives. But few, if any, I should imagine, pay their subscriptions from disinterested motives, so as to help the institution keep going lest it founder. Its finances look as if it is well able to carry on its work without making an appeal for voluntary contributions. I regard this professional institute as very different from a learned society such as the Linnean Society where the subscriptions have long been held to be annual voluntary contributions. The receipt of the published transactions by many of the members of that society is not a direct personal advantage but merely evidence of the work the society is doing for the advancement of science. I am well aware that some societies such as the Institute of Fuel (49) and the Society of Chemical Industry (50) have recently been exempted by this House from payment of rates; but it is to be noticed that the only point argued in those cases was whether the purposes for which the society was *originally* instituted were or were not exclusively scientific. Those cases cannot be considered as authorities on the points which we have discussed today.

I am clearly of opinion that this institution is not entitled to exemption from rates and I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Bristows, Cooke & Carpmael* (for the appellant institution); *Solicitor of Inland Revenue* (for the respondent valuation officer); *Allen & Son* (for the respondent rating authority).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

(49) See *Institute of Fuel* v. *Morley*, [1955] 3 All E.R. 843; [1956] A.C. 245.
(50) See *Cane (Valuation Officer)* v. *Society of Chemical Industry*, (1957), 2 R.R.C. 105, *affmg.*, (1956), 1 R.R.C. 106.

FISHER *v.* BELL.

[Queen's Bench Division (Lord Parker, C.J., Ashworth and Elwes, JJ.), November 10, 1960.]

Criminal Law—Dangerous weapons—Flick knife—Knife displayed in shop window with price attached—Whether "offer for sale"—Restriction of Offensive Weapons Act, 1959 (7 & 8 *Eliz.* 2 *c.* 37), *s.* 1 (1).

A shopkeeper displayed in his shop window a knife with a price ticket behind it. He was charged with offering for sale a flick knife, contrary to s. 1 (1)* of the Restriction of Offensive Weapons Act, 1959.

Held: the shopkeeper was not guilty of the offence with which he was charged because the displaying of the knife in the shop window was merely an invitation to treat and the shopkeeper had not thereby offered the knife for sale, within the meaning of s. 1 (1) of the Act of 1959.

Keating v. *Horwood* ([1926] All E.R. Rep. 88) and *Wiles* v. *Maddison* ([1943] 1 All E.R. 315) distinguished.

Appeal dismissed.

[As to the meaning of "offer", in the law of contract, see 8 Halsbury's Laws (3rd Edn.) 69, para. 119; and for a case on the subject, see 12 Digest (Repl.) 57, *314*.

For the Restriction of Offensive Weapons Act, 1959, s. 1 (1), see 39 Halsbury's Statutes (2nd Edn.) 260.]

Cases referred to:

Keating v. *Horwood*, [1926] All E.R. Rep. 88; 135 L.T. 29; 90 J.P. 141; Digest Supp.

Magor & St. Mellons Rural District Council v. *Newport Corpn.*, [1950] 2 All E.R. 1226; *affd.* H.L., [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 3rd Digest Supp.

Wiles v. *Maddison*, [1943] 1 All E.R. 315; 168 L.T. 280; 107 J.P. 83; 2nd Digest Supp.

Case Stated.

This was a Case Stated by justices for the City and County of Bristol in respect of their adjudication as a magistrates' court sitting in Bristol on Feb. 3, 1960.

On Dec. 14, 1959, an information was preferred by the appellant, a chief inspector of police, against the respondent charging him with an offence against s. 1 of the Restriction of Offensive Weapons Act, 1959, in that, on Oct. 26, 1959, at 15/16, the Arcade, Broadmead, Bristol, he unlawfully offered for sale a knife which had a blade which opened automatically by hand pressure applied to a device attached to the handle of the knife. The justices found the following facts.

The respondent was the occupier of a shop in Bristol (situated at the above address), where he carried on the business of a retail shopkeeper trading under the name of Bell's Music Shop. On Oct. 26, 1959, a police constable saw displayed in the window of the shop, among other articles, the knife referred to in the information. Behind the knife in the window, the police constable also saw a ticket on which were printed the words "Ejector knife—4s." These words referred to the knife. The police constable entered the shop, saw the respondent and said to him: "I have reason to believe that is a flick knife you

* The relevant terms of s. 1 (1) are printed at p. 732, letter G, post.

have displayed in your shop window. May I examine it?" The respondent removed the knife from the window and said: "I have had other policemen in here about the knives". The police constable examined the knife and took it away from the premises for examination by a superintendent of police. Later the same day the police constable returned to the respondent's premises and informed the respondent that in his opinion the knife was a "flick knife". The respondent said: "Why do the manufacturers still bring them round for us to sell?" The police constable informed the respondent that he would be reported for offering for sale a flick knife, and the respondent replied: "Fair enough".

The appellant contended that the respondent, by his action in displaying the knife in the shop window with the ticket behind it and referring to it, such action being carried out with the object of attracting the attention of a buyer of such knife and selling the same to such buyer, had offered the knife for sale within the meaning of the Act of 1959. The respondent contended that, on the facts, he at no time offered the knife for sale within the meaning of the Act of 1959. The justices were of the opinion that, in the absence of a definition in the Act of 1959, the words "offer for sale" ought to be construed as they were in the law of contract, so that, in this instance, the respondent's action was merely an invitation to treat and not a firm offer which needed but a customer's acceptance to make a binding contract for sale, and, accordingly, they dismissed the information.

J. A. Cox for the appellant.
P. Chadd for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the City and County of Bristol, before whom an information was preferred by the appellant, a chief inspector of police, against the respondent that he on a certain day in a shop unlawfully did offer for sale a knife which was, to use ordinary terms, a flick knife, contrary to s. 1 of the Restriction of Offensive Weapons Act, 1959. Section 1 (1) of the Act provides:

> "Any person who manufactures, sells or hires or offers for sale or hire, or lends or gives to any other person—(a) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a 'flick knife' . . . shall be guilty of an offence . . ."

The justices, without deciding whether the knife in question was a knife of the kind described in the statute, decided that the information must be dismissed on the ground that there had not been an offer for sale.

The short facts are these. The respondent keeps a retail shop in Bristol and, in October, 1959, a police constable, walking past the shop, saw in the window, amongst other articles, one of these knives. Behind the knife in the window was a ticket with the words "Ejector knife—4s." The police officer went in and informed the respondent that he would be reported for offering for sale such knife, and the respondent replied: "Fair enough".

The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I think that most lay people would be inclined to the view (as, indeed, I was myself when I first read these papers), that if a knife were displayed in a window like that with a price attached to it, it was nonsense to say that that was not offering it for sale. The knife is there inviting people to buy it, and in ordinary language it is for sale;

but any statute must be looked at in the light of the general law of the country, for Parliament must be taken to know the general law. It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that, in many statutes and orders which prohibit selling and offering for sale of goods, it is very common, when it is so desired, to insert the words "offering or exposing for sale", "exposing for sale" being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes—we have been referred in particular to the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941—Parliament, when it desires to enlarge the ordinary meaning of those words, has a definition section enlarging the ordinary meaning of "offer for sale" to cover other matters including, be it observed, exposure of goods for sale with the price attached (1).

In those circumstances I, for my part, though I confess reluctantly, am driven to the conclusion that no offence was here committed. At first sight it appears absurd that knives of this sort may not be manufactured, they may not be sold, they may not be hired, they may not be lent, they may not be given, but apparently they may be displayed in shop windows; but even if this is a casus omissus—and I am by no means saying that it is—it is not for this court to supply the omission. I am mindful of the strong words of LORD SIMONDS in *Magor & St. Mellons Rural District Council* v. *Newport Corpn.* (2). In that case one of the lords justices in the Court of Appeal had, in effect, said (3) that the court, having discovered the supposed intention of Parliament, must proceed to fill in the gaps—what the legislature has not written, the court must write—and in answer to that contention LORD SIMONDS in his speech said (4):

> "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation . . ."

For my part, approaching this matter apart from authority, I find it quite impossible to say that an exhibition of goods in a shop window is itself an offer for sale. We were, however, referred to several cases, one of which is *Keating* v. *Horwood* (5), a decision of this court. There, a baker's van was being driven on its rounds. There was bread in it that had been ordered and bread in it that was for sale, and it was found that that bread was under weight, contrary to the Sale of Food Order, 1921. That order was an order of the sort to which I have referred already and which prohibited the offering or exposing for sale. In giving his judgment, LORD HEWART, C.J., said (6):

> "The question is whether, on the facts, there were (i) an offering, and (ii) an exposure, for sale. In my opinion, there were both."

AVORY, J., agreed. SHEARMAN, J., however, said (7):

> "I am of the same opinion. I am quite clear that this bread was exposed for sale, but have had some doubt whether it can be said to have been offered for sale until a particular loaf was tendered to a particular customer."

---

(1) See s. 20 (4) (a) of the Goods and Services (Price Control) Act, 1941; 26 HALSBURY'S STATUTES (2nd Edn.) 319. (2) [1951] 2 All E.R. 839; [1952] A.C. 189.
(3) [1950] 2 All E.R. at p. 1236.
(4) [1951] 2 All E.R. at p. 841; [1952] A.C. at p. 191.
(5) [1926] All E.R. Rep. 88. (6) [1926] All E.R. Rep. at p. 89.
(7) [1926] All E.R. Rep. at p. 90.

There are three matters to observe on that case. The first is that the order plainly contained the words " expose for sale ", and, on any view, there was in that case an exposing for sale. Therefore, the question whether there was an offer for sale was unnecessary for decision. Secondly, the principles of general contract law were never referred to; and thirdly, albeit all part of the second ground, the respondents were not represented and there was, in fact, no argument. For my part, I cannot take that as an authority for the proposition that the display here in a shop window was an offer for sale.

The other case to which I should refer is *Wiles* v. *Maddison* (8). I find it unnecessary to go through the facts of that case, which was a very different case and where all that was proved was an intention to commit an offence the next day, but, in the course of his judgment, VISCOUNT CALDECOTE, C.J., said (9):

> " A person might, for instance, be convicted of making an offer of an article of food at too high a price by putting it in his shop window to be sold at an excessive price, although there would be no evidence of anybody having passed the shop window or having seen the offer or the exposure of the article for sale at that price."

Again, be it observed, that was a case where, under the Meat (Maximum Retail Prices) Order, 1940, the words were: " No person shall sell or offer or expose for sale or buy or offer to buy . . ." Although LORD CALDECOTE, C.J., does refer to the making of an offer by putting an article in the shop window, before the sentence is closed he has, in fact, turned the phrase to one of exposing the article. I cannot get any assistance in favour of the appellant from that passage. Accordingly, I have come to the conclusion in this case that the justices were right, and this appeal must be dismissed.

ASHWORTH, J.: I agree.

ELWES, J.: I also agree.

Appeal dismissed.

Solicitors: *Robins, Hay & Waters*, agents for *Town clerk*, Bristol (for the appellant); *Haslewoods*, agents for *Cooke, Painter, Spofforth & Co.*, Bristol (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

---

(8) [1943] 1 All E.R. 315.

(9) [1943] 1 All E.R. at p. 317.

A

WILLIAM MALLINSON & SONS (MFG.), LTD. *v.* KEY TRANSPORT CO., LTD. (S. HUGHES (HIRERS), LTD. Third Party, COASTAL TRANSPORT, LTD. Fourth Party, HENRY LONG (MANNINGHAM), LTD. Fifth Party).

B [COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), November 1, 2, 3, 1960.]

County Court—Appeal—Fact—Third party's appeal on question of fact—Whether claim for indemnity against third party exceeding £200*—Plaintiffs' amended claim* £198 1s. 7d.*—Prayer limiting damages to* £400*—Judgment for plaintiffs for* £195 1s. 7d. *and costs—Defendants' claim against third party for indemnity including costs awarded to plaintiffs against defendants—County Courts Act,* 1959 (7 *&* 8 *Eliz.* 2 *c.* 22), *s.* 109 (2).

C

In their particulars of claim in an action for damages on a contract, the plaintiffs claimed £205 10s. 4d., a sum which was amended at the hearing, after notice to the defendants, to £198 1s. 7d. In the prayer they claimed " damages limited to £400 " (not amended). The defendants brought in a

D sub-contractor as a third party claiming an indemnity. Judgment was given in the county court for the plaintiffs against the defendants for £195 1s. 7d. with costs and for the defendants against the third party for £195 1s. 7d., for the costs awarded to the plaintiffs against the defendants and for the defendants' own costs against the third party.

E **Held:** the third party was entitled to appeal against the judgment on a question of fact, since the indemnity claimed by the defendants against the third party was in respect of both the £198 1s. 7d. and the costs awarded to the plaintiffs against the defendants, so that the total amount claimed by way of indemnity exceeded the £200 requisite to confer a right of such appeal under s. 109 (2) of the County Courts Act, 1959.

Appeal dismissed.

F

[As to appeals from the county court to the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 320, para. 780; and for cases on the subject, see 13 DIGEST (Repl.) 472-474, *956-974.*

For the County Courts Act, 1959, s. 109 (2), see 39 HALSBURY'S STATUTES (2nd Edn.) 186.]

G Case referred to:

Leslie v. *Liverpool Corpn.*, [1959] 3 All E.R. 898; [1960] 1 W.L.R. 1.

Appeal.

The third party appealed against an order made by His Honour JUDGE WINGATE-SAUL, sitting at Dartford County Court, on Apr. 8, 1960, giving

H judgment for the plaintiffs against the defendants and for the defendants against the third party. In their particulars of claim the plaintiffs alleged that the defendants as common carriers had failed to carry safely goods entrusted to them for conveyance from Crayford, Kent, to Shipley, Yorkshire, with the result that they were damaged in transit. They claimed originally £205 10s. 4d. and stated in their prayer: " the plaintiffs claim damages limited to £400 ".

I They subsequently gave notice to the defendants that the sum claimed should be £198 1s. 7d. instead of £205 10s. 4d., and at the hearing the particulars of claim were so amended on their application. They did not amend the prayer limiting the damages to £400. The defendants served a third-party notice on the third party alleging a breach of their sub-contract to assume responsibility for carriage of the goods and claiming an indemnity. Fourth-party and fifth-party notices were in similar form. The judge gave judgment for the plaintiffs for the sum of £195 1s. 7d. with taxed costs on county court scale 4, and judgment for the defendants against the third party for the same sum with the taxed costs

awarded to the plaintiffs and also the taxed costs of the defendants against the third party. He also gave judgment for the fifth party against the fourth party and for the fourth party against the third party. The third party appealed to the Court of Appeal. The preliminary point was raised whether the debt demand or damage claimed exceeded £200 so as to admit of an appeal on fact alone.

R. N. Titheridge for the third party.
J. H. Gower for the defendants.

ORMEROD, L.J., stated the facts and continued: The first point which had to be considered by this court was whether, in the circumstances of this case, the third party had any right of appeal on a question of fact. Counsel for the third party argued that, as in the first place the claim was for a larger sum than £200, it carried with it a right of appeal on questions of fact, and the mere fact that there had been an amendment later did not deprive the third party of that right. There is no doubt that in the ordinary course of events there is no appeal against a judgment of a county court judge on questions of fact, but by s. 109 of the County Courts Act, 1959, there may be an appeal on questions of fact in certain circumstances. Section 109 (2) provides:

> "Subject as aforesaid, the proceedings in which a right of appeal is conferred by this section are—(a) any action founded on contract or tort, or for money recoverable by statute, where either—(i) the debt, demand or damage claimed exceeds £200 . . ."

The subsection then sets out other cases in which a right of appeal is given.

As I understand the argument put here, it was said that this claim did exceed £200, and, in those circumstances, there was a right to maintain this appeal. Counsel for the third party based his argument on a recent decision of this court in *Leslie* v. *Liverpool Corpn.* (1), where certain views were expressed by LORD EVERSHED, M.R., on this matter. That was a claim for damages for personal injuries in which the prayer stated the damages were limited to a sum of £400. It was agreed by both parties that the damages could not amount to a larger sum than £100, and in those circumstances there could not be a claim for damages exceeding £200 and, therefore, there could be no appeal on a question of fact. It was held that, although a claim for damages limited to £400 was not necessarily a claim in excess of £200, yet, having regard to the nature of the goods, the court would treat the plaintiff as having claimed more than £200 when the action started and, therefore, as being entitled to appeal on questions of fact.

Having regard to the view that I have formed, it is unnecessary to deal with that case at any length. Counsel for the third party bases his submissions very largely on the fact that it was a case where a sum in excess of £200 was claimed when the action was started. There was no amendment in that case, and, for my part, although it is not necessary to decide the question, my view as at present advised would be that, if the pleadings were amended at some stage to put the claim at not more than £100, then there would be no right of appeal on a question of fact. But in this case there is the further complication that the prayer was limited to damages to the amount of £400. Whether that would be sufficient in the circumstances of this case to say that the claim was one for over the sum of £200 is a matter on which obviously there might be considerable argument, because the parties here have agreed that the sum of £198 1s. 7d., which is less than £200, is the sum which is claimed in respect of every head of damage which is particularised, and there is nothing in the claim to indicate that there would be any liability for general damages in addition to that. However, that is not the question which we have to consider. We are not considering the right of the defendants to appeal against the judgment which has been given in favour of the plaintiffs against them. We are considering the appeal of the

(1) [1959] 3 All E.R. 898.

A third party against the defendants. That is an entirely separate matter, and the question we have to consider is whether, in the circumstances of this case, the claim of the defendants against the third party is a claim which is in excess of the sum of £200. The third-party notice is a claim by the defendants to be indemnified by the third party against any liability that the defendants may have to the plaintiffs, and that admittedly would include any costs which the B defendants may have to pay to the plaintiffs, and the costs which the defendants may have to incur, or will have incurred, in defending the action. Those are all the matters which are or may be the subject of the indemnity claimed by the defendants against the third party. The amount of damages which the defendants have claimed against the third party is the sum of £198 1s. 7d. That is the amount which the plaintiffs have claimed against the defendants. C But the claim of the defendants for indemnity is not for that sum only, but is also for the costs which they may have to pay by reason of the fault of the third party. In my view, that means that the claim by the defendants against the third party is a claim exceeding the sum of £200. It is well to bear in mind C.C.R., Ord. 12, r. 3 (2), which is the same rule as in the High Court on the subject.

D That provides:

> "As between the defendant by whom the third-party notice has been given and the third party, the judge may grant to either party any relief or remedy which might properly have been granted if the claim against the third party had been made in a separate action, and may give such judgment for either party against the other as may be just."

E The joinder of the third party is a convenient method, which is frequently adopted, of dealing with all matters between the parties. In this case the learned judge decided, no doubt at the request of the parties, that the whole of the matter should be dealt with at the same time. None the less, the claim by the defendants against the third party is a separate claim, and it is in respect of that claim that the learned judge has made certain findings of fact which are F impugned in this court today. My view is that, for the reasons which I have given, it is open to the third party to appeal on those findings of fact, and it is the duty of this court to consider the submissions which have been made.

[HIS LORDSHIP dealt with the facts and held that the appeal should be dismissed on the merits.]

G **WILLMER, L.J.:** I will deal first with the preliminary point which has been raised here, viz., whether this is a case where the debt, demand or damage claimed exceeded £200 so as to admit of an appeal on fact alone. I should be disposed to say that, as between the plaintiffs and the defendants, the claim was one exceeding £200, bearing in mind the general terms of the prayer in the particulars of claim, viz., a claim for damages limited to £400. It is perfectly H true that, in the body of the particulars of claim as amended, the plaintiffs' loss is particularised as £198 1s. 7d. But there is nothing in the particulars of claim to show that a claim for general damages over and above the particularised loss was excluded, and I venture to think that, had learned counsel asked for, and had the learned judge awarded, general damages over and above the particularised loss, it could not have been said that such a claim was not open on the pleadings. Even the conventional figure of 40s. for nominal damages would I just have brought the claim over the vital £200 mark. On this point, I do not find very much help in the authorities cited, but at least I do not think that the view I have expressed is inconsistent with what was said by the learned Master of the Rolls in *Leslie* v. *Liverpool Corpn.* (2), to which my Lord has referred.

For the reasons already given by my Lord, however, it is unnecessary to reach any final conclusion on this point, for what we are concerned with in the present case is the defendants' claim over against the third party. I entertain no doubt

(2) [1959] 3 All E.R. 898.

that this must be regarded as a claim for a sum exceeding £200. If that were not so, it would follow that the order which the learned judge in fact made, and which my Lord has already read, would have been an order made without any jurisdiction. It was conceded by counsel for the defendants that if, instead of bringing the third party into this case, the defendants had chosen to launch a separate action claiming an indemnity against the plaintiffs' claim and costs, then in such separate action there would undoubtedly have been a right of appeal on fact. Can it make any difference that the claim has in fact been put forward by way of third-party proceedings instead of by way of a separate action? The answer to that, I think, is to be found in the provisions of C.C.R., Ord. 12, r. 3 (2), which has already been read by my Lord. The effect of that, as I understand it, is to provide that, as between themselves, the defendants and the third party have the same rights and liabilities as they would have if the claim were put forward in a separate action.

It was urged on us by counsel for the defendants that such a decision might possibly lead to some absurd results; and he instanced the result which might arise in cases of this sort, where the plaintiff's claim against the defendant might be below £200, so that there would be no appeal on fact; yet the defendant's claim against the third party (by reason of the addition of the claim for indemnity against costs) would exceed £200, so that there would be a right of appeal on fact. It was suggested it would be anomalous that the defendant should have a right of appeal as against the third party or vice versa, and yet be denied a right of appeal against the plaintiff. It may be that there could be anomalous cases, but, if so, it is not a matter for this court to correct—it would be a matter for the legislature. Moreover, as pointed out by counsel for the third party, there must inevitably be cases in which that sort of situation may arise, e.g., where the defendant, in addition to his claim for indemnity against the plaintiff's claim, may put forward a separate claim of his own in the third-party proceedings. In those circumstances, like my Lord, I am abundantly satisfied that in this case, as between the defendants and the third party, there is clearly a right of appeal on fact.

[His Lordship held that on the facts the third party was entitled to succeed and said that he would allow the appeal.]

UPJOHN, L.J.: Three points arise in this appeal. The first is whether, having regard to the terms of s. 109 (2) of the County Courts Act, 1959, we have jurisdiction to entertain an appeal on fact. I agree that, in the circumstances of this case, we have such a jurisdiction. I prefer to rest my judgment on the narrow point that this is an appeal between two parties only, the respondents who were the defendants in the court below and the third party who is the appellant here. As between them there is an issue of fact whether a certain term is incorporated in their contract. The claim made by the defendants in the third-party notice is to be indemnified against the claim which they had to meet from the plaintiffs, the plaintiffs having been successful. That claim was for £198 1s. 7d., and for an indemnity against the costs which the defendants had to pay the plaintiffs of the action below and of the defendants' proper costs of defending the action. That plainly must be a claim greatly in excess of £200, and I think on that ground there is jurisdiction to entertain an appeal on the facts. I would prefer myself to leave over for consideration when it arises what is the effect of a general claim to damages limited to £400.

[His Lordship held that on the facts the appeal should be dismissed.]

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Myer Wolff & Co.*, Kingston-on-Hull (for the third party); *W. R. Millar & Sons* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

A

LEACH *v.* LITCHFIELD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), November 10, 11, 1960.]

B *National Insurance—Contributions—Recovery—Arrears of contributions—"Recoverable as a penalty"—Whether a penalty—Whether magistrates' court has jurisdiction to remit arrears—National Insurance Act*, 1946 (9 & 10 *Geo.* 6 *c.* 67), *s.* 8—*National Insurance (Contributions) Regulations*, 1948 (*S.I.* 1948 *No.* 1417), *reg.* 19 (5)—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 55), *s.* 27 (1), *s.* 126 (1), (3).

C *Magistrates—Sentence—Fine—Mitigation—National insurance contribution arrears recoverable as a penalty—Whether court can reduce amount of arrears adjudged recoverable—Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 55), *s.* 27 (1), *s.* 126 (1), (3)—*National Insurance Act*, 1946 (9 & 10 *Geo.* 6 *c.* 67), *s.* 8—*National Insurance (Contributions) Regulations*, 1948 (*S.I.* 1948 *No.* 1417), *reg.* 19 (5).

D Acting under s. 27 (1)* of the Magistrates' Courts Act, 1952, justices, who had fined an offender for failing to pay a national insurance contribution due from him as a self-employed person, mitigated to £5 other arrears of contributions (totalling £19 16s.) proved before them pursuant to notice given under the National Insurance (Contributions) Regulations, 1948, reg. 19†. By reg. 19 (5) "Any sum ordered to be paid to the National Insurance Fund . . . under this regulation shall be recoverable as a penalty." By s. 126 (1) of the Act of 1952 "'Fine' includes any pecuniary penalty or . . . pecuniary compensation payable under a conviction".

E **Held:** although reg. 19 (5) made the arrears of contribution recoverable as if they were a penalty it did not make them a penalty for the purposes of s. 126 (1) and s. 27 (1) of the Magistrates' Courts Act, 1952; therefore the amount of the arrears could not be reduced under s. 27 (1).

F *Fishwick* v. *Gyani* ([1925] 1 K.B. 617) considered.

Per CURIAM: the reference to "pecuniary compensation" in s. 126 (1) of the Act of 1952 is designed only to deal with the case where a court is empowered to make an order for compensation for damage to be paid by the prisoner to third parties (see p. 743, letter C, post).

Appeal allowed.

G [**Editorial Note.** With regard to the recovery of arrears of national insurance contributions the following cases also may be considered with the present case: *Shilvock* v. *Booth* ([1956] 1 All E.R. 382) and *R.* v. *Marlow* (*Bucks*) *JJ., Ex p. Schiller* ([1957] 2 All E.R. 783).

As to recovery of national insurance contributions on prosecution, see 27 HALSBURY'S LAWS (3rd Edn.) 706, para. 1286; as to mitigation of a fine by

H magistrates, see 25 HALSBURY'S LAWS (3rd Edn.) 223, para. 414; and for cases on these subjects, see 33 DIGEST 461, 462, *1733-1735*.

For the National Insurance Act, 1946, s. 8, see 16 HALSBURY'S STATUTES (2nd Edn.) 681, and for the Magistrates' Courts Act, 1952, s. 27 (1), s. 126, see 32 HALSBURY'S STATUTES (2nd Edn.) 447, 518.

For a summary of the National Insurance (Contributions) Regulations, 1948,

I see 15 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 252.]

Cases referred to:

Fishwick v. *Gyani*, [1925] 1 K.B. 617; 94 L.J.K.B. 392; 132 L.T. 761; 89 J.P. 48; 33 Digest 370, *789*.

R. v. *Kerswill*, [1895] 1 Q.B. 1; 64 L.J.M.C. 70; 71 L.T. 574; 59 J.P. 342; 33 Digest 369, *785*.

---

* The relevant terms of s. 27 (1) are set out at p. 742, letter I, post.

† The relevant terms of reg. 19 are printed at p. 741, letters D to G, post.

Case Stated.

This was an appeal by Case Stated by justices for the petty sessional division of Godalming in respect of their adjudication as a magistrates' court on Feb. 5, 1960. On Dec. 9, 1959, the appellant, Maurice Albert Leach, an inspector of the Ministry of Pensions and National Insurance authorised to institute proceedings for offences under the National Insurance Act, 1946, in accordance with s. 53 (1) of that Act, had preferred an information against the respondent, Harry Leonard Litchfield, that he between Oct. 4, 1959, and Oct. 12, 1959, failed to pay a contribution in respect of the week commencing Oct. 5, 1959, which he was liable to pay under the National Insurance Acts, 1946 to 1957, as a self-employed person, contrary to s. 2 (6) of the National Insurance Act, 1946. Notice of intention to prove, in the event of conviction that the respondent had failed to pay contributions amounting to £19 16s. had been given to the respondent under reg. 19 of the National Insurance (Contributions) Regulations, 1948. At the hearing of the information on Jan. 22, 1960, the respondent pleaded guilty to the offence of failing to pay a contribution, contrary to s. 2 (6) of the National Insurance Act, 1946, and admitted that he had failed to pay contributions totalling £19 16s., which he said was due to financial difficulties. The justices then adjourned the hearing for fourteen days to consider a report from the probation officer as to the respondent's full financial circumstances, and on Feb. 5, 1960, at the adjourned hearing, having considered this report, decided to fine the respondent 10s., and to reduce the sum of £19 16s. to £5 and to make an order for the payment of that sum at 5s. weekly. The justices stated that, having regard to the means of the respondent, they thought it just and reasonable both to make the fine a moderate one and to limit the order for arrears.

J. R. Cumming-Bruce for the appellant.

The respondent did not appear and was not represented.

LORD PARKER, C.J.: The justices found the offence proved and inflicted a fine, and nothing turns on that, but the prosecution at the same time had given notice under the relevant regulations (1) that in the event of the respondent being convicted of the offence it was their intention to give evidence of his failure to pay certain other contributions. The total of those other contributions, together with the contribution in respect of which he was prosecuted, amounted to £19 16s. Again, those arrears of contribution were proved, but when the justices came to sentence the respondent they purported to exercise powers under s. 27 (1) of the Magistrates' Courts Act, 1952, to mitigate not merely the fine that had been imposed as a result of the conviction, but also the arrears of contribution, on the basis that they were a penalty which under that section they had power to mitigate, and they mitigated the order for arrears to £5 at 5s. weekly.

The question in this action is whether s. 27 (1) of the Magistrates' Courts Act, 1952, empowered them to do that. It is necessary to look at a few passages in the relevant legislation. We are here concerned with the National Insurance Act, 1946, alone, and not with the National Insurance (Industrial Injuries) Act, 1946. Section 2 (1) of the National Insurance Act, 1946, provides for contributions being payable by insured persons: I leave out all references to "employers" because this respondent was self-employed. Subsection (6) of s. 2 provides:

> "If any . . . insured person fails to pay any contribution which he is liable under this Act to pay, he shall be liable on summary conviction to a fine not exceeding £10."

Section 54 (1) provides:

(1) The National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417,) reg. 19, the relevant part of which is set out in the judgment at p. 741, letters D to G, post.

A "All sums due to the National Insurance Fund shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt."

Be it observed that that is providing for civil proceedings to recover sums due. As long ago as 1913, however, it had been found convenient that where a B man was being prosecuted for failure to pay a contribution, the magistrate at the same time should be able to deal with arrears, and it was provided (2) that notice might be given that he had failed to pay other contributions, leaving it to the justices to find out what was due and to order payment. Accordingly, in the National Insurance Act, 1946, by s. 8 (1) it was provided that:

C "Regulations may provide . . . (e) (without prejudice to any other remedy) for the recovery, on prosecutions brought under or by virtue of this Act, of contributions under this Act or under the Industrial Injuries Act."

Pursuant to that power, regulations were made and are now in force entitled the National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417). Regulation 19 deals with the matters for which power had been given under D s. 8 (1) (e) to which I have referred. Regulation 19 provides:

"(1) In any case where . . . an insured person has been convicted of the offence under s. 2 (6) of the Act of failing to pay a contribution, he shall be liable to pay to the National Insurance Fund a sum equal to the amount which he failed to pay . . . (3) On any such conviction as is mentioned in E [para. (1)] if notice of intention to do so has been served with the summons or warrant, evidence may be given . . . (b) in the case of an insured person (other than an employed person) [in other words, a self-employed person] of the failure on his part to pay other contributions as such an insured person during those two years [that is, the preceding two years]; and on proof of such failure . . . the insured person shall be liable to pay to the F National Insurance Fund . . . a sum equal to the total of all the contributions under the Act . . . which he is so proved to have failed to pay . . . (5) Any sum ordered to be paid to the National Insurance Fund . . . under this regulation shall be recoverable as a penalty . . . (8) Nothing in this regulation shall be construed as preventing the Minister from recovering any sums due to the National Insurance Fund . . . by means of civil proceedings."

G Pausing there, the vital question is the effect of para. (5) when it provides that any sum ordered to be paid shall be recoverable as a penalty. The point is whether those words "shall be recoverable as a penalty" mean that the sum ordered to be paid is a penalty, or whether it is merely saying that the sum ordered to be paid shall be recoverable in like manner as if it was a penalty, H which it is not.

It is convenient to consider the matter first in the light of the position before there was any such paragraph as para. (5) providing that any sum ordered to be paid shall be recoverable as a penalty. The matter was fully considered by this court in *Fishwick* v. *Gyani* (3), the headnote of which reads:

I "Where orders are made against an employer under s. 34 (3) of the National Insurance Act, 1913, and s. 22 (3) of the Unemployment Insurance Act, 1920, for the payment by him to the Insurance Commissioners and the unemployment fund respectively of sums equal to the total amount of his unpaid contributions in respect of an employee, the sums so ordered to be paid are recoverable only as a civil debt."

In other words, it was there held that under this procedure for giving notice in

(2) This provision was made by the National Insurance Act, 1913 (3 & 4 Geo. 5 c. 37), s. 34 (3).

(3) [1925] 1 K.B. 617.

regard to failure to pay arrears the justices had no power to deal with the matter of the arrears, except in the course of civil proceedings as a civil debt. The argument had been that there was a link, if I may put it in that way, between the provision for the collection of arrears, which prima facie were merely matters of civil debt, and the prosecution, the whole matter was therefore a criminal matter, and could be dealt with by the justices in criminal proceedings.

LORD HEWART, C.J., in his judgment, went into the matter very fully, and he came to the clear conclusion, with which the other members of the court concurred, that throughout, and notwithstanding that the matter arose in criminal proceedings, these arrears were merely a matter of a civil debt. I find it unnecessary to go through the judgment in detail. His view can be summed up in the last few words of his judgment, where he says (4):

> " In the statutes we are considering there is no such mixing or binding together [that is, of civil and criminal procedure]. That which is civil remains civil, that which is criminal remains criminal; there are no words linking them together and stamping them with one and the same character."

That, as I have said, was before there was any such paragraph as para. (5) stating that the arrears were recoverable as a penalty.

What, then, is the meaning of those words " recoverable as a penalty " ? For my part, approaching this apart from authority altogether and as a matter of construction, I take the view that those words are clearly saying not that the arrears are a penalty, but that they are to be recoverable in like manner as if they were a penalty, the whole basis of it being that they are not a penalty. There is, however, some authority on the matter. In *Fishwick* v. *Gyani* (5), to which I have already referred, LORD HEWART, C.J., referred to *R.* v. *Kerswill* (6). There the court was considering the effect, in s. 66 of the Town Police Clauses Act, 1847, of words which provided that the fare for a hackney carriage might be recovered before a justice " as a penalty ". MATHEW, J., held that those words did not stamp the arrears, or the fare, in that case, with any criminal character. He said this (7):

> " But it is said that the last words of the section, ' as a penalty ', stamp the non-payment with a criminal character. The words are, ' to be recovered as a penalty '—that is, to be recovered in the same way as a penalty. Those words do not, in my opinion, alter the nature of the obligation itself, which remains a purely civil obligation . . ."

Finally on this point, one cannot shut one's eyes to the fact that it was as a result of the decision of this court in *Fishwick* v. *Gyani* (5) that the words now under consideration were introduced. In other words, the object of the draftsman was to cure the position which arose as a result of *Fishwick* v. *Gyani* (5), that the justices were unable to deal with the arrears at the time of the prosecution. The draftsman, with *Fishwick* v. *Gyani* (5) in mind, and with *R.* v. *Kerswill* (6) in mind, inserted the words which are now to be found in para. (5) providing that the arrears " shall be recoverable as a penalty ". In my judgment, as I have said, it seems to be perfectly clear that those words are not making the arrears a penalty.

One comes, then, finally to s. 27 of the Magistrates' Courts Act, 1952. That section provides, in sub-s. (1), so far as it is material:

> " Where under any enactment passed before the commencement of this Act a magistrates' court has power to sentence an offender to imprisonment for a period specified by the enactment, or to a fine of an amount specified by the enactment, then, except [in certain circumstances] the court may sentence him to imprisonment for less than that period or, as the case may be, to a fine of less than that amount."

---

(4) [1925] 1 K.B. at p. 625. (5) [1925] 1 K.B. 617.
(6) [1895] 1 Q.B.1. (7) [1895] 1 Q.B. at p. 6, cited in [1925] 1 K.B. at p. 624.

A I take the view that the arrears are in no sense a penalty or a fine, at any rate in the ordinary sense of the word.

There being nobody representing the respondent in this case, counsel for the appellant quite rightly thought it proper to draw our attention to certain provisions on which an argument to the contrary might be based. He refers us to the definition section, s. 126 (1) of the Magistrates' Courts Act, 1952, under B which:

> " ' Fine ' includes any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction."

It might be argued that those words are, at any rate, extending the ordinary meaning of the word " fine ", and I suppose that it might be said that " pecuniary C compensation " was apt to cover an order for the payment of the arrears, albeit it was in the nature of a civil debt. For my part, I do not think that the arrears come within any part of that definition. The reference to " pecuniary compensation " is clearly necessary to deal with the case, not uncommon, where under the relevant legislation a court is empowered to make an order for compensation in the case of damage to be paid by the prisoner to third parties. It seems to D me that the reference to " pecuniary compensation " there is designed only to deal with such a case.

Finally, reference was made to s. 126 (3), on which (8) it was said that some argument might be based. I find it unnecessary to deal with that subsection. It is enough for me to say that I can see no argument that could be based on that subsection which in any way would alter the opinion I have already E expressed.

For those reasons, which I have endeavoured to state shortly, I would allow this appeal, and remit the case to the justices, with a direction that they have no power to mitigate any part of the sums ordered to be paid, other than the fine itself.

ASHWORTH, J.: I agree.

F **ELWES, J.:** I agree.

Appeal allowed.

Solicitor: *Solicitor, Ministry of National Insurance* (for the appellant).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

(8) Section 126 (3) provides: " Any reference in this Act to a sum adjudged to be paid by a conviction or order of a magistrates' court shall be construed as including a reference to any costs, damages or compensation adjudged to be paid by the conviction or order of which the amount is ascertained by the conviction or order ".

Re JAMES'S WILL TRUSTS. PEARD *v.* JAMES.

[CHANCERY DIVISION (Buckley, J.), October 26, 27, 28, November 14, 1960.]

Will—Survivor—" My surviving children "—Gift to testator's surviving children if any child should die without leaving issue—Interpretation of " survive " or " survivor ".

A testator directed that the income of his residuary estate should be paid after the death of his wife to his five children in equal shares during their lives and that on the death of any child his share should be held in trust for the children of the deceased child at twenty-one in equal shares. The testator further declared ". . . in case any of my children shall die without leaving any child or issue living at his or her decease then the share of such deceased child shall be held upon the same trusts for the benefit of my surviving children and their his or her children or issue as are hereinbefore declared concerning their original share of and in my said residuary trust estate ". After conferring powers for children to appoint income by will in favour of spouses, the testator continued ". . . I hereby declare that if any child of mine shall die in my lifetime leaving children or issue who shall survive me then and in such case such last mentioned children or issue who shall attain twenty-one years shall take and be entitled (per stirpes and not per capita) to such and the same shares of and in my said estate as his her or their deceased parent and their children would have been entitled to in case he or she had happened to survive me ". A spinster daughter of the testator survived his other children and died in January, 1960. Children of a son of the testator were living at the daughter's death and had attained twenty-one. On the question of the destination of the shares of residue to whose income the daughter was entitled at her death,

Held: the words " my surviving children " in the testator's will should be given their natural meaning, and the mere fact that the words, when so interpreted, could produce odd results was insufficient to justify them being construed in another sense; accordingly only a child of the testator living at the death of the daughter would qualify to benefit under the disposition and, as there was no such child, there was an intestacy as to the daughter's original share and accrued shares.

Dicta of ROLFE, B., in *Grover* v. *Burningham* ((1850), 5 Exch. at p. 194) and of KNIGHT BRUCE, L.J., in *Hart* v. *Tulk* ((1852), 2 De G.M. & G. at p. 313) applied.

The propositions to be derived from the authorities on the interpretation of the words " survived " or " survivor " used in testamentary dispositions are stated at p. 754, letter E, to p. 755, letter A, post.

The following authorities, in particular, considered and applied: *Auger* v. *Beaudry* ([1920] A.C. 1010); *Gilmour* v. *MacPhillamy* ([1930] A.C. 712); *Re Benn* ((1885), 29 Ch.D. 839); *Harrison* v. *Harrison* ([1901] 2 Ch. 136); *Inderwick* v. *Tatchell* ([1903] A.C. 120); *Waite* v. *Littlewood* ((1872), 8 Ch. App. 70) and *Wake* v. *Varah* ((1876), 2 Ch.D. 348).

[As to the rules of construction of the word " survivors ", see 34 HALSBURY'S LAWS (2nd Edn.) 281, para. 333; and for cases on the subject, see 44 DIGEST 1201, *10,401 et seq.*]

Cases referred to:

Auger v. *Beaudry*, [1920] A.C. 1010; 89 L.J.P.C. 251; 124 L.T. 106; 44 Digest 1205, *10,427*.

Benn, Re, Benn v. *Benn*, (1885), 29 Ch.D. 839; 53 L.T. 240; 44 Digest 1185, *10,246*.

Bilham, Re, Buchanan v. *Hill*, [1901] 2 Ch. 169; 70 L.J.Ch. 518; 84 L.T. 499; 44 Digest 1211, *10,470*.

Bowman, Re, Lay, Re, Whytehead v. *Boulton*, (1889), 41 Ch.D. 525; 60 L.T. 888; 44 Digest 1207, *10,440.*

Cross v. *Maltby*, (1875), L.R. 20 Eq. 378; 33 L.T. 300; 44 Digest 1206, *10,430.*

Curle's Trustees v. *Millar*, 1922 S.C. (H.L.) 15; sub nom. *Lamont* v. *Millar*, 152 L.T. Jo. 417; 44 Digest 1211, *10,472.*

Friend's Settlement, Re, Cole v. *Allcot*, [1906] 1 Ch. 47; 75 L.J.Ch. 14; 93 L.T. 739; 40 Digest (Repl.) 504, *159.*

Gilmour v. *MacPhillamy*, [1930] A.C. 712; 143 L.T. 606; sub nom. *Macphillamy (Charles), Re, Gilmour* v. *Macphillamy*, 99 L.J.P.C. 199; Digest Supp.

Grover v. *Burningham*, (1850), 5 Exch. 184; 155 E.R. 79.

Hamlet, Re, Stephen v. *Cunningham*, (1888), 39 Ch.D. 426; 58 L.J.Ch. 242; 59 L.T. 745; 44 Digest 560, *3761.*

Hancock v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; *affg.* S.C. sub nom. *Hancock, Re, Watson* v. *Watson*, [1901] 1 Ch. 482; 43 Digest 644, *792.*

Harrison v. *Harrison*, [1901] 2 Ch. 136; 70 L.J.Ch. 551; 85 L.T. 39; 44 Digest 1211, *10,469.*

Hart v. *Tulk, Hart* v. *Gordon, Tulk* v. *Hart, Hart* v. *Cottrell*, (1852), 2 De G.M. & G. 300; 22 L.J.Ch. 649; 21 L.T.O.S. 174; 42 E.R. 888; 44 Digest 557, *3732.*

Horner's Estate, Re, Pomfret v. *Graham*, (1881), 19 Ch.D. 186; 51 L.J.Ch. 43; 45 L.T. 670; 44 Digest 1204, *10,418.*

Inderwick v. *Tatchell*, [1903] A.C. 120; 72 L.J.Ch. 393; 88 L.T. 399; *affg.* S.C. sub nom. *Inderwick* v. *Tatchell, Tatchell* v. *Tatchell, Inderwick* v. *Inderwick*, [1901] 2 Ch. 738; 44 Digest 1205, *10,425.*

King v. *Frost, Underwood* v. *Frost, Price* v. *Frost, Plomley* v. *Frost*, (1890), 15 App. Cas. 548; 60 L.J.P.C. 15; 63 L.T. 422; 44 Digest 1204, *10,423.*

Lucena v. *Lucena*, (1877), 7 Ch.D. 255; 47 L.J.Ch. 203; 37 L.T. 420; 44 Digest 1210, *10,463.*

Mears, Re, Parker v. *Mears*, [1914] 1 Ch. 694; 83 L.J.Ch. 450; 110 L.T. 686; 44 Digest 1287, *11,149.*

Powell v. *Hellicar*, [1919] 1 Ch. 138; 88 L.J.Ch. 68; 120 L.T. 218; 44 Digest 1211, *10,471.*

Waite v. *Littlewood*, (1872), 8 Ch. App. 70; 42 L.J.Ch. 216; 28 L.T. 123; 44 Digest 1210, *10,465.*

Wake v. *Varah*, (1876), 2 Ch.D. 348; 45 L.J.Ch. 533; 34 L.T. 437; 44 Digest 1206, *10,439.*

Walker's Estate, Re, Church v. *Tyacke*, (1879), 12 Ch.D. 205; 48 L.J.Ch. 598; 44 Digest 1217, *10,533.*

Adjourned Summons.

This was an application by originating summons dated Apr. 22, 1960, by Noel Davis Peard, the sole trustee of the will dated Aug. 5, 1902, of Henry James, deceased, for the determination of the question, who, on the true construction of the testator's will and in the events which had happened, was entitled to the shares (both original and accrued) of his residuary estate, to the income of which Margaret Helen James was entitled immediately before her death and the income thereof immediately after her death, and in what shares.

The first, second and third defendants were Francis Raymond James, Mary Margaret Joan Schwager and Bernard Henry Peter James, otherwise Peter Theodore James, who were grandchildren of the testator. The fourth defendant was Barclays Bank, Ltd., a trustee of a settlement made by the fourth grandchild of the testator. The fifth, sixth, seventh, eighth and ninth defendants were John Henry Francis Simson, Leonard Stanley Daintree, Sybil Mary Bell, Mervyn Hubert Peard and Felix Josef Schwager, who were respectively executors

of the wills of the testator's wife and three of his children and one of his grandchildren. All the defendants claimed to be entitled to share in the distribution of the testator's estate. A

The facts appear in the judgment.

P. W. E. Taylor for the plaintiff.

J. Bradburn for the first, second, third and fourth defendants.

I. L. R. Romer for the fifth and sixth defendants. B

G. M. Parbury for the seventh, eighth and ninth defendants.

Cur. adv. vult.

Nov. 14. **BUCKLEY, J.,** read the following judgment: In this case I am confronted by the problem, familiar to anyone accustomed to this branch of the law, whether a testator has used the word " surviving " in its accurate C sense of being alive at, and after, the time of the event to be survived, or in some less accurate secondary sense. This problem in one form or another has over the years begotten a large brood of judicial decisions and it is tempting first to study those decisions in an attempt to distil a rule or series of rules of construction and then to proceed to apply such rule, or rules, to the present case. I think, however, that the better course to follow is first to consider the D circumstances of the particular case and to try to discover the testator's intention without reference to authority, and thereafter to see whether a study of the reported decisions suggests any reasons for modifying whatever conclusion is reached.

The testator, Henry James, made his will on Aug. 5, 1902. After making certain specific dispositions, he gave his residuary estate to his trustees on the E usual administrative trusts for conversion and so forth. He directed payment out of the income of his residuary estate of certain annuities and proceeded as follows:

> " And my said trustees shall then save as hereinafter mentioned pay the residue of the annual income of the said trust funds to my said wife so long F as she shall continue my widow and after my wife's death or second marriage shall pay the same income equally between each of my children during his or her life the income of each of my daughters to be for her sole and separate use free from the control of any husband and she shall not have the power to dispose of the same by way of anticipation and from and after the decease of any child then I direct my trustees to hold the share of the income of G such deceased child and also a like share in the trust property from which such income is derived upon trust for all the children of such deceased child who shall live to attain the age of twenty-one years in equal shares and in case any of my children shall die without leaving any child or issue living at his or her decease then the share of such deceased child shall be held upon the same trusts for the benefit of my surviving children and their H his or her children or issue as are hereinbefore declared concerning their original share of and in my said residuary trust estate."

There follows a power for the testator's children to appoint income by will in favour of their spouses, and the will goes on as follows:

> " And I hereby declare that if any child of mine shall die in my lifetime leaving children or issue who shall survive me then and in such case such I last mentioned children or issue who shall attain twenty-one years shall take and be entitled (per stirpes and not per capita) to such and the same shares of and in my said estate as his her or their deceased parent and their children would have been entitled to in case he or she had happened to survive me."

There then follow certain hotchpot and other administrative provisions which I need not read.

The testator, who died on July 26, 1903, was survived by his wife and all his five children. His wife died without having re-married on Nov. 7, 1921. Two of his sons died bachelors on Aug. 28, 1911, and Oct. 25, 1935, respectively. A daughter, Mrs. Edith Louisa Jesse, died on Dec. 9, 1941. She had two daughters, Mrs. Simpson and Mrs. Harwood, both of whom attained the age of twenty-one years and married but died without issue, one on June 17, 1942, and the other on Aug. 6, 1958. A third son of the testator died on June 24, 1956, having had four children, all of whom are alive. A second daughter of the testator died on Jan. 11, 1960, a spinster. I have to decide the destination of the last-mentioned daughter's settled share of the testator's residue. For the sake of completeness, I may add that both the testator's married children were already married and had issue at the date of the testator's will.

There can be no doubt that, according to its proper meaning, the word "survive" means that he who survives the given event must be alive both at, and after, the time of that event. Accordingly, if the testator used the word "surviving" accurately in the phrase "for the benefit of my surviving children", only a child of his who was living at and after the occurrence of the relevant contingency (viz., the death of a child of the testator without leaving any issue living at his or her decease) and the children or issue of such a child could qualify to benefit under this disposition, which I will call the accruer clause.

One consequence of this construction would be that the chances of the testator's grandchildren benefiting under the accruer clause would depend on the order in which the testator's children might happen to die. For instance, in the events which happened, Mrs. Jesse's two children would have benefited from the deaths without issue of the testator's two sons who were the first of his children to die because Mrs. Jesse survived these two brothers of hers: and this would have been the case even if Mrs. Jesse's two daughters, having attained the age of twenty-one years, had both predeceased their two uncles. On the other hand, had Mrs. Jesse been the first of the testator's children to die, her two daughters would have taken no benefit under the accruer clause on the death of either of their two uncles in question, even although Mrs. Jesse's daughters had survived the uncles. Another consequence of this construction would be that there would be an intestacy as to the share of the last surviving child of the testator, should the not improbable event occur of that child dying without leaving any child or issue of him or her living at his or her death; for this is not a case to which the rule in *Hancock* v. *Watson* (1) can apply.

Both these consequences of applying to the word "surviving" its correct meaning may be said to impute to the testator such a degree either of arbitrariness or of carelessness as to suggest that he did not mean to use the word in this sense. But a testator is entitled to be capricious or eccentric in his testamentary dispositions if he chooses (see per KNIGHT BRUCE, L.J., in *Hart* v. *Tulk* (2)) and the fact that the terms of his will, when interpreted according to their ordinary and apparent meaning, may produce odd results, is not alone a ground for construing his language in some other sense which it is less apt to bear; nor is the fact that he may have failed to think out how the scheme of his will might operate in all possible or probable circumstances; for, to infer from the fact that the language may not appropriately fit all the possible or probable circumstances, that the testator used such language in some sense other than its natural meaning, assumes that the testator did the very thing which it seems that he failed to do, namely, consider the appropriateness of his will to all possible or probable contingencies. One likely explanation may be that he meant his words to bear their normal meaning and failed to appreciate the consequences. It is not the function of a court of construction to be officious in curing defects in a testator's dispositions, but, as ROLFE, B., once said, "to ascertain quod voluit by interpreting quod dixit" (*Grover* v. *Burningham* (3)).

(1) [1902] A.C. 14.
(2) (1852), 2 De G.M. & G. at p. 313.
(3) (1850), 5 Exch. at p. 194.

In the present case there appears to me to be no difficulty about giving to the words " my surviving children " their natural meaning, apart from the two consequences already referred to. It is true that this testator, or the draftsman of his will, has shown himself to have been in some other respects somewhat careless. The trusts of the settled shares of residue are in favour of the testator's children who attain twenty-one years. The accruer clause, however, is to operate in the event of a child of the testator dying without leaving any child or issue living at his or her decease. The initial trusts and the gift over do not readily fit together and it would seem that, had a child of the testator had children who attained the age of twenty-one years but all died in his or her lifetime without issue, the vested interests of those grandchildren of the testator in their parent's settled share of residue would have been divested by operation of the accruer clause (compare *Re Hamlet, Stephen* v. *Cunningham* (4)). Counsel suggested in the present case that the words " without leaving any child " might be construed as meaning " without having had a child " and that this loose use of language would help to justify me in holding that the testator was equally loose in his use of the word " surviving " (compare *Powell* v. *Hellicar* (5)); but I do not think that this can be so, because the words " living at his or her decease " render the suggested interpretation of " leaving " impossible in the present case. In fact, this part of the will seems to me a good instance of a testator clearly using a word in its proper sense without properly appreciating its effect on the scheme of his disposition. In two later places in those parts of the will which I have read the testator used the word " survive " undoubtedly in its accurate sense, and I do not think that I have any reason for construing " my surviving children " in any other sense.

I turn, therefore, to the consideration of the authorities. The case having been very fully and ably argued before me, it may be useful to collect the cases to which I have been referred together in my judgment with such comments as seem to me to be appropriate.

The earliest case to which I was referred was *Waite* v. *Littlewood* (6), decided by LORD SELBORNE, L.C., on appeal from LORD ROMILLY, M.R. There, a testator gave property on trust for his six daughters equally for life, with remainder as regards each daughter's share for her children at twenty-one or marriage, with a proviso that, if any daughter should die without leaving a child who attained a vested interest, her share should be held in trust for his surviving daughters equally for life, with remainder to their children per stirpes in the same manner as their original shares. The will contained a gift over of the entire fund in case none of the testator's daughters should have a child who attained a vested interest. LORD SELBORNE, L.C. (7), expressed the view that on the whole scheme of the will it was very improbable that the grandchildren were to take under the trust in favour of surviving daughters and their children only if their own mothers survived the death of the life tenant on whose death that trust came into operation. For this view he relied, amongst other things, on the ultimate gift over of the entire fund. Such a gift over clearly affords a strong indication that the testator has by the preceding trusts intended to dispose of the whole beneficial interest in the fund in every event except that in which the gift over is to take effect. I have not got any such gift over in the will which I have to consider. LORD SELBORNE, L.C., preferred a construction of " surviving " which treated it as equivalent to " surviving in the persons of issue " to one which treated it as equivalent to " other ". In this view I respectfully concur. The word " surviving " has a quite distinct meaning from the word " other ". While, of course, it is clear that all the members of a class who survive the death of one member of that class must be other than that member, all the members of that class other than that member will not necessarily have

(4) (1888), 39 Ch.D. 426.
(5) [1919] 1 Ch. at p. 142.
(6) (1872), 8 Ch. App. 70.
(7) (1872), 8 Ch. App. at p. 73.

A survived him. The word " other " imports no sense or element of survivorship and is not an analogue of " surviving ", or anything like one.

In *Wake* v. *Varah* (8) the Court of Appeal had to consider a will in terms which were in essence the same as those considered in *Waite* v. *Littlewood* (9). BAGGALLAY, J.A., after drawing attention to the capricious character of the disposition, if strictly construed, and to the fact that it would result in intestacy in several B not only possible but probable events, said this (10):

> " But neither the consideration that a literal interpretation of the language used would lead to intestacy in particular events, nor the consideration that such an interpretation would lead to a construction which, if really intended by the testator, would have been capricious, would justify the C court in attributing to the language used by the testator other than its literal interpretation, unless satisfied, upon a consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was. Now the provisions, the effect of which I am now considering, are introduced by the words, ' In case and so often as any D of my said three children shall die without leaving issue ', thus indicating the intention of the testator to provide for the death of the longest liver of his three children, as well as for the deaths of the two who should previously die. But, if the words ' survivors or survivor ' receive their literal interpretation, the death without issue of the longest liver is clearly unprovided for, inasmuch as on the death of the longest liver there can be no survivor. It E is apparent, then, from these provisions alone, that the testator has not used language adequate to provide for all the events for which he has expressed his intention to provide; but, though we may surmise in what way the testator would have supplied the deficiency, had his attention been directed to it, these provisions afford no clear evidence as to what his intentions were. But the next provision in the will supplies the necessary F clue. It is as follows: ' And, in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor '. From this it is evident, not only that the testator intended to provide, and considered that he had provided, in the previous portions of his will for all possible events in which any of his children might have sued, but also that it was his intention, if there was any G such issue, whether of one child or more, that that issue should become entitled to his property."

JAMES, L.J., and CLEASBY, B., also delivered judgments relying on the ultimate gift over. It is, in my view, clear from the judgment of BAGGALLAY, J.A., that the case would not have been decided as it was had the will not contained the gift over.

H *Lucena* v. *Lucena* (11) was an unusual case, because the shares of beneficiaries of the first generation were some of them settled and some given absolutely. The will contained an ultimate gift over, which was one of the matters relied on by the Court of Appeal for their decision, which was that " surviving " should in that case be construed " other ". The facts of the case were special and, for that reason, I do not think that the decision is helpful in the present I case.

In *Re Benn*, *Benn* v. *Benn* (12), where there was no gift over on the death of all the testator's children without leaving children, the Court of Appeal held that " surviving children " in an accruer clause must be construed in its proper sense. There, as in the present case, " surviving " was clearly used elsewhere

---

(8) (1876), 2 Ch.D. 348.
(9) (1872), 8 Ch. App. 70.
(10) (1876), 2 Ch.D. at p. 354.
(11) (1877), 7 Ch.D. 255.
(12) (1885), 29 Ch.D. 839.

in the same series of trusts in its proper sense, and COTTON, L.J., said that to give it another sense in the same clause would be a forced construction. He went on (13):

> " It is said that when all the shares are settled, and there is a general clause of accruer on the death of the tenant for life without children, the accrued shares being settled in the same way as the original shares, that is a sufficient indication of intention that ' survivors ' means ' others '. I am not aware of any such rule. No doubt such a scheme of disposition tends in favour of the view contended for, and when it is followed by a gift over in the event of all dying without issue there is sufficient evidence of an intention not to use the word ' survivors ' in its proper sense, but whether a scheme of disposition of this kind without a gift over is sufficient evidence of such an intention is a very different matter."

He then expressed the view that in *Waite* v. *Littlewood* (14) LORD SELBORNE, L.C., mainly relied on the gift over; and, after discussing *Lucena* v. *Lucena* (15), concluded his judgment as follows (16):

> " It is not there said that the fact of the shares being settled would have been enough to vary the meaning of the word ' surviving ' though it was held enough when combined with the ultimate gift over. There are cases which seem to support the contention that a settlement of the shares is sufficient, but it has never been decided that it is so, and none of the latter cases tend to recognise it as by itself sufficient."

This case is authority for the proposition that the mere fact that the original shares are all settled and that accruing shares are to be held on the same trusts as original shares is insufficient to justify adopting a secondary meaning for the word " survive ".

Nevertheless, in *Re Bowman, Re Lay, Whytehead* v. *Boulton* (17), KAY, J., after reviewing the authorities, reached the following conclusion (18):

> " It seems to me that the decisions establish the following propositions:— Where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares."

His method of reconciling *Re Benn* (19) with this classification appears to have been as follows. In *Re Benn* (19), the trust of the accruer clause was for (20):

> ". . . my surviving sons and daughters, for the term of their respective natural lives, and after their deceases respectively, then I give their respective shares unto their several and respective children . . ."

Only sons and daughters who personally survived the event could take a life interest under the accruer clause and only children of such survivors could take in remainder. KAY, J., therefore treated *Re Benn* (19) as falling within his first category and as not conflicting with his third category. He felt himself

(13) (1885), 29 Ch.D. at p. 844.
(14) (1872), 8 Ch. App. 70.
(15) (1877), 7 Ch.D. 255.
(16) (1885), 29 Ch.D. at p. 846.
(17) (1889), 41 Ch.D. 525.
(18) (1889), 41 Ch.D. at p. 531.
(19) (1885), 29 Ch.D. 839.
(20) (1885), 29 Ch.D. at p. 840.

able, therefore, in *Re Bowman* (21) to hold that the children of the first of four life tenants to die were entitled to participate in the settled shares of other life tenants who died without issue after their mother notwithstanding that there was in that case no ultimate gift over. With the greatest respect to that distinguished judge, it seems to me that in doing so he ignored certainly the dicta, and, as I think, the ratio decidendi, of the Court of Appeal in *Re Benn* (22).

In *Inderwick* v. *Tatchell* (23) the Court of Appeal deprecated any attempt to state rules governing the construction of provisions of this kind. VAUGHAN WILLIAMS, L.J., said (24):

> ". . . there is no hard and fast rule to enable you to say when you are to follow the literal construction and when you are not. It is a matter always of the intention of the testator, to be ascertained from the whole of a will."

ROMER, L.J., said (24):

> "I should like to add that I also think there is no such fixed rule of construction as that which is called the third rule in the case of *Re Bowman* (21), and I have nothing to add on that point to what was said by my brother COZENS-HARDY in his judgment in the case of *Harrison* v. *Harrison* (25)."

Earlier in the year 1901, two other cases of this kind had come before the courts. *Harrison* v. *Harrison* (25) and *Re Bilham, Buchanan* v. *Hill* (26). In the former the testator left personal estate, including one-third of his residue, on trust for each of his three sons for life and after the death of each son on trusts for such son's children and remoter issue and directed that in case any of his sons should have no issue who should attain a vested interest in his share, that share should be held in trust for the testator's surviving sons and their issue in the like manner as their original shares. There was no ultimate gift over in default of issue of any son attaining a vested interest. Two sons died leaving issue who attained vested interests. The third son survived them and died without having had a child. COZENS-HARDY, J., held that the last-mentioned son's share of residue was undisposed of after his death. After referring to KAY, J.'s classifications in *Re Bowman* (21), the learned judge made a careful survey of the earlier decisions and said (27):

> "It follows that in my opinion the third proposition in *Re Bowman* (21) is not warranted by the authorities, and I must decline to follow it. In my view it makes no difference whether the gift of an accruing share is to the survivors for life with remainder to their children expressly, or is to the survivors and their children by reference to the limitations of the original shares."

In *Re Bilham* (26), the testatrix gave property to her three daughters for their respective lives in equal shares, with remainder in each case to the daughter's children who should survive her and attain the age of twenty-one. In case of the death of any daughter without leaving issue surviving who should attain twenty-one years, the testatrix gave the income of that daughter's share to the testatrix' surviving daughters in like manner as the income thereinbefore given to them for their respective lives and after their decease she gave the capital to the children of her said surviving daughters who should attain twenty-one per stirpes. There was an ultimate gift over in the event of all the daughters dying without leaving issue who should attain twenty-one years. The first daughter to die left children who attained twenty-one years but predeceased the last surviving daughter. The second left children who attained twenty-one and survived the last surviving daughter. The last surviving daughter left no

(21) (1889), 41 Ch.D. 525. (22) (1885), 29 Ch.D. 839. (23) [1901] 2 Ch. 738.
(24) [1901] 2 Ch. at p. 745. (25) [1901] 2 Ch. 136.
(26) [1901] 2 Ch. 169. (27) [1901] 2 Ch. at p. 144.

issue surviving her. JOYCE, J., following *Waite* v. *Littlewood* (28) and *Wake* v. *Varah* (29) and a dictum in *Lucena* v. *Lucena* (30), held that " surviving " in the gift to the testatrix' surviving daughters could not be read literally but ought to be construed, not as " other " but as " surviving in stock ". Accordingly, the children of the first daughter to die did not, but the children of the second did, participate in the settled share of the last surviving daughter. In so doing, JOYCE, J., relied on the presence of the gift over as excluding the literal construction and on the distinctive feature that a child of the last surviving daughter who attained twenty-one years but predeceased her mother took no interest as excluding the possibility of treating " surviving " as equivalent to " other ".

In *Re Friend's Settlement, Cole* v. *Allcot* (31) FARWELL, J., had to consider a trust of a similar kind contained in a deed. There was an ultimate gift over. The children of the life tenants took vested interests in the capital of their parents' shares on attaining twenty-one years or marrying, whether they did or did not survive their parents. The learned judge construed " survivors " as meaning " others ", relying on the words which I italicise in the accruer clause before him, which was in the following terms (32):

> ". . . then and in such case the share or shares of her, him or them so dying . . . shall go to and be divided unto and equally between the survivors and survivor of them the said six daughters of the said R. M. Morey and the said James Morey and their, her and his issue respectively for such estates and interests in such shares and proportions and *in such manner in all respects* as the original shares of the said six daughters of the said R. M. Morey and the said James Morey and their issue respectively are hereinbefore directed to be divided."

In relying on those italicised words, the learned judge must, I think, have had in mind that they had to be read with the words " as the original shares of the said six daughters " etc. Had the will before him merely referred at this point to " their original shares " (compare the will in the present case), I think that he would not have relied on the italicised words in the way in which he did; for it seems to me that such words as " in the same manner as their original shares ", where the word " their " relates back grammatically to the surviving members of a class, could not of themselves justify a relaxed construction of the word " surviving ". See also in this connexion the speech of LORD DAVEY in *Inderwick* v. *Tatchell* (33). FARWELL, J., in *Re Friend's Settlement* (31) also propounded an interesting possible alternative relaxed construction of " surviving ", treating the word as referring to survivorship by estates or interests. Thus, a settled share, the trusts of which antecedent to the accruer clause had not failed at the date for survival, might be regarded as surviving that date notwithstanding that the share in question had become absolutely vested in some person who died before the date of survival. As I read his judgment, however, FARWELL, J., did not decide the case on this ground and, so far as I am aware, this construction has not yet been adopted by the court in any case.

In *Powell* v. *Hellicar* (34), to which I have already referred, where there was no ultimate gift over, YOUNGER, J., with characteristic agility and ingenuity, found at least six reasons for holding that " survivors or survivor " should not be construed literally. I hope I may be forgiven if I say that to my less analytical mind some of these reasons appear to be refined; but, of course, on a question of construction one may well be entitled to rely on refined arguments to add weight to other considerations and to build up a cumulus of reasons for adopting a particular interpretation. With deference to that learned and most distinguished judge, however, and without at all impugning the correctness of his decision on the particular terms of the will which he was considering, I cannot

(28) (1872), 8 Ch. App. 70. (29) (1876), 2 Ch.D. 348.
(30) (1877), 7 Ch.D. 255. (31) [1906] 1 Ch. 47. (32) [1906] 1 Ch. at p. 48.
(33) [1903] A.C. at p. 124. (34) [1919] 1 Ch. 138.

escape a feeling that he was benevolently disposed towards those who were there claiming under a relaxed construction of the word " survivor ", perhaps because apart from the particular language with which he had to deal he felt that such a construction was more likely to give effect to the probable intention of the testator. The court, in my judgment, however, must not allow such a sense of benevolence to induce it to lean in favour of a relaxed construction (*Gilmour* v. *MacPhillamy* (35), to which I shall refer later). Having reached his conclusion as to the proper construction of the will before him, YOUNGER, J., turned to the question whether the authorities precluded him from giving effect to it, particularly having regard to the absence of a gift over, and concluded that they did not. In short, he treated the matter as a question of construction to be decided not according to any particular rule but by interpreting the testator's language in the light of any and all relevant and admissible considerations.

In *Curle's Trustees* v. *Millar* (36) the House of Lords considered a problem of the same kind arising on a Scottish trust disposition and settlement. The decision there turned on the precise language of the document, which I need not here discuss in detail. On a close analysis of the language, it was held that when the testator used the word " survivor " he was referring not to any individual but to a stirps consisting of a child of his entitled for life and such child's children entitled in remainder to a settled share of his residue.

I should next refer to *Auger* v. *Beaudry* (37), to quote a passage from the advice of the Judicial Committee of the Privy Council in that case, which was a Canadian appeal. Referring to gifts to survivors in cases of the kind I have been considering, LORD BUCKMASTER said (38):

> " The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the courts to attempt so to read the words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognised that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean."

Finally, I must refer to *Gilmour* v. *MacPhillamy* (35), another Privy Council case, where there was no ultimate gift over and the literal construction of " survivors " was adopted. The words of the accruer clause in that case (which strangely preceded the trusts of capital to take effect after the deaths of the original life tenants) were as follows (39):

> " Provided however that if any of my said children shall die without leaving lawful issue or widow or widower living at the date of their his or her decease, the shares or share of the said child so dying shall be equally divided amongst the survivors upon the same trusts and conditions."

LORD TOMLIN there said (40):

> " In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the instrument containing it a context which necessitates or justifies such departure. It is not enough that the natural and ordinary meaning may produce results which to some

(35) [1930] A.C. 712. (36) 1922 S.C. (H.L.) 15. (37) [1920] A.C. 1010.
(38) [1920] A.C. at p. 1013. (39) [1930] A.C. at p. 715.
(40) [1930] A.C. at p. 716.

minds appear capricious or fail to accord with a logical scheme of disposition. In their Lordships' view there is nothing in the context of the present will rendering it necessary or even possible to give to the word 'survivors' any but its natural and ordinary meaning. On the contrary their Lordships think that the phrase 'shall be equally divided amongst the survivors upon the same trusts and conditions' can only be read as meaning 'shall be equally divided amongst the survivors so that each survivor takes a life interest with remainder to his children as in the case of his or her original share'. In their Lordships' judgment this construction concludes the matter, because it necessarily involves the idea of successive trusts and of the survivor being some one intended to take an interest and therefore living."

From this review of the authorities, which covers, I believe, every relevant decision on this subject since the year 1872 (with the exception of the following cases which I have looked at but need not refer to in particular: *Cross* v. *Maltby* (41) which would probably not now be followed; *Re Walker's Estate, Church* v. *Tyacke* (42), a decision of HALL, V.-C., the correctness of which he himself doubted in the case next mentioned; *Re Horner's Estate, Pomfret* v. *Graham* (43); *King* v. *Frost* (44); and *Re Mears, Parker* v. *Mears* (45)) I derive the following propositions:

1. There is no particular rule prescribing when such words as "survive" or "survivor" should be construed strictly and when in a secondary sense, or, where they are not to be construed strictly, what secondary sense should be adopted (*Inderwick* v. *Tatchell* (46)).

2. The question must in every case be answered by applying ordinary principles of construction to the particular language used and having regard to any relevant surrounding circumstances.

3. The language used must be construed in its natural sense unless the context shows that this would defeat the testator's intention (*Gilmour* v. *MacPhillamy* (47)).

4. The mere fact that, so construed, the will might in certain possible, or even probable, circumstances produce results that seem fanciful or even harsh is not a sufficient ground for adopting another interpretation; for, although this fact may raise doubts whether this construction fulfils the testator's intention, doubts are not enough: it must be possible to discover from the language used what the intention was, that is to say, that the testator intended to use the word "survive" in some secondary sense (*Wake* v. *Varah* (48); *Auger* v. *Beaudry* (49); *Gilmour* v. *MacPhillamy* (47)).

5. The mere fact that a fund is initially given in shares which are settled on stirpital trusts and that, on failure of the trusts in favour of one stirps, the share of that stirps is directed to accrue to the shares of the survivors of the original life tenants to be held on the trusts of their original shares is an insufficient ground for holding that the testator intended the word "survive" or "survivors" to bear a secondary meaning (*Wake* v. *Varah* (48); *Re Benn* (50); *Gilmour* v. *MacPhillamy* (47)).

---

(41) (1875), L.R. 20 Eq. 378.
(42) (1879), 12 Ch.D. 205.
(43) (1881), 19 Ch.D. 186.
(44) (1890), 15 App. Cas. 548.
(45) [1914] 1 Ch. 694.
(46) [1903] A.C. 120.
(47) [1930] A.C. 712.
(48) (1876), 2 Ch.D. 348.
(49) [1920] A.C. 1010.
(50) (1885), 29 Ch.D. 839.

A 6. Where it is proper to adopt a secondary meaning, a meaning which imports some kind or element of survivorship (e.g., survival by issue) is to be preferred to construing " survivors " as equivalent to " others " (*Waite* v. *Littlewood* (51)).

These propositions do not, in my judgment, in any way conflict with the view which I have formed, apart from authority, of the proper interpretation of the B will in the present case. On the contrary, they seem to me to support it. Counsel submitted, I think accurately, that there is no substantial distinction to be drawn between the language of the accruer clause in the present case and that considered in *Harrison* v. *Harrison* (52). The decision of COZENS-HARDY, J., in that case has not since been criticised. Indeed, it was referred to with approval in the Court of Appeal in *Inderwick* v. *Tatchell* (53).

C I shall accordingly declare that on the true construction of the will of the testator and in the events which have happened, the shares (both original and accrued) of his residuary estate, to the income of which Margaret Helen James was entitled immediately before her death, and the income thereof from and after her death, are undisposed of by the will of the testator.

D *Declaration accordingly.*

Solicitors: *Cunliffe & Mossman*, agents for *Peard, Son & Webster*, Croydon (for the plaintiff and the fifth, sixth, seventh, eighth and ninth defendants); *Langhams & Letts*, agents for *Hart, Scales & Hodges*, Dorking (for the first, second, third and fourth defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

---

(51) (1872), 8 Ch. App. 70. (52) [1901] 2 Ch. 136. (53) [1901] 2 Ch. 738.

Re BEDFORD (DUKE) (*deceased*). RUSSELL AND ANOTHER *v.* BEDFORD AND OTHERS.

[CHANCERY DIVISION (Cross, J.), November 8, 10, 11, 1960.]

Estate Duty—Exemptions and remissions—Pictures and objects of artistic interest—Bequest of exempted chattels "free of duty"—Incidence of duty payable on future sale—Finance Act, 1930 (20 & 21 *Geo.* 5 c. 28), *s.* 40.

By his will, dated Feb. 21, 1952, a testator who died on Oct. 9, 1953, bequeathed to his children "free of duty" all the chattels of the character there mentioned including chattels which were of national, scientific, historic or artistic interest within the meaning of the Finance Act, 1930, s. 40, and, therefore, exempt from estate duty until sale. The testator made other bequests and a devise, all free of duty, and directed that the residue was to be held on the usual trusts for sale and conversion and further that, out of the proceeds of sale, after the payment of his funeral, testamentary and other expenses, his trustees were to "pay the estate duty payable on [his] death" in respect of any part of his estate, real or personal, and "all legacy succession and other duties payable on [his] death on any gifts which by [his] will . . . are made free from duty". The testator directed that the ultimate residue was to be divided among named legatees. None of the exempt chattels had been distributed among the legatees and there had been no sale. On the question whether, such exempt chattels having been bequeathed "free of duty", in the event of any sale by any legatee of such chattels the amount of estate duty for which he would be accountable would be payable out of the residuary estate,

Held: the words "free of duty" did not relate only to duty payable on the death of the testator but included duty contingently payable pursuant to s. 40 on a sale of the chattels, and accordingly that duty would be payable out of the residuary estate.

Re Scott ([1916] 2 Ch. 268) applied.

Re Leconfield ((1904), 90 L.T. 399) considered.

[As to accountability for estate duty on sale of objects of national, scientific, historic or artistic interest, see 15 HALSBURY'S LAWS (3rd Edn.) 121, para. 249; and for cases on the subject, see 21 DIGEST 21, 22, *122-124* and 2nd DIGEST Supp.

For the Finance Act, 1930, s. 40, see 9 HALSBURY'S STATUTES (2nd Edn.) 445, and for the Finance Act, 1950, s. 48, see 29 HALSBURY'S STATUTES (2nd Edn.) 181.]

Cases referred to:

Leconfield, Re, Wyndham v. *Leconfield*, (1904), 90 L.T. 399; 21 Digest 21, *122*.

Oppenheimer, Re, Tyser v. *Oppenheimer*, [1948] Ch. 721; [1948] L.J.R. 1553; 2nd Digest Supp.

Scott, Re, Scott v. *Scott*, [1916] 2 Ch. 268; 85 L.J.Ch. 528; 114 L.T. 1114; 21 Digest 21, *124*.

Wedgwood, Re, Allen v. *Public Trustee*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146; 21 Digest 36, *226*.

Adjourned Summons.

The plaintiffs, as executors of the will of the twelfth Duke of Bedford, deceased, applied to the court by originating summons for decision of the questions (i) as respects each of the first three defendants, specific legatees, to whom chattels exempt from estate duty under the Finance Act, 1930, s. 40 (1), until sale or breach of the undertaking required by the Finance Act, 1950, s. 48 (1), should be allotted pursuant to cl. 2 of the will, whether such defendant would or would not be entitled to be paid out of the testator's residuary estate the estate duty which would become payable (a) on sale by such defendant in his lifetime

of such chattels or any of them or (b) on breach of the statutory undertaking relating to such chattels; and if question (i) were answered in the affirmative (ii) that directions might be given to the executors as to what provision they should make for the duty contingently payable with a view to a distribution of the balance of the residuary estate. HIS LORDSHIP stood over question (ii).

E. G. Wright for the plaintiffs, the executors.

J. A. Brightman for the first three defendants, the specific legatees of the exempt chattels.

M. J. Fox for the remaining defendants, the residuary legatees.

CROSS, J.: The twelfth Duke of Bedford made his will on Feb. 21, 1952. He died on Oct. 9, 1953, and probate of his will was granted on Nov. 7, 1953, to his executors, who are the plaintiffs in these proceedings. By cl. 2, he bequeathed to his children Lord Tavistock, the Honourable Daphne Russell and Lord Hugh Hastings Russell (to be fairly and equally distributed according to value among them in such manner as they should agree or, in the case of difference, as should be settled by his trustees, whose decision should be final) free of duty all the chattels of a certain character there set out. Then, by cl. 3, he bequeathed free of duty to the person who should inherit the Woburn Settled Estates immediately on his death certain farming stock. By cl. 4, he made another bequest free of duty. By cl. 5, he devised a freehold house free of all duty. By cl. 6, he made a pecuniary bequest free of duty; and, by cl. 7, another pecuniary bequest free of duty. By cl. 8, he gave a number of pecuniary legacies free of duty. Then, by cl. 13, he disposed of his residue in the usual way on trust for sale; and, by cl. 14, he directed his trustees, out of the moneys to arise from the sale, calling in and conversion of or forming part of his real and personal property and out of any ready money, to pay his funeral and testamentary expenses and debts and the legacies given by his will or any codicil thereto, and to pay the estate duty payable on his death in respect of any part of his estate, real or personal, and all legacy, succession and other duties payable on his death on any gifts made by his will or any codicil thereto which were made free from duty. Then, finally, by cl. 15, he directed his trustees to hold the residue of the proceeds of sale (thereinafter called his residuary estate) on trust to divide it into one hundred equal parts and to hold it in various proportions for a number of legatees who are given absolute interests.

The chattels which were bequeathed to his children by cl. 2 included a number of chattels of artistic or historic importance which are given exemption from duty while they remain unsold in the hands of the legatees, under the provisions of the Finance Act, 1930, s. 40. The question which arises in this case is whether the duty which would become payable on the proceeds of sale of those chattels in the event of their being sold by any of the three legatees during their lifetime should be borne by those legatees or will have to be provided for out of the testator's residuary estate. The rate of duty on the residuary estate, having regard to the settled property which passed on the testator's death, is the highest rate, eighty per cent.; so that, if the claim of the legatees to have that duty contingently payable provided for out of residue is right, a large part of the residuary estate—possibly all of the residuary estate—will have to be held up to abide the event whether or not the duty becomes payable.

The exemption from duty in the case of chattels of great artistic or historic interest was first introduced by the Finance Act, 1896, s. 20, and was then confined to settled chattels. That section, as originally passed, provided by sub-s. (1):

> "Where any property passing on the death of a deceased person consists of such [chattels] not yielding income as appear to the Treasury to be of

national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty, but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to estate duty."

Subsection (2) provides that the person selling the chattels, or the person who comes into possession and becomes competent to dispose of them, shall be accountable for the duty.

The construction of that section came before the Court of Appeal in 1904 in *Re Leconfield, Wyndham* v. *Leconfield* (1). By his will, Lord Leconfield (who died in 1901) directed his trustees to pay out of the residuary proceeds of his estate

> "so much of the estate duty and other death duties . . . which . . . shall become payable upon or by reason of my death in respect of all the estates and property (including as well real estate as leaseholds, moneys, funds, stocks, shares, and securities) of which I shall immediately before my death be seised or entitled as tenant for life under or by virtue of or by reference to the will of the late . . . Earl of Egremont."

The contents of Petworth House of which the testator was tenant for life immediately before his death under Lord Egremont's will were exempt from duty under the Finance Act, 1896, s. 20, because they were of national or historic interest and were settled property. The question raised was whether, when estate duty fell to be payable on those chattels either because of a sale by the next life tenant or when they eventually came into possession of a person competent to dispose of them under the settlement, that estate duty would be payable out of the free estate of the testator under that direction in his will. It was held in that case by the Court of Appeal (2) that the estate duty which eventually might become payable on the exempted chattels would not be payable on or by reason of the death of Lord Leconfield; it would become payable on the sale of the chattels and in consequence of the sale of the chattels, or alternatively on the chattels coming into the possession of an absolute owner and in consequence of that fact, but not on or by reason of the death of Lord Leconfield.

The provisions of s. 20 of the Act of 1896 were varied by the Finance (1909-10) Act, 1910, s. 63, in two ways which are material. First, the exemption was extended to legacy duty and succession duty and did not apply only to estate duty; and, secondly, the exemption extended to cases where the chattels in question were not settled but were the subject of an absolute bequest, but in that case it was provided that the duty should only become chargeable when the property was sold and then only in respect of the last death on which the property passed. If, therefore, exempted chattels were given absolutely to a legatee, and he sold them during his lifetime, then duty would become payable in respect of the death of the original testator, whereas if the legatee in question retained the chattels during his lifetime and then died, so that they passed on his death and were sold by the next taker, duty would not be payable in respect of the death of the original testator but in respect of the death of the legatee.

That was the state of the law when *Re Scott, Scott* v. *Scott* (3) came before the courts. In that case Sir John Murray Scott, who was domiciled in this country but was possessed of an extremely valuable collection of objects of art in his apartment in Paris which were worth about £300,000, bequeathed those objects to Lady Sackville free of legacy duty. A large part of those chattels was exempted from immediate payment of legacy duty and also estate duty, under the relevant statutory provisions to which I have referred. Lady Sackville in fact sold the greater part of those chattels before she was put into possession of them by the executors,

(1) (1904), 90 L.T. 399. (2) (1904), 90 L.T. at pp. 403, 404. (3) [1916] 2 Ch. 268.

A and estate duty and legacy duty thereon became payable. One question which arose, the only question which is material for the decision of this case, was whether or not the gift of the chattels free of legacy duty exempted Lady Sackville from the liability, which she would otherwise be under, to pay the legacy duty which became payable, not on the death of the testator, but on her sale of the chattels. In that case, the Court of Appeal distinguished *Re Leconfield* (4) B and held (5) that a bequest of chattels free of duty was apt to cover duty payable " in respect of " the death, though not payable immediately on the death, i.e., duty which was contingently payable on a sale of the chattels in question by the legatee, and was different from a direction to pay duties payable " upon or by reason of " the death, which was the phrase which the Court of Appeal had had to construe in *Re Leconfield* (4). It was put to them by counsel C who was arguing on behalf of the residuary legatees in *Re Scott* (6), that to decide as they did decide might in other circumstances cause very great administrative inconvenience, because no one could say at the date of the testator's death, when his residue was ascertained, whether or not the duty in question would eventually become payable. In that case there was no inconvenience, because Lady Sackville sold the chattels very shortly after the death, but she might have D retained them for many years and, if that had been done, it would have been necessary for the executors to hold up a sufficient part of the residue to meet the legacy duty contingently payable. It is, however, to be observed that they would, as the law then stood, have known the maximum sum which they had to retain, because the duty was payable by reference to the value of the chattels at the death and by reference to the rate which was then ascertained. Despite E that argument of inconvenience, which was put to them, the court arrived at the decision that a general bequest free of duty covered the legacy duty contingently payable.

The law now applicable to exempted chattels is to be found in the Finance Act, 1930, s. 40, which repealed the earlier legislation and, in re-enacting it, amended it in this respect, that the duty is now not payable on the value of F the chattels at the death of the testator, but on the proceeds of their sale when they come to be sold; and that figure, of course, is at the date of the testator's death quite uncertain. The relevant parts of s. 40 are:

> " (1) Where there pass on the death of a person dying after the commencement of this Act any objects to which this section applies [objects of national, G scientific, historic or artistic interest] the value of those objects shall not be taken into account for the purpose of estimating the principal value of the estate passing on the death or the rate at which estate duty is chargeable thereon, and those objects shall, while enjoyed in kind, be exempt from death duties.
>
> " (2) In the event of the sale of any objects to which this section applies, H death duties shall, subject as hereinafter provided, become chargeable on the proceeds of sale in respect of the last death on which the objects passed . . . and the person by whom or for whose benefit the objects were sold shall be accountable . . ."

In that state of the law, ROXBURGH, J., in 1948 had to decide *Re Oppenheimer, Tyser* v. *Oppenheimer* (7). There, the testator had made bequests from his I collection of various objects which were exempt from duty as being of national or historic interest, and by cl. 5 he directed that all pecuniary and specific bequests given by his will or any codicil thereto should be " free from all duties in respect of my death ". The question arose whether that general direction for payment of " all duties in respect of my death " covered the duty which would be contingently payable in the event of any legatee of the chattels in

(4) (1904), 90 L.T. 399.
(5) [1916] 2 Ch. 268, 269.
(6) [1916] 2 Ch. at p. 280.
(7) [1948] Ch. 721.

question selling them. It was argued there that the change made in the law by the Finance Act, 1930, made that case distinguishable from *Re Scott* (8), but ROXBURGH, J., held that it made no difference that the duty was now charged on the proceeds of sale and not on the chattels themselves. It is to be observed that the words used in the will in *Re Oppenheimer* (9) " all duties in respect of my death ", are virtually the very words used in s. 40 (2) of the Finance Act, 1930. What decision the learned judge would have come to had the direction been for payment of " all duties payable upon or by reason of my death ", which were the words in *Re Leconfield* (10) I do not know. It may be that there is a distinction to be drawn between the two phrases.

The law has been once more amended since *Re Oppenheimer* (9). That is by s. 48 of the Finance Act, 1950, which provides by sub-s. (1) that as a condition of the giving of exemption of chattels of national, scientific, historic or artistic interest, the beneficiary shall give an undertaking to the Treasury that (a) the objects will be kept permanently in the United Kingdom, (b) reasonable steps will be taken for the preservation of the objects, and (c) reasonable facilities for examining them to persons authorised by the Treasury will be afforded. The section also provides by sub-s. (3) that, in the event of a breach of that undertaking, then duty will become payable in the same way as it would become payable if the objects were sold by the legatee.

A question has been raised in the summons and referred to by counsel for the plaintiffs whether, assuming that this future duty will be payable out of residue, it will be payable not only if the legatees sell the chattels but also if they break the undertaking which they will have to give. But it is not necessary for me to determine that question because counsel for the specific legatees does not seek to argue that if duty should become payable by reason of a breach of undertaking by his clients they could claim to throw the duty then payable on residue. He confines his claim entirely to the duty which will become payable in the event of their selling the chattels during their lifetime. Of course, if they retain the chattels during the whole of their lives and they pass on their deaths, then there will be no question of any duty being payable in respect of the death of the testator.

It is conceded by counsel for the residuary legatees that if cl. 2 of the will stood alone, and was the only relevant provision in the will, the case would be indistinguishable from *Re Scott* (8); the freedom from duty would include the duty contingently payable in the event of a sale of chattels by the legatee. As counsel pointed out, that construction leads to an even greater inconvenience now than it could have led to in 1916, because the duty is now payable on the proceeds of sale, the amount of which is totally uncertain and may be vastly greater than the probate value of the chattels. Nevertheless, I think he concedes that if one simply had the words " free of duty ", the result would be that the contingent duty would be payable out of residue. But counsel says, quite rightly, that the will must be construed as a whole, and argues that, on reading cl. 2 and cl. 14 together, the words " free of duty " in cl. 2 really mean " free of duty payable on the death of the testator ", as opposed to duty payable at some other date. He says, in reliance on *Re Leconfield* (10), that supposing the words in cl. 2 had been " free of duty payable on my death ", those words, having regard to the decision in *Re Leconfield* (10) would not have covered the duty which was payable on another date, viz., on the contingency of a sale, and he submits that, reading cl. 2 and cl. 14 together, that is the proper construction to put on the words " free of duty " in cl. 2. In aid of that submission, counsel says that if I am in any doubt on the matter, if I feel that the arguments are evenly balanced, I ought to incline to the construction which would confine the words " free of

(8) [1916] 2 Ch. 268. (9) [1948] Ch. 721. (10) (1904), 90 L.T. 399.

duty " in cl. 2 to duties payable on the death, because of the great administrative inconvenience of the other construction which will result in a great part, if not the whole, of the residue having to be retained for an indefinite time to meet this contingent claim.

As an analogy in support of his argument, he referred me to *Re Wedgwood, Allen* v. *Public Trustee* (11), which is the leading case on the question whether, where a settled legacy is given " free of all death duties ", future estate duty payable on the death of a tenant for life is payable out of residue or falls on the legacy. Counsel says that in that case one of the arguments which weighed with the court in confining the words " free of all death duties " to duties payable in consequence of the death of the testator, as opposed to future estate duty payable on the death of a life tenant of a settled legacy, was the great inconvenience which would be caused by the other construction. Counsel for the specific legatees, on the other hand, points out that in *Re Wedgwood* (11), though the court held that future estate duty payable on the death of some other person was not prima facie included in a gift free of all death duties, the court held that legacy duty which might become payable on the death of a life tenant of a settled legacy where the rates of duty payable by the life tenant were different from those payable by the reversioner and therefore the legacy duty could not be paid as a whole at the date of the testator's death, was payable out of residue under a gift free of all death duties, notwithstanding that it was not payable until the death of the life tenant. Counsel contended that here it would be wrong to attribute such force to cl. 14 as counsel for the residuary legatees said ought to be attributed to it, since it is merely an administrative direction to the trustees to make certain payments out of the net proceeds of sale of the testator's residuary estate and does not on the face of it profess to be making any disposition in favour of anybody.

In my judgment, the argument presented by counsel for the specific legatees on that point is right. I think that it would be wrong to read a clause such as cl. 14 as cutting down what I think is the prima facie meaning of the phrase " free of duty " in cl. 2. It may well be—in fact, I think that it is highly probable—that the testator had not in mind the fact that some duty payable in respect of his death would not be payable on his death but would only be payable contingently at some future date. If he had been aware of that, he might have made a different disposition. But, reading the two clauses together, I do not think that I can give effect to the submission of counsel for the residuary legatees; and I therefore declare that the duty contingently payable on a sale by a legatee—I say nothing about a breach of undertaking —will be payable out of residue.

Order accordingly.

Solicitors: *Taylor & Humbert* (for all parties other than the first defendant); *Bell, Brodrick & Gray* (for the first defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(11) [1921] 1 Ch. 601.

WEG MOTORS, LTD. *v.* HALES AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 26, 27, 28, November 3, 1960.]

Landlord and Tenant—Lease—Contract to grant lease more than twenty-one years after date of contract—Validity—Law of Property Act, 1925 (15 & 16 *Geo.* 5 *c.* 20), *s.* 149 (3).

Option—Option to renew lease—Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease—Whether option for renewal of lease or void as infringing rule against perpetuities—Whether obligation to grant new lease ran with reversion—Whether agreement was "covenant" within Law of Property Act, 1925 (15 & 16 *Geo.* 5 *c.* 20), *s.* 142 (1).

By a mortgage, dated July 8, 1937, G.R.I., Ltd., as the registered proprietors with an absolute title under the Land Registration Act, 1925, of property* in London, including certain land with the garages erected thereon, charged the property by way of legal mortgage to an insurance company. Clause 15 of the mortgage provided that the statutory powers of leasing should not be exercisable by the borrowers without the written consent of the lenders except in the case of lettings for any period up to twenty-one years. The charge was registered. By a lease, dated July 26, 1938, G.R.I., Ltd. demised the land with the garages thereon to the plaintiff company for a term of twenty-one years from Dec. 25, 1938, determinable by the lessee at the end of seven or fourteen years, at a rent of £1,500 a year. A clause in the lease referred to "making good [certain matters] at the expiration of the term or any renewal thereof". By an agreement made on the same date and between the same parties (referred to therein as "the lessors" and "the lessees"), but signed before the execution of the lease, it was stated that the expressions "lessors" and "lessees" included, wherever appropriate, their respective successors in title, and it was agreed that "In consideration of the lessees taking a lease of even date with but executed after these presents from the lessors the lessees shall have the option of taking a further lease of the premises demised by the . . . lease for a term of twenty-one years at the yearly rent of £1,500". By cl. 2 it was agreed that the option should be exercisable by notice in writing given by the lessees to the lessors at any time before Dec. 25, 1959, and that, if and when it should be exercised, the lessors should grant "a further lease" of the premises "for the same term (such term to commence from the date of the exercise of the option) at the said rent", and the lessees should thereupon surrender the unexpired residue if any of the lease of July 26, 1938. By cl. 2 it was agreed that the lease should be in the form and to the effect of the lease of July 26, 1938. On Jan. 5, 1939, notice of the option was registered in the charges register. On Oct. 15, 1941, G.H.C., Ltd., transferees of the freehold, were registered as the proprietors of the land. By an agreement in writing dated Jan. 10, 1947, G.H.C., Ltd. sold the freehold to a friendly society, subject to the plaintiff company's lease and with notice of the option agreement, and, by a transfer dated Feb. 11, 1947, the land was transferred to the trustees of the society, subject to the matters set out in the register of title so far as they were still subsisting and capable of being enforced. By a lease, dated Feb. 11, 1947, the trustees of the friendly society demised the land to G.H.C., Ltd. for a term of one hundred and fifty years from that date, subject to the matters set out in the register, at a yearly rent. By a deed of substituted security, also dated Feb. 11, 1947, and made between G.H.C., Ltd., of the first part, the insurance

* The property which was the subject of the legal charge and of the agreements between the defendants comprised not only the property demised to the plaintiff (title No. 348760), but also other property (title Nos. 348759 and 396102).

company, of the second part, and the trustees of the friendly society, of the third part, G.H.C., Ltd. demised the land comprised in the lease of the same date to the insurance company for the term of a hundred and fifty years less the last ten days thereof, and the insurance company surrendered to the trustees of the friendly society the land comprised in the freehold titles to the intent that the term subsisting therein by virtue of, among other deeds, the mortgage of July 8, 1937, might cease and merge in the reversion immediately expectant thereon. No term had, in fact, subsisted under the mortgage, but the insurance company was protected under s. 87 (1) (a)* of the Law of Property Act, 1925. On Feb. 21, 1947, the entry on the charges register relating to the mortgage of July 8, 1937, was cancelled. By notices dated Apr. 30, 1959, the plaintiff company's solicitors gave notice to G.H.C., Ltd., the insurance company and the friendly society, requiring a renewed lease of the land for a further term of twenty-one years from the date on which the notices were served, in accordance with the agreement of July 26, 1938. Before giving these notices (and again at a later date) the plaintiff company's solicitors had written to the insurance company explaining the circumstances and asking if the insurance company would be agreeable to the grant of a lease in accordance with the option. In written replies, the assistant investment manager of the insurance company said that the company did not consider that its consent would be required. All moneys due to the insurance company were paid by Sept. 2, 1959. As G.H.C., Ltd. and the trustees of the friendly society refused to grant a lease in accordance with the agreement of July 26, 1938, the plaintiff company brought an action against them for specific performance of the agreement.

Held: the plaintiff company was entitled to specific performance of the agreement of July 26, 1938, for the following reasons:

(i) the option agreement and the lease were to be treated as one transaction, and the option, on its true construction, was an option for the renewal of the lease and was exercisable only while the relationship of landlord and tenant continued (see p. 769, letter H, post), and, therefore, the option was not affected by the rule against perpetuities.

(ii) the agreement was not rendered void by s. 149 (3)† of the Law of Property Act, 1925, because, so far as contracts were concerned, the subsection invalidated only a contract to grant a lease which, when granted, would be a reversionary lease taking effect more than twenty-one years after the date of the lease (see p. 770, letter G, post).

Re Strand & Savoy Properties, Ltd., D.P. Development Co., Ltd. v. *Cumbrae Properties, Ltd.* ([1960] 2 All E.R. 327) followed.

(iii) the obligation to grant the renewed lease ran with the reversion under s. 142 of the Law of Property Act, 1925, because

(a) it was "a covenant entered into by a lessor", within the meaning of s. 142 (1)‡, as the subsection applied to tenancies created by documents whether or not the documents were under seal, and the agreement to grant the option was an integral part of the transaction between the plaintiff company and the lessor and was not collateral to it (see p. 771, letters E and A, post);

(b) the option was an obligation "with reference to the subject-matter of the lease", within the meaning of s. 142 (1), as a covenant to renew a lease had always been regarded as a covenant touching and concerning the land; and

(c) at the date of the grant of the option the only reversionary estate was the fee simple vested in the lessor (G.R.I., Ltd.), notwithstanding the

* The relevant terms of s. 87 (1) are printed at p. 766, footnote (2), post.
† The relevant terms of s. 149 (3) are printed at p. 770, letter D, post.
‡ The relevant terms of s. 142 (1) are printed at p. 771, letter D, post.

existence of the charge by way of legal mortgage, dated July 8, 1937, and the lessor had the "power to bind the reversionary estate immediately expectant on the term granted by the lease", within s. 142 (1) of the Act of 1925 (see p. 772, letters C and G, post); the lease and option granted by the lessor must have been effective against anyone other than the mortgagee, and, as the mortgagee had not objected and the legal charge on the freehold had been released, were effective against the defendants (see p. 772, letter F, post).

[As to an option to renew a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 473, para. 1094; and for cases on the subject, see 31 DIGEST (Repl.) 67-69, *2236-2258*.

For the Law of Property Act, 1925, s. 142 (1), s. 149 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 734, 753.]

Cases referred to:

Allen v. *Anthony*, (1816), 1 Mer. 282; 35 E.R. 679; 20 Digest 329, *734*.

Barnhart v. *Greenshields*, (1853), 9 Moo. P.C.C. 18; 2 Eq. Rep. 1217; 22 L.T.O.S. 178; 14 E.R. 204; 20 Digest 301, *552*.

Beesly v. *Hallwood Estates, Ltd.*, [1960] 2 All E.R. 314; [1960] 1 W.L.R. 549.

Cole v. *Kelly*, [1920] 2 K.B. 106; 89 L.J.K.B. 819; 123 L.T. 105; 31 Digest (Repl.) 473, *5998*.

Daniels v. *Davison*, (1809), 16 Ves. 249; 33 E.R. 978; *subsequent proceedings*, (1811), 17 Ves. 433; 34 E.R. 167; 31 Digest (Repl.) 37, *1937*.

Doe d. Henniker v. *Watt*, (1828), 8 B. & C. 308; 1 Man. & Ry. K.B. 694; 6 L.J.O.S.K.B. 185; 108 E.R. 1057; 31 Digest (Repl.) 515, *6378*.

Hayne v. *Cummings*, (1864), 16 C.B.N.S. 421; 4 New Rep. 61; 10 L.T. 341; 143 E.R. 1191; 31 Digest (Repl.) 515, *6380*.

Hunt v. *Luck*, [1901] 1 Ch. 45; 70 L.J.Ch. 30; 83 L.T. 479; *affd.* C.A., [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 40 Digest (Repl.) 168, *1309*.

London & South Western Ry. Co. v. *Gomm*, (1881), 20 Ch.D. 562; 51 L.J.Ch. 193; 45 L.T. 505; *on appeal*, (1882), 20 Ch.D. 576; 37 Digest 89, *259*.

Muller v. *Trafford*, [1901] 1 Ch. 54; 70 L.J.Ch. 72; 31 Digest (Repl.) 470, *5960*.

Richardson v. *Sydenham*, (1703), 2 Vern. 447; 1 Eq. Cas. Abr. 47; 23 E.R. 885; 31 Digest (Repl.) 69, *2253*.

Rider v. *Ford*, [1923] All E.R. Rep. 562; [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347; 30 Digest (Repl.) 495, *1397*.

Shirlaw v. *Southern Foundries (1926), Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 108 L.J.K.B. 747; 160 L.T. 353; *affd.*, H.L., sub nom. *Southern Foundries (1926), Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; 9 Digest (Repl.) 557, *3689*.

Simpson v. *Clayton*, (1838), 4 Bing. N.C. 758; 1 Arn. 299; 6 Scott, 469; 8 L.J.C.P. 59; 132 E.R. 981; 31 Digest (Repl.) 67, *2241*.

Strand & Savoy Properties, Ltd., Re, D.P. Development Co., Ltd. v. *Cumbrae Properties, Ltd.*, [1960] 2 All E.R. 327; [1960] 3 W.L.R. 1.

Taylor v. *Stibbert*, (1794), 2 Ves. 437; 30 E.R. 713; 31 Digest (Repl.) 69, *2256*.

Woodall v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 30 Digest (Repl.) 495, *1395*.

Action.

The plaintiff company, Weg Motors, Ltd., claimed specific performance of an agreement for the grant of a further lease of the garages and outbuildings at the rear of a block of flats known as Grove Hall Court, Hall Road, St. John's Wood, London, and rights (demised by a lease dated July 26, 1938, and made between G.R. Investments, Ltd. and the plaintiff company) for a term of twenty-one years from Apr. 30, 1959, at the yearly rent of £1,500. The agreement of which specific performance was claimed was alleged to have been constituted

by an agreement, dated July 26, 1938, and made between G.R. Investments, Ltd. and the plaintiff company, and a notice or notices in writing, dated Apr. 30, 1959, and Oct. 14, 1959, and given by the plaintiff company's solicitors to Grove Hall Court, Ltd. (the fourth defendants), the Standard Life Assurance Co. (as the owners of a legal charge on the property), the Royal Liver Friendly Society (the present owner in fee simple), and Daejan Investments (Grove Hall), Ltd. (the fifth defendants). The first, second and third defendants were the trustees of the Royal Liver Friendly Society and were sued in that capacity. At the date of the commencement of the action, the fourth defendants were registered as the proprietors of a leasehold interest in the land for a term of one hundred and fifty years from Feb. 11, 1947, and the action was originally brought only against the trustees of the Royal Liver Friendly Society and the fourth defendants. On Sept. 2, 1959, Daejan Investments (Grove Hall), Ltd., were registered as proprietors of the leasehold interest, and were, therefore, added as defendants, the writ and statement of claim being amended accordingly.

R. W. Goff, Q.C., and *I. M. Phillips* for the plaintiff company.

J. L. Arnold, Q.C., and *E. W. Griffith* for the first, second and third defendants, the trustees of the Royal Liver Friendly Society.

H. E. Francis, Q.C., and *A. A. B. Fuller* for the fourth defendants, Grove Hall Court, Ltd., and the fifth defendants, Daejan Investments (Grove Hall), Ltd.

Cur. adv. vult.

Nov. 3. **DANCKWERTS, J.**, read the following judgment: The facts in this action are somewhat complicated. By a lease dated July 26, 1938, and made between a company, now no longer in existence, called G.R. Investments, Ltd. (thereinafter called " the lessor ", which expression was to include the reversioner for the time being immediately expectant on the term thereby created where the context so admitted), and the plaintiff company (thereinafter called " the lessee ", which expression was to include its successors and assigns where the context so admitted), certain land situate in St. John's Wood, London, at the rear of a block of flats known as Grove Hall Court, together with the garages and outbuildings erected thereon, was demised by G.R. Investments, Ltd. to the plaintiff company for a term of twenty-one years from Dec. 25, 1938 (that is, a date after the date of the lease), determinable by the lessee at the end of seven or fourteen years, at a rent of £1,500 a year. By cl. 3 (ix) the lessor covenanted that the lessor would permit the lessee to make certain openings in party walls, " the lessee reinstating and making good the same at the expiration of the term or any renewal thereof . . ."

By an agreement made on the same date, July 26, 1938, but signed, it appears, immediately before the execution of the lease, and made between the same parties (with definitions (1) also including their respective successors in title), it was agreed that, in consideration of the plaintiff company taking a lease of even date with but " executed after these presents " from the lessors, the lessees should have the option of taking a further lease of the premises demised by the lease for a term of twenty-one years at the yearly rent of £1,500. By cl. 2 it was provided that the said option should be exercisable by notice in writing given by the lessee to the lessors at any time before Dec. 25, 1959, and, if and when the same should be exercised, then the lessors should grant and the lessees should accept a further lease of the said premises for the same term (such term to commence from the date of the exercise of the option) at the said rent and the lessees should thereupon surrender the unexpired residue (if any) of the lease of July 26, 1938, to the lessors who should accept such surrender. Clause 2 provided that the lease should be in the form and to the effect of the lease of July 26, 1938.

(1) The parties were referred to as " lessor " and " lessee " in the lease dated July 26, 1938, and as " lessors " and " lessees " in the option agreement of the same date.

At the date of this transaction or these transactions, G.R. Investments, Ltd. were the legal owners of the fee simple in the property, but, by a mortgage dated July 8, 1937, they had mortgaged the property to the Standard Life Assurance Co. of Edinburgh. This mortgage was a charge by way of legal mortgage and, consequently, no actual demise or term of years was created, but it had the effect (2) provided by s. 87 (1) of the Law of Property Act, 1925. Clause 15 provided that the statutory powers of leasing and accepting surrenders of leases should not be exercisable by the borrowers without the written consent of the lenders, but that this clause was not to be deemed to apply to lettings by lease or agreement or otherwise for any period up to twenty-one years, and the acceptance of surrenders thereof, it being thereby agreed that such might be done by the borrowers without the consent of the lenders. Clause 18 provided that in every case in which, under the mortgage, anything was to be to the satisfaction or done with the approval or consent of the lenders, or any direction or notice was to be given by or to the lenders, such satisfaction, approval or consent should be sufficiently evidenced by any writing under the hand of the secretary or general manager for the time being of the lenders, and every such direction or notice should be sufficiently and effectually given by or to such secretary or general manager.

The consent of the lenders was not obtained in respect of the lease of July 26, 1938, and was not required in respect of the term of twenty-one years thereby created, but, if the statutory power of leasing was restricted in respect of the term to be created under the option contained in the agreement of the same date, difficulties might arise not only in respect of the lenders' consent but also because, when the option was exercised as hereinafter mentioned, the annual rent of £1,500 provided for by the option was, admittedly, not at that date " the best rent that [could] reasonably be obtained ", referred to (3) in s. 99 (6) of the Law of Property Act, 1925. G.R. Investments, Ltd. had been registered under the Land Registration Act, 1925, as proprietors of the land with absolute title, on Sept. 14, 1934. On July 10, 1937, the above-mentioned mortgage was registered in the charges register. On Jan. 5, 1939, notice of the option was registered as

> " an agreement dated July 26, 1938, conferring on [the plaintiff company] an option to take a lease . . . for a term of twenty-one years from the exercise of the option at the rent of £1,500 and on the condition therein contained."

On Jan. 11, 1939, there was registered a transfer of the land to United Investors Co-operative Society, Ltd. (which apparently afterwards changed its name to Unicos Property Corporation, Ltd.). On Oct. 15, 1941, the fourth defendants, Grove Hall Court, Ltd., were registered as the proprietors of the land. On Feb. 21, 1947, the trustees of the Royal Liver Friendly Society were registered as the proprietors of the land. The first three defendants are the present trustees of that society. On the same day, Feb. 21, 1947, the entry of the above-mentioned mortgage on the charges register was cancelled. This was in fulfilment of the following transactions.

By an agreement in writing dated Jan. 10, 1947, Grove Hall Court, Ltd. sold the land in fee simple to the Royal Liver Friendly Society. Clause 9 of that agreement provided:

---

(2) By s. 87 (1) of the Law of Property Act, 1925: " Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies . . . as if—(a) where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three thousand years . . . had been thereby created in favour of the mortgagee . . ."

(3) The statutory powers of a mortgagor or mortgagee of land, while in possession, to grant leases of the mortgaged land are contained in s. 99 of the Law of Property Act, 1925. Section 99 (6) reads: " Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case . . ."

A "The property is sold subject to the following: (a) the existing leases or tenancies of the flats at the said property, (b) a lease of the garages forming the rear part of the said property dated July 26, 1938, in favour of [the plaintiff company] for a term of twenty-one years from Dec. 25, 1938 (determinable at tenant's option at end of seventh or fourteenth year) at the rent of £1,500 per annum. By an agreement dated July 26, 1938, the lessee B has an option exercisable at any time prior to Dec. 25, 1959, to take a further term of twenty-one years from the date of the exercise of such option at the same rent and conditions as in the existing lease. Copies of the counterpart lease and option agreement mentioned in (b) above having been furnished to the purchasers or their solicitors (whether the purchasers inspect the originals or not) the purchasers shall be deemed to have full knowledge of C the contents thereof and shall raise no objection or requisition with regard thereto or with regard to the leases and tenancies referred to in (a) above."

It is plain that the above-mentioned sale was subject to the existence of the lease and the plaintiff company's option, and presumably these encumbrances affected the price to be paid for the property. Clause 7 of the agreement provided that the purchaser should on completion grant to the vendor (that is, Grove D Hall Court, Ltd.) a lease of the property thereby agreed to be sold at a rental of £5,000 per annum for a term of one hundred and fifty years from the date of completion of the sale. Clause 11 provided that the sale was subject to the vendor obtaining from the Standard Life Assurance Co. (the mortgagee of the property) a release of the freehold interest in the said property and an acceptance, by way of substituted security, of the lease to be granted to the vendor pursuant E to cl. 7, and the completion of the sale and purchase and of the grant of the lease thereunder was to be conditional on the completion of the release and substituted security by the Standard Life Assurance Co.

By a transfer dated Feb. 11, 1947, Grove Hall Court, Ltd. transferred the land to three persons, who were then the trustees of the Royal Liver Friendly Society, subject to

F "the exceptions reservations covenants and other matters set out or referred to in the entries in the register of the . . . titles so far as they are still subsisting and capable of being enforced and affect the properties included in the . . . titles."

This transfer was completed by the appropriate entry on the register of Feb. 21, G 1947, which I have mentioned.

By a lease dated Feb. 11, 1947, the trustees of the Royal Liver Friendly Society demised the land to Grove Hall Court, Ltd. for the term of one hundred and fifty years from Feb. 11, 1947, subject (a) to and with the benefit of the existing leases and tenancies of the flats and garages, and (b) to the exceptions, reservations and covenants and other matters set out or referred to in the entries H at Her Majesty's Land Registry under the title numbers of the land, at the yearly rent of £5,000. By cl. 2 (14) of the lease, Grove Hall Court, Ltd. covenanted to observe and perform such of the covenants and stipulations set out or referred to in the entries contained in the title numbers as were still subsisting and capable of taking effect and to keep the landlords effectively indemnified from all claims, costs, expenses and demands in respect thereof.

I By a deed of substituted security of the same date, and made between Grove Hall Court, Ltd., of the first part, the Standard Life Assurance Co., of the second part, and the trustees of the Royal Liver Friendly Society, of the third part, reciting an agreement for the substitution of the leasehold interest in the land for the freehold interest therein by way of security for the payment of the principal moneys and interest owing under the mortgage of July 8, 1937, Grove Hall Court, Ltd. demised the land comprised in the lease of Feb. 11, 1947, to the Standard Life Assurance Co. for the said term of one hundred and fifty years granted by the lease less the last ten days thereof; and the Standard Life

Assurance Co. surrendered to the trustees (who were described as " the reversioners ") the land comprised in the freehold titles to the intent that the term subsisting therein by virtue of the deeds referred to in the recitals (which included the mortgage of July 8, 1937) or any of them might cease and merge in the reversion immediately expectant thereon. In fact, of course, no actual term had subsisted under the mortgage of July 8, 1937. On Feb. 21, 1947, the entry on the charges register relating to the mortgage of July 8, 1937, was cancelled.

As the result of these transactions a new good leasehold title was registered at the Land Registry in respect of the land, and Grove Hall Court, Ltd. were registered on Feb. 21, 1947, as proprietors. By a registered transfer dated July 10, 1959 (which was after the issue of the writ in this action on June 29, 1959), Grove Hall Court, Ltd. transferred to the fifth defendants, Daejan Investments (Grove Hall), Ltd. the leasehold interest in the land. This transfer was completed by registration of that company as the proprietors of the leasehold interest on Sept. 2, 1959. But in the meantime a caution had been put on the leasehold title in favour of the plaintiff company on Aug. 21, 1959.

By notices, dated Apr. 30, 1959, the plaintiff company's solicitors, on behalf of the plaintiff company, gave notice to Grove Hall Court, Ltd., the Standard Life Assurance Co., and the Royal Liver Friendly Society, requiring a renewed lease of the land for a further term of twenty-one years from the date of service of the notices, in accordance with the agreement of July 26, 1938. Prior to this, on Apr. 14, 1959, the plaintiff company's solicitors had written to the Standard Life Assurance Co., explaining the circumstances and asking whether the assurance company were agreeable to the grant to the plaintiff company of a lease in accordance with the option. On Apr. 24, 1959, the assistant investment manager of the assurance company replied that the assurance company considered that their consent would not be required to the grant of any lease for any period up to twenty-one years. On June 23, 1959, the plaintiff company's solicitors, being uncertain whether the officers of the assurance company had really appreciated the points involved, wrote again to the assurance company explaining the situation, and on July 1, 1959, the assistant investment manager of the assurance company replied that the assurance company had not anything to add to their letter of Apr. 24, and thanking the solicitors for writing so fully. It is contended on behalf of the plaintiff company that, if the written consent of the assurance company was required to the granting of the lease referred to in the option agreement, it was effectively given by these letters. In fact, all moneys due to the Standard Life Assurance Co., were paid off on or before Sept. 2, 1959.

The defendants were not prepared to agree to the granting of a lease in accordance with the option to the plaintiff company, and accordingly this action was begun on June 29, 1959, against the trustees of the Royal Liver Friendly Society and Grove Hall Court, Ltd. Daejan Investments (Grove Hall), Ltd. were added as defendants as a result of their acquisition of the leasehold interest. Although the land appears to have been sold by Grove Hall Court, Ltd. to the Royal Liver Friendly Society, or the trustees thereof, on the footing that the land was subject to the option agreement as well as to the lease of July 26, 1938, numerous technical points have been raised by the defendants. On behalf of the trustees of the Royal Liver Friendly Society, some attempt was made to distinguish their position on the ground that they were not involved in the granting of the lease, as the long leasehold interest was the immediate reversion on the plaintiff company's leasehold term; but it seemed to me that these defendants really made common cause with the fourth defendants and the fifth defendants in the action. One of the objections taken was that the action was not properly constituted because the party to the agreement creating the option, G.R. Investments, Ltd., was not a defendant in the action. G.R. Investments, Ltd., ceased to exist at some date during the last war. I am far from being satisfied that, where the original party has parted with all his interest in the property concerned, he is a necessary party to an action to enforce an equity which

A is binding on a purchaser who has acquired the property with notice or, for other reasons, is bound by the obligation in question. Where, as in the present case, the original party has completely gone out of existence, it would be ridiculous that a defendant should be entitled to object to the absence of that party from the action. This objection, in my opinion, has no force. Of course, only a contracting party can be made liable in damages for a breach of contractual obligation, but that is quite a different matter.

The most important question which arises, in my view, is whether the agreement containing the option was a covenant for the renewal of a lease. If it was not such a covenant, it seems clear that, so far as it amounted to an attempt to create an interest in land, it would be invalid by reason of the rule against perpetuities: see *London & South Western Ry. Co.* v. *Gomm* (4), *Woodall* v. *Clifton* (5) and *Rider* v. *Ford* (6). But, if the agreement is one for the renewal of a lease, the matter is not affected by the rule against perpetuities at all. Covenants for the renewal of leases are said to be an anomalous case which should not be extended. It seems to me to be quite a sensible exception. It appears that covenants for the renewal of leases had become established as valid long before the rule against perpetuities was evolved to prevent unbarrable entails, and they do not seem to me to be involved in the abuses which the rule against perpetuities sought to correct.

It was, however, argued strenuously that the agreement of July 26, 1938, did not amount to an option for the renewal of a lease but was a provision for the granting of a new lease which might be implemented after an interval from the expiry of the original term of twenty-one years. Clause 1 of the option agreement creates an option of taking " a further lease of the premises ". By cl. 2 the option is " exercisable by notice in writing " at any time before Dec. 25, 1959, when the term of twenty-one years would have run its full course, if not determined by the tenant at the end of the first seven or fourteen years or by the landlord entering under the condition of re-entry. It is said, therefore, that the period during which the option might be exercised is not bound to the continuation of the relation of landlord and tenant between the parties, and reliance is placed on the description in the charges register of the absolute title under the Land Registration Act, 1925, as " an option to take a lease " and not an option to renew the lease. It was suggested that this description must or might be based on the description in the application form, and further discovery was asked for. I do not think that this point amounts to anything, because the description in the charges register seems to me to be not inconsistent with an option for renewal, and in any case could not contradict the terms of the option itself.

On the construction of the agreement of July 26, 1938, I think that the option is an option for the renewal of the lease. In consideration of the lessees taking the lease of even date, the lessees are given the option of " taking a further lease ". The fixing of the end of the period during which the option is exercisable coincides with the end of the term of twenty-one years granted by the lease of the same date, and it seems to me to be inconceivable that the option was to be exercisable when the term had been determined by the lessees or by their forfeiture of the lease and the exercise by the landlords of the conditions of re-entry. In the result, I hold that the option was only exercisable while the relation of landlord and tenant continued. I reach this conclusion as a matter of construction; but I think that it would be admissible in this case to imply a term to the same effect.

As MACKINNON, L.J., said in *Shirlaw* v. *Southern Foundries (1926), Ltd.* (7):

" ' Prima facie that which in any contract is left to be implied and need

(4) (1881), 20 Ch.D. 562.
(5) [1905] 2 Ch. 257.
(6) [1923] All E.R. Rep. 562; [1923] 1 Ch. 541.
(7) [1939] 2 All E.R. at p. 124; [1939] 2 K.B. at p. 227.

not be expressed is something so obvious that it goes without saying'. Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: 'Oh, of course'."

A

He added (8):

"At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong."

B

I feel quite sure that, if in July, 1938, the officious bystander had asked, "Are the lessees to be able to exercise the option when they have determined the lease or forfeited it?", the answer would have been "Don't be silly; of course not".

Another objection was based on the fact that the option was conferred by a document separate from the lease and executed, it appears, immediately before the lease itself was executed. So far as these points are concerned, in my view the option agreement and the lease must be treated as one transaction. After all, in the option agreement the respective parties are described as "the lessors" and "the lessees". It is, of course, not really possible to execute two documents exactly simultaneously. In my view, all the circumstances point to the agreement and the lease being regarded by the parties as part of the same transaction.

C

D

Another matter, which can be dealt with shortly, arises under s. 149 (3) of the Law of Property Act, 1925. This subsection provides:

"A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void . . ."

E

In *Re Strand & Savoy Properties, Ltd., D.P. Development Co., Ltd.* v. *Cumbrae Properties, Ltd.* (9) BUCKLEY, J., held that the subsection, so far as it applied to contracts, was confined to, and only rendered void, contracts to grant leases which, when created, would be reversionary leases, the postponement of the commencement of the term being for more than twenty-one years from the date of the lease, and did not invalidate a contract to create a lease at however remote a date in the future, which, when granted, would create a term taking effect within twenty-one years of the date of that lease. BUCKLEY, J., consequently held that the option in that case for renewal to take effect as a further term of thirty-five years from the expiration of the term of thirty-five years originally granted was a valid provision. I agree with that decision and follow it. It was not contended on behalf of the defendants that I should not do so, but they wished to keep the point open in case this case should go further.

F

G

The defendants did not, I think, seriously contend that, if other objections failed, they had not effective notice of the plaintiff company's rights under the option agreement by reason of the entries on the freehold title under the Land Registration Act, 1925. It is plain that the plaintiff company was adequately protected (see Land Registration Act, 1925, s. 3 (ix), s. 9, s. 10, s. 20, s. 23, s. 48 and s. 49; and *Beesly* v. *Hallwood Estates, Ltd.* (10)), but it was contended that the option was ineffective on a number of grounds.

H

Counsel for the fourth defendants and the fifth defendants contended that the plaintiff company could only succeed if the obligation ran with the reversion under s. 142 of the Law of Property Act, 1925. He based this contention on three points: (i) that the option was not "a covenant entered into", within the meaning of s. 142 (1); (ii) that the obligation did not have reference to the subject-matter of the lease, as interpreted by decisions of the court; and (iii) that G.R. Investments, Ltd. had no power to bind the reversionary interest immediately expectant on the leasehold term.

I

(8) [1939] 2 All E.R. at p. 124; [1939] 2 K.B. at p. 227.
(9) [1960] 2 All E.R. 327.
(10) [1960] 2 All E.R. 314.

Point (i) was based on the circumstance that the option agreement was not under seal, and the contention that in any case it was merely a collateral agreement. As regards this contention, I have already expressed the view (11) that the lease and the option agreement must be treated as one transaction, and the agreement for the lessees to have an option for the renewal of the lease seems to me to be an integral part of the transaction. I do not regard it as merely collateral. As regards the meaning of the word " covenant " in s. 142 (1), the word is, of course, often used to describe stipulations in a contract under seal or in a deed. But in the law of landlord and tenant I do not think that the word is confined to that meaning. It is commonplace to have tenancies by agreements which are not under seal and are not required by law to be made by deed. The stipulations contained in such agreements are generally treated as running with the land, and s. 142 of the Law of Property Act, 1925, cannot have been intended to upset the law of landlord and tenant in this respect. Counsel for the plaintiff company was able to satisfy me on this point. This view is supported by *Doe d. Henniker* v. *Watt* (12) and *Hayne* v. *Cummings* (13), where several definitions in dictionaries are referred to; and see *Muller* v. *Trafford* (14). A similar construction has been applied to s. 10 (1) of the Conveyancing Act, 1881 (15), and s. 141 of the Law of Property Act, 1925: see *Cole* v. *Kelly* (16).

Under s. 142 (1) of the Law of Property Act, 1925:

> " The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof . . ."

By s. 154, " ' lease ' includes an under-lease or other tenancy ". This makes it clear that s. 142 (1) is intended to apply to tenancies created by documents which are not under seal, in the same manner.

As to the argument under point (ii), that the option was not " with reference to the subject-matter " of the lease, a phrase which s. 142 (1) substitutes for the former description of " touching and concerning the land " (17), a covenant for renewal has always been regarded as one touching and concerning the land, in this respect differing from an option to acquire the freehold: see *Richardson* v. *Sydenham* (18), *Simpson* v. *Clayton* (19), and *Muller* v. *Trafford* (20). Of course, the argument of counsel for the fourth defendants and the fifth defendants on this point was also involved in his submissions as to the nature of the option in the present case, with which I have dealt previously. Professor Cheshire, in his MODERN REAL PROPERTY (8th Edn.) (1958), pp. 426, 427, on which counsel relied, in fact lists a covenant to renew the lease as one of the covenants touching and concerning the land. Professor Cheshire's observations on personal and collateral covenants, which are not capable of running with the land, are plainly not applicable to the option in the present case.

Point (iii) of counsel's contentions depended on the existence, at the date of the option agreement, of the mortgage of July 8, 1937. Section 142 (1) only applies

> ". . . if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease . . ."

At that date G.R. Investments, Ltd. were the owners of the freehold and the

(11) See p. 770, letter C, ante.
(12) (1828), 8 B. & C. 308.
(13) (1864), 16 C.B.N.S. at pp. 426, 427.
(14) [1901] 1 Ch. at p. 61.
(15) Section 10 (1) of the Conveyancing Act, 1881, was repealed by the Law of Property Act, 1925, and its provisions were re-enacted in s. 141 of the Act of 1925.
(16) [1920] 2 K.B. 106.
(17) See note " Having reference to the subject-matter thereof " in 20 HALSBURY'S STATUTES (2nd Edn.) 731; and 23 HALSBURY'S LAWS (3rd Edn.) 645, 646.
(18) (1703), 2 Vern. 447.
(19) (1838), 4 Bing. N.C. at p. 780.
(20) [1901] 1 Ch. at p. 60.

mortgage did not in fact create any term of years, because it was a charge by way of legal mortgage. It is true that s. 87 (1) of the Law of Property Act, 1925, provides that the mortgagee shall have the same protection, powers and remedies as if a mortgage term for three thousand years had been created; and s. 3 (i) of the Land Registration Act, 1925, provides:

> " ' Charge by way of legal mortgage ' means a mortgage created by charge under which, by virtue of the Law of Property Act, 1925, the mortgagee is to be treated as an estate owner in like manner as if a mortgage term by demise or subdemise were vested in him . . ."

Section 87 (1) and s. 205 (1) (xvi) of the Law of Property Act, 1925, however, do not describe such a mortgagee as an estate owner, and, where a mortgagee converts his mortgage into a charge by way of legal mortgage under s. 87 (2), the mortgage term is to be extinguished in the inheritance or the head term, as the case may be. It appears to me that the only reversionary estate at the date of the option agreement was the fee simple which was vested in G.R. Investments, Ltd.

There is then the question whether G.R. Investments, Ltd. had the power to bind the reversionary estate by the option. Assuming that the option fell within the restriction on the statutory powers of leasing contained in cl. 15 of the mortgage, there is much to be said for the view that due written consent was given to the option by the Standard Life Assurance Co. by their letters in 1959. The assurance company, after all, was the only person entitled to object under the clause in the mortgage, and that person was not raising any objection.

There is another and even stronger answer, in my view, to the contentions of the defendants. G.R. Investments, Ltd. were the owners in fee simple and had the powers of such an owner to make a lease of the land, apart from the statutory powers of leasing contained in s. 99 of the Law of Property Act, 1925. A lease granted under such powers must be effective against anyone other than the mortgagee and persons claiming through the mortgagee, at the worst. If the mortgagee does not object, who else can object to the validity of the lease? Moreover, in 1947 the mortgagee released the fee simple from the charge and accepted in substitution a charge on the term of one hundred and fifty years then created, which was subject to the rights of the plaintiff company. Any protection under s. 87 of the Law of Property Act, 1925, in respect of the freehold estate must have disappeared. And even the charge on the term of one hundred and fifty years disappeared when subsequently the moneys due to the assurance company were paid off.

In my view, G.R. Investments, Ltd. had power to bind the reversionary estate immediately expectant on the term granted by the lease and the option. If the defendants are barred by the option by reason of the provisions of s. 142 (1) of the Law of Property Act, 1925, it is not really necessary to consider the other contention of counsel for the plaintiff company that, as the plaintiff company was at all material times in possession, the option constituted an " overriding interest ", to which a purchaser of the land would be subject, quite apart from registration under the Land Registration Act, 1925: see *Hunt* v. *Luck* (21), in which it was held that a purchaser of land of which a tenant was in occupation had notice of all that tenant's rights. In that case FARWELL, J., said (22):

> " I take the law as stated in 1853 by LORD KINGSDOWN (then MR. PEMBERTON LEIGH), in *Barnhart* v. *Greenshields* (23): ' With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (24),

(21) [1901] 1 Ch. 45.
(22) [1901] 1 Ch. at p. 49.
(23) (1853), 9 Moo. P.C.C. at p. 32.
(24) (1794), 2 Ves. 437.

A but also to interests under collateral agreements, as in *Daniels* v. *Davison* (25), *Allen* v. *Anthony* (26), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be . . . '."

B Counsel's contention thus appears to be fully supported.

Counsel for the trustees of the Royal Liver Friendly Society contended that his clients could not be affected by any relief which the plaintiff company could claim in the action, and that they ceased to be reversioners when the lease for one hundred and fifty years was granted in 1947. But in the present case the C lease and the option for renewal were granted by the freeholder, and there is force in the argument of counsel for the plaintiff company that the plaintiff company is entitled to a further lease from the freeholders, and not merely to an underlease from the lessees of the one hundred and fifty year term. The trustees, as the present freeholders, are as much bound by the lease and the option, and are bound to give effect to the option, if binding. In my opinion, the plaintiff D company was fully justified in making the trustees defendants and asking for relief against them. In any case, the trustees retain the freehold estate, and the term of one hundred and fifty years might be ended prematurely by forfeiture or surrender. When I was disinclined to accept the elimination of the trustees from the matter, counsel for the trustees pursued the arguments put forward on behalf of the other defendants, and the trustees, in my opinion, must be taken to E have adopted quite as hostile an attitude to the claims of the plaintiff company.

Judgment for the plaintiff company.

Solicitors: *Curwen, Carter & Evans* (for the plaintiff company); *Sharpe, Pritchard & Co.*, agents for *Bremner, Sons & Corlett*, Liverpool (for the first, second and third defendants); *Franks, Charlesly & Co.* (for the fourth and the fifth defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

---

(25) (1809), 16 Ves. 249; (1811), 17 Ves. 433. (26) (1816), 1 Mer. 282.

A

NOTE.

RIORDAN *v.* THE WAR OFFICE.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), November 24, 1960.]

B

Crown—Crown servant—Dismissal—Dismissal at pleasure by Crown—Whether regulations made by Army Council under letters patent excluded Crown's right to dismiss employee at pleasure—Whether employee determined own employment under regulations—War Department (Outstations) Civilian Staff Regulations, 1950, *reg.* 437, *reg.* 438.

C

The plaintiff's appeal against the decision of DIPLOCK, J., given on Oct. 15, 1959, and reported [1959] 3 All E.R. 552, was heard and dismissed by the Court of Appeal on Nov. 24, 1960. The plaintiff's grounds of appeal related solely to the conduct of the trial at first instance, and the points of law on which DIPLOCK, J.'s judgment turned and was reported were not discussed. The judgment of the Court of Appeal is therefore not reported.

D

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

MARGATE CORPORATION *v.* ROACH.

E

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 29, 1960.]

Highway—Street—Private street works—Street—Occupation way used after housing development as a right of footway by public—Resolution passed by local authority concerning proposed street works—Objection by frontager—Whether occupation way repairable by public at large or excepted under the Highway Act, 1835 (5 & 6 *Will.* 4 *c.* 50), *s.* 23—*Whether part of a street within the meaning of the Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 5.

F

Part of an alleged street, viz., a strip of land ten feet wide running the full length (274 feet) of the alleged street whose width varied between twenty-four and twenty-eight feet, had been laid out as an occupation way at some date after the passing of the Highway Act, 1835, and had been used, until 1898, as an occupation way only. In 1898 housing development took place along a side of the alleged street and thereafter the ten-foot strip was used by the public only as a footway. The local authority had never repaired or maintained the alleged street or any part of it, but on Oct. 14, 1958, passed a resolution to make up this street pursuant to s. 6 of the Private Street Works Act, 1892. A frontager objected that the road concerned was not a street or part of a street within the meaning of s. 5 of the Act of 1892*, but was excepted from that definition because it was a highway repairable by the public at large. On appeal from a decision of the justices quashing the resolution,

G

H

I

Held: the inhabitants at large, by virtue of s. 23† of the Highway Act, 1835, had not become liable for the repair of the strip of land, and the fact that it became after 1898 a public footpath made no difference for present purposes; therefore, the strip of land was not excepted from the definition of

---

* The relevant terms of s. 5 are printed at p. 776, letter E, post; see now Highways Act, 1959, s. 213 (1).

† Section 23 is printed at p. 776, letter H, post; see now Highways Act, 1959, s. 39.

street in s. 5 of the Private Street Works Act, 1892, and the resolution of the local authority had been wrongly quashed.

Richmond (Surrey) Corpn. v. *Robinson* ([1955] 1 All E.R. 321) explained and distinguished.

Appeal allowed.

[Editorial Note. The decision in the present case was followed in *Ware U.D.C.* v. *Gaunt* (see p. 778, post). Section 23 of the Highway Act, 1835, is repealed by the Highways Act, 1959, and the replacing enactment (s. 39) is in somewhat different terms.

As to highways repairable by the public at large and the effect of the Highway Act, 1835, s. 23, see 19 HALSBURY'S LAWS (3rd Edn.) 110, para. 162 (3), 112, 113, paras. 165, 166; and for cases on the subject, see 26 DIGEST (Repl.) 392-394, *993-1011.*

As to resolutions to execute street works under the Private Street Works Act, 1892, see 19 HALSBURY'S LAWS (3rd Edn.) 438, para. 698; and as to objections by frontagers, see ibid., 443-445, paras. 703, 705; and for cases on these subjects, see 26 DIGEST (Repl.) 610, *2648, 2649,* 611, 612, *2654, 2655, 2660-2662,* 615, 616, *2687-2690.*

For the Highway Act, 1835, s. 23, see 11 HALSBURY'S STATUTES (2nd Edn.) 46; and see now Highways Act, 1959, s. 39; 39 HALSBURY'S STATUTES (2nd Edn.) 455.

For the Private Street Works Act, 1892, s. 5, s. 6, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 183-187; and see now Highways Act, 1959, s. 187, s. 174, s. 177; 39 HALSBURY'S STATUTES (2nd Edn.) 611, 598, 602.]

Case referred to:

Richmond (Surrey) Corpn. v. *Robinson,* [1955] 1 All E.R. 321; 119 J.P. 168; sub nom. *Robinson* v. *Richmond (Surrey) B.C.,* [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; 26 Digest (Repl.) 393, *1003.*

Case Stated.

This was an appeal by Case Stated by justices for the borough of Margate whereby they allowed an objection by the respondent, Stanley D. Roach, to a resolution passed by the appellants, the mayor, aldermen and burgesses of the borough of Margate, under s. 6 of the Private Street Works Act, 1892.

On Oct. 14, 1958, the appellants, by resolution under s. 6 of the Act of 1892, approved a specification, estimate and provisional apportionment of private street works to be done in part of a street known as St. James' Terrace, Birchington, Margate. The respondent, being an owner of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works, objected as a frontager under s. 7 of the Act of 1892 on two grounds—(i) that the alleged street or part of a street was not, and did not form part of, a street within the meaning of the Act of 1892, and (ii) that the street or part of the street was in whole or in part a highway repairable by the public at large. On Mar. 11, 1959, the appellants applied to the magistrates' court to appoint a time for hearing the objection which was heard by the justices on Mar. 20, 1959, and they gave their determination on Apr. 10, 1959, having found the following facts:—that the appellants had duly passed their resolutions as aforesaid which complied with the formalities of the Act of 1892 in relation to the proposed works; that the subject of the proposed works was in St. James' Terrace, Birchington, being a section 274 feet in length and varying between twenty-four feet, six inches and twenty-eight feet in width, being a street as defined by the Public Health Act, 1875. Included in this section was a strip ten feet in width which ran the full length of the street and had been laid out as an occupation way at some date after the passing of the Highway Act, 1835, and had been used as such only at least until 1898. In 1898 a housing development took place; thereafter the ten-foot strip had been used by the public as a right of way on foot only. It

was now shown in the draft map and statement prepared by Kent County Council under the provisions of s. 27 of the National Parks and Access to the Countryside Act, 1949, as a public footpath. The appellants had never repaired or maintained the street or any part of it, and the resolution approving specifications, estimates and provisional apportionment was for the purpose of making up the full width of the street including the ten-foot strip at the expense of the frontagers, subject to a contribution by the appellants under s. 15 of the Act of 1892. The appellants contended that the dedication to the public as a highway was a dedication to which the provisions of s. 23 of the Highway Act, 1835, applied, notwithstanding that the highway was a footpath only; that the ten-foot strip had only become repairable by the inhabitants at large by virtue of s. 47 of the Act of 1949* and that s. 50† of the Act of 1949 preserved the right of the appellants to carry out works to the whole street including the ten-foot strip and recover their expenses from the frontagers under the Act of 1892. The justices found that s. 50 of the Act of 1949 did not apply and that the appellants had no power to make up the ten-foot strip under the Act of 1892. They, therefore, quashed the appellants' resolution. The respondent thereupon applied, pursuant to s. 87 of the Magistrates' Courts Act, 1952, to the justices to state a Case for the opinion of the High Court whether on the foregoing facts they came to a correct decision in law.

N. C. Bridge appeared for the appellant local authority.

The respondent frontager did not appear and was not represented.

LORD PARKER, C.J., summarised the facts and continued: It is necessary to look at a few statutory provisions. The Private Street Works Act, 1892, by s. 5 defines streets to which that Act applies, in the following terms:

> " In this Act, if not inconsistent with the context— . . . The expression ' street ' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large."

There is a finding here that the section in question was a street as defined by the Public Health Act, 1875 (1), and the sole question, accordingly, is whether it had become a highway repairable by the inhabitants at large. That the public acquired rights over the strip from 1898 onwards is perfectly clear, and there is a presumption accordingly of a dedication to the public. The real question here is whether, although the public acquired such rights, they had become responsible for the repair of the strip by reason of s. 23 of the Highway Act, 1835. That section, so far as it is relevant here, is in these terms:

> " No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public . . ."

broadly speaking, shall have made the same up to a certain standard.

It is said here by the appellants that that section applies in the present case. It is said that here was an occupation way laid out a long time ago and after the passing of this Act of 1835. There is an express finding to that effect in para. 2 (c)

---

* 28 HALSBURY'S STATUTES (2nd Edn.) 592; see now Highways Act, 1959, s. 38 (2) (e), s. 53 (1); 39 HALSBURY'S STATUTES (2nd Edn.) 454, 473.

† 28 HALSBURY'S STATUTES (2nd Edn.) 595; see now Highways Act, 1959, Sch. 24, para. 24; 39 HALSBURY'S STATUTES (2nd Edn.) 767.

(1) Section 4 reads: " . . . Street includes any highway . . . and any road lane footway . . . or passage whether a thoroughfare or not ". **This section was repealed by the Public Health Act, 1936, s. 346 and Sch. 3, Part 1.**

of the Case (2). Accordingly, if the public thereafter, as they did in 1898, got rights over that occupation way, albeit only for persons on foot, it is said that s. 23 prevents the inhabitants at large being liable for its repair.

I confess that prima facie it seems to me that the facts of this case come fairly and squarely within s. 23. What troubled the justices is clear, and that is the decision of this court in *Richmond (Surrey) Corpn.* v. *Robinson* (3). The justices took the view that that case governed the facts of the present case, that the facts of the present case were indistinguishable, and accordingly they felt bound to quash the resolution and to hold that the case did not come within s. 23. It is to be observed that in *Richmond (Surrey) Corpn.* v. *Robinson* (3) no form of road or occupation way was ever made at the expense of the individual or private person within s. 23. What happened there was that when land was divided into plots a strip was left abutting the plots and at once that strip was used not only as access to the plots which were being developed but was, as was found, trodden down and used as a footpath by the public. On those facts this court held that s. 23 did not apply, and, accordingly, that, there having been a dedication to the public, the strip had become repairable by the inhabitants at large, and being so repairable, was not a street within the meaning of that term in the Private Street Works Act, 1892. Be it observed that the facts here are very different because, whereas in *Richmond (Surrey) Corpn.* v. *Robinson* (3) there had been no previous laying out at all, in the present case this strip with which we are concerned was originally an occupation way. Accordingly, this case, unlike *Richmond (Surrey) Corpn.* v. *Robinson* (3) does come within s. 23 unless it can be said that the mere fact that the subsequent dedication is in respect of a footpath makes a difference. In my judgment it makes no difference. I have come to the conclusion here that while *Richmond (Surrey) Corpn.* v. *Robinson* (3) is, of course, binding on this court, the facts here are entirely different and that on the facts in this case s. 23 applies. The conditions of s. 23 have never been fulfilled. Accordingly, this strip has never become repairable by the inhabitants at large and is, accordingly, a street within the Act of 1892. Therefore, I would allow this appeal and the case should go back with a direction that the justices' conclusion was wrong in law.

CASSELS, J.: I agree, and as I was a party to *Richmond (Surrey) Corpn.* v. *Robinson* (4), I agree that that case is distinguishable for the reasons set out in the judgment which has just been delivered by my Lord. Those reasons, of course, are that the facts of this case are very different from the facts in that one.

ASHWORTH, J.: I agree.

Appeal allowed. Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Margate (for the appellant local authority).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

---

(2) Paragraph 2 (c) of the Case reads: " Part of the street, namely a strip ten feet in width running the full length of the street and situated to the west of its centre-line (hereinafter called the ten-foot strip) had been laid out as an occupation way at some date after the Highway Act, 1835, was passed and had been used as an occupation way only at least until 1898 ".

(3) [1955] 1 All E.R. 321; [1955] 1 Q.B. 401.

(4) [1955] 1 All E.R. 321; [1955] 1 Q.B. 401 (i.e. LORD GODDARD, C.J., CASSELS and STREATFEILD, JJ.).

WARE URBAN DISTRICT COUNCIL *v.* GAUNT AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Elwes, JJ.), October 12, 19, 20, November 8, 1960.]

Highway—Street—Private street works—Making-up—Expenses—Apportionment to premises—Street lighting—Subterranean drainage—Resolution did not express dissatisfaction with existing street lights or mention subterranean drainage—Whether justices had power to amend resolution—Whether expenses could be apportioned to premises on the far side of public footpath adjoining street—"Front"—"Adjoin"—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 6.

Highway—Street—Private street works—Street—Occupation way or road laid out alongside footpath repairable by inhabitants at large—Whether road subject to provisions of Highway Act, 1835 (5 & 6 *Will.* 4 *c.* 50), *s.* 23.

In 1885 W. road was laid out by one T. as a new road, the southern section of which was laid out alongside and undivided from an existing public footpath to the western side of the new road. The footpath was repairable by the inhabitants at large and therefore was excluded from the definition of "street" in s. 5 of the Private Street Works Act, 1892. In March, 1956, the local authority resolved to make up the W. road and to apportion the expenses amongst the frontagers, who included the owners of a school which lay on the west side of the public footpath and thus was separated by it from the new road. This resolution did not refer to the lighting of the road. In December, 1958, the local authority approved a specification, etc., which included the provision of lighting and the provision of works described as "provide surface water drainage, gully pots and connexions to soakaways". Objection having been made by the frontagers,

Held: (i) W. road was not excluded from the definition of street in s. 5 of the Private Street Works Act, 1892, and accordingly could be the subject of a resolution under s. 6, for the following reasons—

(a) W. road, excluding the public footpath, was within s. 23* of the Highway Act, 1835, and had not, therefore, become repairable by the inhabitants at large, since it was originally laid out as a road or occupation way and the fact that it was only dedicated, or presumed to have been dedicated, as a footway, would not prevent its falling within s. 23 (see p. 784, letter H, post).

Margate Corpn. v. *Roach* (p. 774, ante) followed.

Richmond (Surrey) Corpn. v. *Robinson* ([1955] 1 All E.R. 321) distinguished.

(b) further, when the southern section of W. road was made by T., it retained its character of a road within s. 23 of the Highway Act, 1835, notwithstanding that the new road adjoined and was not separated from the public footpath on the west side (see p. 785, letter F, post).

A.-G. v. *Esher Linoleum Co., Ltd.* ([1901] 2 Ch. 647) distinguished.

(ii) if street lighting were to be included in proposed private street works, it was essential that there should be a resolution of a local authority expressing dissatisfaction with the existing lighting, and, in the absence of any such resolution the justices had no power to amend the resolution so as to include street lighting; accordingly all references to street lighting should be deleted from the specification (see p. 786, letters C to F, post).

Chester Corpn. v. *Briggs* ([1923] All E.R. Rep. 222) applied.

(iii) in so far as the works intended to be covered by the item "provide surface water drainage, gully pots and connexions" involved subterranean drainage the works should be struck out of the specification, etc. (see p. 787, letter G, post).

* Section 23, so far as relevant, is printed at p. 776, letter H, ante.

Dictum of LORD HEWART, C.J., in *East Barnet U.D.C.* v. *Stacey* ([1939] 2 All E.R. at p. 624) considered and applied.

(iv) although the school did not front on W. road, being separated therefrom by the public footpath (which was not a "street" within s. 5 of the Private Street Works Act, 1892), yet the school did "adjoin" W. road within the words "fronting, adjoining or abutting on" in s. 6 of the Act of 1892, and was, therefore, premises to which expenses of street works on W. road could properly be apportioned (see p. 789, letters D and E, post).

Dictum of LORD MACMILLAN in *New Plymouth Borough Council* v. *Taranaki Electric Power Board* ([1933] A.C. at p. 682) considered and dictum of BOWEN, L.J., in *Lightbound* v. *Higher Bebington Local Board* ((1885), 16 Q.B.D. at pp. 584, 585) applied.

Appeal allowed.

[Editorial Note. Section 23 of the Highway Act, 1835, has been repealed and its provisions are replaced, but in different terms, by s. 39 of the Highways Act, 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 455. Section 6 of the Private Street Works Act, 1892, is repealed by the Highways Act, 1959, and is replaced by ibid., s. 174; 39 HALSBURY'S STATUTES (2nd Edn.) 598.

As to the highways repairable by the public at large and the effect of the Highway Act, 1835, s. 23, see 19 HALSBURY'S LAWS (3rd Edn.) 110, para. 162 (3), 112, 113, paras. 165, 166 and SUPPLEMENT; and for cases on the subject, see 26 DIGEST (Repl.) 392-394, *993-1005*.

As to resolutions, etc., to execute street works under the Private Street Works Act, 1892, see 19 HALSBURY'S LAWS (3rd Edn.) 438-441, paras. 698, 699, 700; ibid., 442-446, paras. 702-705 and 707 and SUPPLEMENT; and for cases on the subject, see 26 DIGEST (Repl.) 537, *2117*; 563, 564, *2298-2302*; 590, *2475*; 610, 611, *2648*, *2649*; 611-613, *2654-2664*; 615-619, *2687-2692*, *2696*, *2699*, *2701*, *2702*, *2706*, *2707*; 621, *2729*.

For the Highway Act, 1835, s. 23, see 11 HALSBURY'S STATUTES (2nd Edn.) 46.

For the Private Street Works Act, 1892, s. 5, s. 6, s. 7, s. 8 (1) and s. 10, see ibid., 183-189.]

Cases referred to:

A.-G. v. *Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414; 66 J.P. 71; 26 Digest (Repl.) 289, *150*.

Cababé v. *Walton-upon-Thames U.C.*, [1913] 1 K.B. 481; *affd.* H.L., [1914] A.C. 102; 83 L.J.K.B. 243; 110 L.T. 674; 78 J.P. 129; 26 Digest (Repl.) 393, *1000*.

Chester Corpn. v. *Briggs*, [1923] All E.R. Rep. 222; [1924] 1 K.B. 239; 93 L.J.K.B. 69; 130 L.T. 221; 88 J.P. 1; 26 Digest (Repl.) 621, *2729*.

East Barnet U.D.C. v. *Stacey*, [1939] 2 All E.R. 621; [1939] 2 K.B. 861; 109 L.J.K.B. 53; 160 L.T. 561; 103 J.P. 237; 26 Digest (Repl.) 611, *2653*.

Herne Bay U.C. v. *Payne & Wood*, [1907] 2 K.B. 130; 76 L.J.K.B. 685; 96 L.T. 666; 71 J.P. 282; 26 Digest (Repl.) 617, *2698*.

Kingston-upon-Thames Corpn. v. *Baverstock*, (1909), 100 L.T. 935; 73 J.P. 378; 26 Digest (Repl.) 381, *907*.

Lightbound v. *Higher Bebington Local Board*, (1885), 16 Q.B.D. 577; 55 L.J.M.C. 94; 53 L.T. 812; 50 J.P. 500; 26 Digest (Repl.) 590, *2476*.

Margate Corpn. v. *Roach*, p. 774, ante.

New Plymouth Borough Council v. *Taranaki Electric Power Board*, [1933] A.C. 680; 102 L.J.P.C. 212; 149 L.T. 594; Digest Supp.

R. v. *Dukinfield* (*Inhabitants*), (1863), 4 B. & S. 158; 32 L.J.M.C. 230; 27 J.P. 805; 122 E.R. 420; 26 Digest (Repl.) 392, *997*.

Richmond (Surrey) Corpn. v. *Robinson*, [1955] 1 All E.R. 321; 119 J.P. 168; sub nom. *Robinson* v. *Richmond (Surrey) B.C.*, [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; 26 Digest (Repl.) 393, *1003*. A

Wakefield Local Board v. *Lee*, (1876), 1 Ex.D. 336; 35 L.T. 481; 41 J.P. 54; 26 Digest (Repl.) 590, *2475*.

Wandsworth B.C. v. *Golds*, [1911] 1 K.B. 60; 80 L.J.K.B. 126; 103 L.T. 568; 74 J.P. 464; 26 Digest (Repl.) 555, *2344*. B

Case Stated.

This was a Case Stated by justices for the county of Hertford, acting in and for the petty sessional division of Hertford and Ware, in respect of their adjudication as a magistrates' court sitting at Ware.

On Oct. 6, 1959, a complaint was preferred by the appellants, Ware Urban C District Council, against the respondents, Ernest John Gaunt and others, in respect of objections made under s. 7 of the Private Street Works Act, 1892, to street works proposed to be executed in Walton Road within the appellants' district and charged to the respondents and others under the Private Street Works Act, 1892. The justices heard the complaint on Oct. 19, 20 and 31, 1959, and found the following facts:—(a) Prior to 1885 Walton Road did not exist, D but there was a public footpath along what is now the westerly side of Walton Road from its junction into Hoe Lane to the north-east corner of Warner Road and then along in an almost straight line in a northerly direction to London Road. (b) In 1885 Walton Road was laid out as a new road by one Arthur Tite. The southern section of the road stretched from Hoe Lane to a junction with Warner Road, and was laid out alongside the aforesaid public footpath. (c) E In 1885, by a diversion order of Hertfordshire Quarter Sessions, the northern section of the aforesaid public footpath was directed to follow and lie open to the westerly side of Walton Road, which had then been laid out, from its junction with London Road for a distance of five hundred and ten feet and thence for three hundred and twenty feet (hereinafter called the non-contiguous section) away F from Walton Road in an almost straight line to the north-east corner of Warner Road. (d) On Mar. 7, 1956, the appellants resolved to level, pave, metal, flag, channel and make good the hitherto unmade-up Walton Road under the provisions of the Private Street Works Act, 1892, and that the expenses thereby incurred should be apportioned on the premises fronting, adjoining or abutting the said road according to (i) the respective frontages of such premises and G (ii) the greater or less degree of benefit to be derived by any premises from such works, and that the appellants' surveyor should prepare, in conformity with that resolution, and submit to the appellants, a specification, estimate and provisional apportionment. (e) On Dec. 3, 1958, the appellants by resolution approved a specification plan, sections, estimate and provisional apportionment relating to the works proposed to be done in sewering, levelling and making good Walton H Road prepared by their surveyor in accordance with the aforesaid resolution. (f) On Jan. 15 and 16, 1959, the respondents served on the appellants notices of objection to the provisional apportionment under s. 7 (a) to (f) of the Act of 1892. (g) On May 29, 1959, and June 5, 1959, a copy of the last resolution was duly published and copies were served on May 22, 1959, on the respondent owners of premises shown as liable to be charged in the provisional apportionment. (h) I The works comprised in the specification included the making-up of the westerly footpath (other than the non-contiguous section) the provision of lighting, adjustment of cover levels, alterations to public utility undertakings' apparatus, filling in underground passage, works to private properties such as adjustments to gates and path levels, and the provision of openings to private entrances. (i) The works relating to lighting, cover levels, and public utility undertakings' apparatus included works on or under the westerly footpath (other than the

non-contiguous section). (j) A credit of 10s. per foot in respect of the estimated cost of making-up the westerly footpath from London Road to the south-east corner of Scotts Hill House (but excluding the non-contiguous section) was allowed in the provisional apportionment against the amounts apportioned to the premises fronting, adjoining or abutting the western side of that part of the said footpath. (k) The road-ends or junctions of London Road, Warner Road, Windmill Fields and Hoe Lane were not included in the provisional apportionment. (l) The expenses were apportioned pro rata according to frontage. (m) There was no evidence of the appellants ever having repaired Walton Road other than the westerly public footpath. (n) Walton Road was substantially developed along both sides and was in a bad state of repair. (o) There existed in Walton Road three electric lamp standards erected by the appellants. (p) There was in Walton Road a limited system of soakaways to carry off surface water—at present silted up and ineffective. The appellants cannot tell if they can be restored to use until they are cleaned. (q) Ever since Walton Road was laid out its whole length and breadth has been open to the public on foot and there was evidence (accepted by the justices) that the whole width of Walton Road had been so used by the public on foot for at least forty years.

It was contended by the appellants: (i) that, except for the westerly footpath, Walton Road was a street within the meaning of the Act of 1892 and not a highway repairable by the public at large—the estimated cost of works in respect of the said westerly footpath from Hoe Lane to the south-east of Scotts Hill House had been wrongly charged against the respondents and an order should be made deducting that cost from the estimates. (ii) that the works alleged not to be street works were street works or necessarily ancillary and incidental thereto. (iii) that the resolution should be amended to provide for street lighting. (iv) that the proposed street works were not unreasonable. (v) that the said public footpath did not front, adjoin or abut the street but was in and part of the street. (vi) that the premises, being road-ends or junctions known as Windmill Fields, London Road, Warner Road and Hoe Lane, ought to have been included in the provisional apportionment and were not and an order should be made accordingly. (vii) that the provisional apportionment by reference to frontage reflected the greater or less degree of benefit to be derived by any premises from the street works, having regard to the possibility of additional buildings in those premises with longer frontages. (viii) that the estimated cost of works referred to in sub-para. (j) (see letter A, supra) in respect of the westerly public footpath ought not to have been so dealt with but ought to have been deducted from the total amount of estimated expenses and an order should be made accordingly.

It was contended by the respondents, other than Hertfordshire County Council (i) that the whole of Walton Road was a highway repairable by the inhabitants at large. Alternatively it was contended (ii) that the proposed street works were premature and therefore, unreasonable. In the further alternative it was contended (iii) that parts of the proposed works—making up the westerly footpath, adjusting existing cover levels, alterations to public utility undertakings' apparatus, works to private properties such as adjusting gates and path levels, filling in the underground passage and the provisions of openings to private entrances, were not street works within the meaning of the Act of 1892. (iv) the cost of the street lighting, not being provided for in the said resolutions and the appellants not having otherwise proved their dissatisfaction of the existing street lighting, could not be charged as street works under the Act of 1892. (v) the premises in Windmill Fields, the westerly public footpath, London Road, Warner Road, Windmill Fields and the Hoe Lane frontages should be included in the provisional apportionments. (vi) the

provisional apportionment had not been made with regard to the greater or less degree of benefit derived. A

In the yet further alternative it was contended (vii) that insufficient credit had been allowed for the said westerly footpath and the credit should be given to each and every property chargeable.

It was contended by the respondents, the Hertfordshire County Council:— (a) that the westerly public footpath was contiguous with Walton Road and repairable by the inhabitants at large. (b) that the power of the appellants under s. 6 of the Act of 1892 to make a resolution with respect to a street to do any one or more of the private street works therein mentioned is a power so to resolve in respect of a street not repairable by the inhabitants at large. (c) that the resolution of the appellants made under s. 6 in respect of Walton Road was a resolution in respect of the whole of Walton Road including the westerly footpath. (d) that the appellants had power to make a resolution under s. 6 in respect of the whole of a street to do one or more but not all of the private street works in that street but the street must be a street within the meaning of the Act of 1892 and not a street repairable by the public at large. (e) that the justices had, therefore, no power to amend the resolution of the appellants to do such private street works in Walton Road other than the westerly footpath. (f) that the resolution of the appellants must, therefore, be quashed or amended so as to be a resolution in respect of part of Walton Road other than the westerly footpath. (g) that, if the resolution is so amended, the premises against which the expenses of the private street works must be apportioned are the premises fronting, adjoining or abutting that part of Walton Road in respect of which the resolution as amended is made to take effect. (h) that the westerly public footpath fronts, abuts and adjoins that part of Walton Road other than the westerly public footpath and are premises to be included in the apportionment. (i) that the premises of Ware Grammar School, the property of the respondent county council, fronts on to the westerly public footpath and does not front, adjoin or abut that part of Walton Road other than the westerly public footpath. (j) that if the appellants' resolution is so amended so as to be a resolution in respect of that part of Walton Road other than the westerly public footpath, it is in effect a resolution to make up that part as a street separate from the westerly public footpath, and Ware Grammar School cannot front, adjoin and abut both on the westerly public footpath and on that part of Walton Road in respect of which the resolution as amended is made to take effect. B C D E F G

The justices were of the opinion that—(i) All the works alleged not to be street works, with the exception of the provisional road name-plates, were street works or necessarily ancillary and incidental thereto. (ii) The proposed street works were not unreasonable. (iii) The public footpath did not front, adjoin or abut the street, but was in and part of the street. (iv) The premises, being road-ends and junctions known as Windmill Fields, London Road, Warner Road and Hoe Lane ought to have been included in the provisional apportionments. (v) The provisional apportionment by reference to frontage was in accordance with the appellants' resolution and reflected the greater or less degree of benefit to be derived by the various premises from the street works. (vi) The estimated costs of the works referred to in respect of the westerly public footpath ought not to have been dealt with as stated in sub-para. (j) (see p. 781, letter A, ante), but ought to have been deducted from the total amount of the estimated expenses. The credit of 10s. per foot allowed for these works was sufficient. A similar credit of 10s. per foot in respect of the estimated cost of making up the westerly footpath from the south-eastern corner of Scotts Hill House to its junction with Hoe Lane should have been given and deducted from the total amount of estimated expenses. (vii) They (the justices) had power to amend the appellants' resolution to provide street lighting. (viii) The H I

A appellants had power to make resolutions under s. 6 of the Act of 1892 in respect of Walton Road including the westerly public footpath. (ix) The premises of Ware Grammar School, property of the respondent county council, front, adjoin or abut on Walton Road including the westerly public footpath. (x) The whole of Walton Road including the westerly public footpath is a highway repairable by the public at large, and accordingly, they (the justices) quashed B the whole of the resolution, plans, sections, estimates and provisional apportionments of the appellants.

The question for the opinion of the High Court was whether, on the above facts, the justices came to a correct determination and decision in point of law.

C. E. Scholefield, Q.C., and *D. G. H. Frank* for the appellants, Ware Urban C District Council.

P. M. H. Mottershead for the respondents, other than Hertfordshire County Council.

H. Parrish for the respondents, Hertfordshire County Council.

Cur. adv. vult.

Nov. 8. **ASHWORTH, J.,** read the first judgment at the request of LORD D PARKER, C.J.: The events leading up to these proceedings may be summarised as follows: (a) On Mar. 7, 1956, the appellants passed a resolution that Walton Road should be levelled, paved, metalled, flagged, channelled and made good under and in accordance with the Private Street Works Act, 1892, and that the expense should be apportioned on the premises fronting, adjoining or abutting on the said road. They further resolved that their surveyor should prepare in conformity with the E said resolution a specification, estimate and provisional apportionment. (b) On Dec. 3, 1958, the appellants by resolution approved a specification, plan, sections, estimate and provisional apportionment relating to the works proposed to be done in sewering, levelling and making good Walton Road prepared by their surveyor. (c) On Jan. 15 and 16, 1959, the respondents served notices of objection raising all the points covered by paras. (a) to (f) of s. 7 of the Act of 1892, (1).

F When the matter came before the justices they reached a number of conclusions on points of detail in favour of the appellants and, in addition, one general conclusion regarding Walton Road, as a result of which the whole of the appellants' proposals regarding Walton Road were quashed. In para. 6 (j) of the Case this general conclusion is stated as follows:

G > " The whole of Walton Road including the westerly public footpath is a highway repairable by the inhabitants at large, and accordingly we quashed in whole the resolution, plans, sections, estimates and provisional apportionments of the appellants."

If that conclusion is correct, Walton Road is not a street within the meaning of the Act of 1892, and the proposals were rightly quashed. As the decision H on this issue might render it unnecessary to consider the points of detail, it was decided to hear argument from both sides on this issue first. I propose to follow the same course in this judgment.

[HIS LORDSHIP summarised the facts as set out previously (see p. 780, letter D, et seq., ante), and continued:] The definition of " street " in s. 5 of the Act I of 1892 is in these terms:

> " The expression ' street ' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large " (2).

The appellants contend that Walton Road excluding the footpath was a street

(1) See now s. 177 of the Highways Act, 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 602.

(2) See now Highways Act, 1959, s. 213 (1); 39 HALSBURY'S STATUTES (2nd Edn.) 638.

not repairable by the inhabitants at large and they naturally rely on s. 23 of the Highway Act, 1835, one object of which was to protect ratepayers from being saddled with liability to repair roads laid down by private persons and dedicated to the public, unless the conditions prescribed in that section were complied with. In *Cababé* v. *Walton-upon-Thames U.C.* (3) HAMILTON, L.J., said:

> " Upon the face of it s. 23 of the Highway Act, 1835, is enacted in relief of the public. It severs that connexion between the right of the public to use a road as a highway and the obligation of the public to repair the road, which at common law was inseverable. It does so by annexing a statutory condition to repairability (see per BLACKBURN, J., in *R.* v. *Dukinfield* (*Inhabitants*) (4)), while leaving untouched the acquisition of a right of highway by the public against the owner of the soil. The occasion which brought before the attention of the legislature the need of some enactment was the practice of building owners who dedicated ways across their building estates with an eye to the development of the estate irrespective of public needs, and thereby cast on the parish or its successors in obligation the cost of repairs which enured almost exclusively to the advantage of themselves and their tenants or purchasers."

It has not been suggested that the conditions prescribed in s. 23 were complied with when Walton Road was first laid out in 1885 or since that date, so as to render it repairable by the inhabitants at large. Prima facie, therefore, Walton Road (excluding the public footpath on its westerly side) would appear to fall within the definition of " street " in the Act of 1892.

The respondents concede that if Walton Road (excluding the footpath) is properly to be regarded as a road, the conditions prescribed in s. 23 of the Act of 1835 have not at any time been complied with, but they contend that, in spite of its name and in spite of the description given to it in the quarter sessions' order of 1885 (5), Walton Road is and has been for over forty years a footpath, and therefore not within the mischief of s. 23. It is argued that for the purposes of that section and the ascertainment of the true character of a public way one must have regard to the rights exercised by the public over it, and that in the present case there was no evidence before the justices of any greater public right than that of walking on Walton Road on foot. In other words, even if a strip of land is dedicated to the public as a road, its legal character is that of a footpath if use as a footpath is the only use which the public choose to make of it.

The respondents' contentions were said to derive support from the decision of this court in *Richmond* (*Surrey*) *Corpn.* v. *Robinson* (6) but, in my judgment, that case is plainly distinguishable from the present. In that case the strip of ground was not laid out as a road and such dedication of it as was proved or presumed was dedicated as a footpath. Moreover, it is clear from the later decision of this court in *Margate Corpn.* v. *Roach* (7) that if the land in question was in fact laid out as a road or occupation way the provisions of s. 23 of the Act of 1835 would be applicable to it, even though the only public use made of it was as a footpath. It is only right to mention that the decision in *Margate Corpn.* v. *Roach* (7) was given after the justices' decision in the present case, and therefore could not have been brought to their notice. In my judgment, in spite of counsel for the first respondents' persuasive efforts to suggest the contrary, the decision in *Margate Corpn.* v. *Roach* (7) is binding on this court, and should be followed.

The justices appear also to have been influenced by the decision in *Kingston-upon-Thames Corpn.* v. *Baverstock* (8). At first sight that case has a similarity to the present case in that an existing footpath was diverted to run along a

(3) [1913] 1 K.B. at p. 494. (4) (1863), 4 B. & S. 158.
(5) I.e., " the new road recently made by . . . Arthur Tite ".
(6) [1955] 1 All E.R. 321; [1955] 1 Q.B. 401. (7) Reported p. 774, ante.
(8) (1909), 100 L.T. 935.

new road lately made, but in my view there is an important distinction between the two cases. In *Kingston-upon-Thames Corpn.* v. *Baverstock* (9) the justices found that the whole of the new road including the new footpath was taken and agreed to by the public authorities in lieu of the old diverted footpath only and that that then became a highway which was to be repairable by the parish as distinguished from the single strip along the side. This court held that there was sufficient evidence to justify the justices' finding. In my view, not only is there no evidence to justify a similar finding in the present case, but such evidence as there is points in the opposite direction, in particular the evidence as to the precise width of the new footpath alongside Walton Road.

Reliance was also placed by the respondents on the decision in *A.-G.* v. *Esher Linoleum Co., Ltd.* (10). The headnote reads as follows:

> "Where there is a public footway, and adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has devoted to traffic in fact."

It is to be noted that no question of repairability arose in that case, and it is further to be noted that the new carriageway was laid out alongside an existing public footpath. In his judgment BUCKLEY, J., emphasises that the owner of the land who laid out the new carriageway might have taken steps by fencing or otherwise to keep the public to the footpath (11). In the present case, so far as the northern section of Walton Road is concerned, the diversion order and certificate provided that the diverted footpath should be open to the new road which was already in existence, so that there was no possibility of the footpath being fenced. So far as the southern section is concerned, it is true that the public footpath was in existence before the new road was made and that in the absence of any fence separating the footpath from that section of the new road, it might have been impossible for Arthur Tite or his successors in title to prevent the public from walking over that section. But, in my view, so far as repairability goes, that section of the road retained the character with which it started, namely, that of a road, and remained subject to the provisions of s. 23 of the Act of 1835, that is to say, it was not repairable by the inhabitants at large even up to the standard appropriate for a footpath.

For these reasons, I am of opinion that the justices' conclusion, expressed in the Case Stated (12), that the whole of Walton Road, including the westerly public footpath, is a highway repairable by the inhabitants at large, was wrong in law, and it follows that, so far as that issue is concerned, the appellants' resolution, plans, sections, estimates and provisional apportionments should not have been quashed.

The remaining issues in the case relating to matters of detail were in substance decided by the justices in favour of the appellants. The respondents were, however, dissatisfied with some of the decisions and (there being no objection to this course by the appellants) submitted that those particular decisions should be reversed or varied.

In the first place, it was submitted that parts of the proposed works were not street works within the meaning of the Act of 1892. In a paragraph of the Case Stated, the works in question are set out (13), but I do not think it necessary to describe them in detail, as counsel for the appellants agreed that they should be excluded.

---

(9) (1909), 100 L.T. 935.
(10) [1901] 2 Ch. 647.
(11) [1901] 2 Ch. at pp. 649-651.
(12) See p. 783, letter A, ante.
(13) See p. 781, letter H, ante.

It is convenient to deal next with the question of street lighting. The justices' conclusion expressed in the Case Stated [see p. 782, letter I, ante] was that they had power to amend the appellants' resolution to enable them to provide street lighting notwithstanding the absence of any reference to it in the originating resolution dated Mar. 7, 1956. Under s. 8 (1) of the Act of 1892, a court of summary jurisdiction hearing objections to proposed street works is undoubtedly given power to amend a local authority's resolution, but the extent to which that power may be exercised is not unlimited. In *Chester Corpn.* v. *Briggs* (14) it was held in this court that in the absence of a resolution under s. 15 of the Act of 1892, justices had no power to insert by way of amendment to a resolution under s. 6 of the Act a resolution that the urban authority should contribute in whole or in part to the expenses of private street works. For my part, I see no difference in principle between a request to amend a resolution under s. 6 by inserting a matter which should have been the subject of a resolution under s. 15 and a request such as was made in the present case, namely, to amend a resolution under s. 6 by inserting a matter which under the same section could have been, but was not, included in the resolution. Section 6 expressly refers to lighting and, in my view, if an authority wishes to include lighting in the works proposed under that section, an essential step is a resolution expressing its dissatisfaction with the existing lighting. That step was not taken in the present case, and I am not prepared to accept the contention that, by approving a surveyor's specification which included proposals regarding lighting, an authority must be taken by implication to have resolved that the existing lighting was unsatisfactory. It is quite possible that the authority's attention was not specifically directed to the question of lighting and, in my view, the respondents, whom it is sought to charge with the expense of, inter alia, new lighting, are entitled to insist that the provisions of s. 6 are strictly observed. Accordingly, in my judgment, all references to lighting in the specification and estimate should be struck out.

A somewhat similar point arises in regard to surface water drainage, except that in this instance the justices do not appear to have reached a specific conclusion about it; there is no reference to the point in the paragraph of the Case Stated in which the justices' decisions are set out. The point was, however, argued before them and before us and counsel asked us to deal with it. The appellants contend that these particular works are comprised in the word "channelled" which appears both in s. 6 and in the appellants' resolution. The respondents contend that the appropriate word to cover works of the type now under consideration is "sewered", which appears in s. 6 but does not appear in the appellants' resolution. I confess that if it were open to me to do so I should give effect to the appellants' argument, on the footing that the works in question, described in the specification as "Provide surface water drainage, gully pots and connexions to soakaways", are necessarily or at least reasonably incidental to the channelling and making good of a road. As counsel for the appellants said, there is not much point in channelling a road unless means are provided for taking away such water as flows along the channels. Difficulty, however, arises owing to two decisions of this court, *Wandsworth B.C.* v. *Golds* (15) and *East Barnet U.D.C.* v. *Stacey* (16). In the latter case the following passage (which opens with a quotation from the judgment of LORD ALVERSTONE, C.J., in *Wandsworth B.C.* v. *Golds* (15)) occurs in the judgment of LORD HEWART, C.J. (17):

> "'The second point relied on by Mr. Danckwerts was that the expense of providing the gullies which formed part of the system of subterranean drainage [that is a useful phrase, if I may respectfully say so] did not come

(14) [1923] All E.R. Rep. 222; [1924] 1 K.B. 239.
(15) [1911] 1 K.B. 60.
(16) [1939] 2 All E.R. 621; [1939] 2 K.B. 861.
(17) [1939] 2 All E.R. at p. 624; [1939] 2 K.B. at p. 867.

under the head of paving or forming the road, and consequently was not properly chargeable to the owners. Speaking for myself, I should have great difficulty in coming to the conclusion that the construction of a gully, that is to say, of the connexion of the channel with the sewer, is part either of the paving or the formation of the road. The paving of the road is one thing. The making of improved drainage to take away water which will require to be taken away more rapidly in consequence of that paving is another '. In that particular case (18) LORD ALVERSTONE, C.J., refrains from expressing a decided opinion. PICKFORD, J., mentions the point without dealing with it (19). I think that it throws light upon this as a case, and I think that the true differentia which we have to bear in mind is a differentia between what may be called the system of subterranean drainage, on the one hand, and the paving of the road and matters immediately connected with it, on the other hand."

In *East Barnet U.D.C.* v. *Stacey* (20) the respondent frontagers appear to have relied to a large extent on the fact that the existing gullies and connecting pipes had been approved by the urban authority and that improvements and additions to them could not be charged to frontagers under the Act of 1892. In the present case it is found as a fact in the Case Stated [see p. 781, letter C, ante] that there is in Walton Road a limited system of soakaways designed to carry off surface water, but the respondents have not raised the same contention as was upheld in *East Barnet U.D.C.* v. *Stacey* (20); their case is founded on the absence of any reference to sewering in the appellants' resolution.

One of the matters which causes me some concern is the lack of any description of the works actually involved in the item in the specification: " Provide surface water drainage, gully pots and connexions to soakaways ". Although it is almost certain that this item involves subterranean drainage, there is nothing in the Case Stated to establish this, and it may be said against the respondents that, if they wished to challenge this point in this court, it was their responsibility to ensure that the relevant material is fully set out. Alternatively, it would be possible to remit the case to the justices so that they could state additional facts, but it was made clear by all the counsel concerned in the case that this course would not be welcomed by them or their clients. Not without some misgiving, I have come to the conclusion that in principle and in the light of the judgments to which I have referred, the respondents are right, but I do not think that it would be right to strike out the whole item, since it may include some works which can legitimately be charged. In my view it is sufficient to say that in so far as the works included in the item involve subterranean drainage they should be struck out.

The remaining issue is, in a sense, the most troublesome of all, namely, whether it is open to the appellants to apportion part of the expense on premises situate on the westerly side of Walton Road but separated from it by the public footpath. This issue involves as an ancillary problem the question whether part of the expense should in any event be apportioned on the public footpath. Section 6 of the Act of 1892 provides (21), inter alia, that

> " . . . the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street."

The respondents, Hertfordshire County Council, are the owners of premises known as Ware Grammar School, and those respondents contend that such

(18) I.e., [1911] 1 K.B. 60.
(19) [1911] 1 K.B. at pp. 68, 69.
(20) [1939] 2 All E.R. 621; [1939] 2 K.B. 861.
(21) See now Highways Act, 1959, s. 174 (1).

premises front on the public footpath and do not front, adjoin or abut on Walton Road itself. The premises of the other respondents or some of them are situated, so far as the public footpath and Walton Road itself are concerned, in a similar position to Ware Grammar School, and although those respondents did not expressly put forward the contention advanced on behalf of the county council, counsel on their behalf contrived to include in his able argument a measure of support for that contention. Counsel for the appellants argued that although the public footpath is repairable by the inhabitants at large, and therefore not of itself a street within the meaning of the Act of 1892, its existence did not prevent one as treating it and Walton Road together as a street within the meaning of s. 5. This argument involves construing s. 5 as if it read " 'Street' means a street in so far as it is not a highway repairable by the inhabitants at large ". For my part, I am quite unable to give effect to this argument and, in my view, the problem must be considered on the footing that the street in which the works are to be carried out under the Act of 1892 is Walton Road itself, excluding the public footpath.

Assuming that the street for the purposes of the Act of 1892 is Walton Road itself, the next problem is to ascertain what premises front, adjoin or abut on the westerly side of that street. In my view, only one answer is possible so far as the word " front " is concerned, namely, the public footpath. The fact that the fronting premises are a public footpath and not private property creates no difficulty. (Compare *Herne Bay U.C.* v. *Payne & Wood* (22)). For my part, I agree with the submission of counsel for the county council that if the premises fronting on Walton Road are the public footpath, it follows that Ware Grammar School does not so front. In my view, not more than one parcel of land can front on a particular part of a street.

The question then arises whether Ware Grammar School can be said to " adjoin " Walton Road. In *New Plymouth Borough Council* v. *Taranaki Electric Power Board* (23) LORD MACMILLAN said:

> " Their Lordships agree . . . that the primary and exact meaning of 'adjoining' is 'conterminous'. At the same time it cannot be disputed that the word is also used in a looser sense as meaning 'near' or 'neighbouring'."

In each case, as it seems to me, regard must be paid to the context in which the words appear and, quite apart from any decided cases, I am inclined to think that the context in the present case points to an enlarged rather than a restricted meaning of the word " adjoin ". I think that the inclusion of the three alternative types of chargeable premises, namely, those " fronting, adjoining or abutting on ", suggests that something more than mere physical contiguity was in the mind of the legislature. This view is in accordance with that expressed by BOWEN, L.J., in *Lightbound* v. *Higher Bebington Local Board* (24):

> " In construing such words as 'front', 'abut', and 'adjoin', in this Act of Parliament, actual contiguity is not necessary in order that the terms should be fulfilled. The case of *Wakefield Local Board* v. *Lee* (25) shows that. We have to go further and ascertain what is the true statutory meaning of this term as used in this section; and there is a broad rule of construction, of which the present case, so far as there is any law involved in it (which is very little), is to my mind an illustration. It is that in construing the words you must look at the subject-matter of the section and see what is its scope and object. Here one has a section which presumably is intended to charge persons who are benefited by the work done, and as soon as one

(22) [1907] 2 K.B. 130.
(23) [1933] A.C. at p. 682.
(24) (1885), 16 Q.B.D. at pp. 584, 585.
(25) (1876), 1 Ex.D. 336.

finds that, one gets a kind of light shed on the words 'front, abut, and adjoin'. With regard to 'front' and 'abut', it does not appear to me that these cottages in either plot can be said, in any fair use of language, to front or abut upon the part of the street which has been paved, and it seems to me, though it is not necessary to decide it, that the judgment of CLEASBY, B., in *Wakefield Local Board* v. *Lee* (26) is preferable to that of GROVE, J. (27). There is in this statute a larger word, 'adjoin', and we must see whether the cottages do not fall within the term 'adjoin'. Now, you cannot define adjoin as meaning benefit of access, or vice versa, but in considering whether houses adjoin which are placed in close proximity to the part of the street which is to be paved, it is a most important fact, and, in many cases, a dominant fact, to see whether there is a substantial access and advantage which the houses enjoy from that portion of the street which is to be paved, and a substantial access and advantage of that kind, coupled with close proximity, may bring the case within the word 'adjoin', though there is no actual touch."

That case was decided on s. 150 of the Public Health Act, 1875, (28) but the material words are the same.

No doubt in many, if not most, cases where an authority seeks to apportion a share of the expense on premises which do not front on the street which is being made good under the Act of 1892, reliance is placed on the provisions of s. 10 of the Act (29) relating to premises having access to the street. But in my view those provisions do not preclude the charging under s. 6 of premises which, though not fronting on the street, can properly be said to adjoin it: the circumstances in which such a course can be taken are not likely to occur often, but the present case is, in my opinion, a good illustration. When these circumstances do exist, it follows that the expense of making good the street is charged both on the premises actually fronting and on the premises adjoining, in this case the public footpath and Ware Grammar School. In my judgment, therefore, the premises known as Ware Grammar School adjoin Walton Road and are premises on which the expenses may properly be apportioned.

ELWES, J.: I agree.

LORD PARKER, C.J.: I also agree.

Appeal allowed.

[Argument then followed on the form of the order to be made, the court adjourning the matter for counsel to agree the order.

Dec. 6. The court made the following order in terms agreed by counsel:—

IT IS ORDERED THAT the judgment or determination of etc. . . . whereby the appellants' resolution, plans, sections, estimates and provisional apportionments were quashed in whole, be reversed so far as such determination relates to the said resolution, plans and sections and affirmed so far as the same relates to the said estimates and provisional apportionments AND THAT the matter be remitted to the said justices with the opinion of this court thereon . . .

AND THIS COURT IS OF OPINION that—(a) Walton Road, excluding the public footpath on the westerly side thereof, is not a highway repairable by the inhabitants at large and is a street within the meaning of the Private Street Works Act, 1892. Accordingly the determination of the justices to quash in whole the appellants' aforesaid resolution, plans and sections was wrong in law and the same should be restored subject to amendment in the manner mentioned in the next following paragraph hereof; (b) the appellants

(26) (1876), 1 Ex.D. at pp. 341-343. (27) (1876), 1 Ex.D. at pp. 343, 344.
(28) See now s. 189 of the Highways Act, 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 612.
(29) See now s. 176 of the Highways Act, 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 601.

had no power to make a resolution under the said Act in respect of Walton Road including the said westerly public footpath (which is not a street within the meaning of the said Act) and the appellants' restored resolution, plans and sections should be so amended as to exclude the said footpath and all works on or in respect of the same; (c) the following works and the estimated expenses thereof appearing in the appellants' specification, estimates and provisional apportionments were wrongly included therein, namely—(i) the works relating to adjustments to existing cover levels, alterations to public utilities undertakings' apparatus, works to private properties, work involved in filling in and sealing underground passage and provision of name-plates (which in the opinion of this court are not street works within the meaning of the said Act), (ii) the works relating to the provision of street lighting and such of the works relating to the provision of surface-water drainage, gully pots, and connexions to soakaways as involve subterranean drainage works (none of which works are, in the opinion of this court sufficiently provided for in the appellants' resolution); (d) the justices had no power to amend the appellants' resolution to enable them to provide street lighting; (e) the aforesaid westerly public footpath (in the sections where the same lies alongside Walton Road) fronts upon that part of Walton Road which is a street within the meaning of the said Act. Accordingly such footpath (in the sections aforesaid) forms premises which ought to have been inserted in, and charged by, the provisional apportionments; (f) the premises known as Ware Grammar School, the property of the respondent county council, do not front or abut but do adjoin that part of Walton Road which is a street within the meaning of the said Act and accordingly such premises were properly included in the appellants' provisional apportionments; and (g) having regard to the matters aforesaid and to the nature and extent of the amendments to the appellants' estimates and provisional apportionments which would be requisite to remedy the consequential defects therein, it is proper that the said estimates and apportionments should remain quashed, without prejudice to the appellants, if thought fit, causing to be prepared, approved and published, in accordance with the aforesaid Act, a further estimate and provisional apportionment pursuant to their resolution when amended as aforesaid.]

A B C D E

Solicitors: *Batchelor, Fry, Coulson & Burder*, agents for *Gisby & Son*, Ware (for the appellants); *Russell & Arnholz*, agents for *Chalmers Hunt & Baily*, Ware (for the respondents other than Hertfordshire County Council); *A. N. Moon*, Hertford (for Hertfordshire County Council).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

Re BUGLE PRESS, LTD.
Re HOUSES AND ESTATES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), November 9, 10, 11, 1960.]

Company—Scheme of arrangement—Scheme for transfer of shares to transferee company—Acquisition of shares of dissentients—Majority shareholders in transferor company holding all shares in transferee company—Sanction of court in exceptional circumstances only—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 209 (1).

The issued share capital of B., Ltd. comprised ten thousand shares of £1 each of which S. and J. each held four thousand five hundred and T. held one thousand. S. and J. also held all the issued shares (one hundred of £1 each) equally between them of J. & S., Ltd., which company was incorporated in September, 1958, and carried on no business except the transaction next stated. In July, 1959, J. & S., Ltd. offered to acquire T.'s shares in B., Ltd. at £10 per share, on the footing that it was clear that J. and S. (who between them held ninety per cent. of the issued shares of B., Ltd.) would accept the offer of £10 per share. The offer was based on a valuation by a firm of accountants. T. refused the offer and applied to the court for a declaration under the Companies Act, 1948, s. 209 (1)*, that J. & S., Ltd. was not entitled to acquire his shares.

Held: T. was entitled to the declaration because, the offeror and the holders of ninety per cent. of the company's shares whose transfer was involved being the same, the section (s. 209 (1)) was being used, not for a scheme or contract properly so called, but for the different purpose of enabling majority shareholders to expropriate the minority.

Decision of BUCKLEY, J. ([1960] 1 All E.R. 768) affirmed.

Semble: it might be otherwise if the minority shareholder were acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own (see p. 796, letter A, post).

[As to power to acquire shares of dissenting shareholders, see 6 HALSBURY'S LAWS (3rd Edn.) 774, para. 1561; and for cases on the subject, see 10 DIGEST (Repl.) 1093-1096, *7559-7574*.

For s. 209 (1) of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 628.]

Cases referred to:

Hoare & Co., Ltd., Re, [1933] All E.R. Rep. 105; 150 L.T. 374; 10 Digest (Repl.) 1095, *7572*.

Press Caps, Ltd., Re, [1949] 1 All E.R. 1013; [1949] Ch. 434; [1949] L.J.R. 1460; 10 Digest (Repl.) 1095, *7574*.

Sussex Brick Co., Ltd., Re, [1960] 1 All E.R. 772.

Appeal.

This was an appeal by the respondent Jackson & Shaw (Holdings), Ltd., from an order of BUCKLEY, J., dated Mar. 10, 1960, reported [1960] 1 All E.R. 768, whereby it was declared that the respondent company was not entitled to acquire the shares of the applicant, Henry Charles Treby, in the capital of Bugle Press, Ltd., on the terms of a scheme or contract dated July 14, 1959, notwithstanding that such scheme or contract had been approved by the holders of nine-tenths in value of the shares whose transfer was thereby involved.

A similar order was made in respect of Henry Charles Treby's holding of shares in the capital of Houses and Estates, Ltd., the facts being in essentials similar to those in the case of Bugle Press, Ltd.

---

* Section 209 (1) is printed at p. 793, letter B, post.

R. B. S. Instone for the respondent, the company.
Sir Milner Holland, Q.C., and *M. Finer* for the applicant.

LORD EVERSHED, M.R.: I shall follow the example set by BUCKLEY, J., in delivering a single judgment in the two cases before us. It is not in doubt that all relevant facts in the two cases are entirely analogous, and I shall make my necessary references to facts and documents from the Bugle Press case.

The appeal comes before us as a result of an application by originating summons made at the suit of Mr. Treby asking for a declaration that the respondents, Jackson & Shaw (Holdings), Ltd., were neither entitled nor bound to acquire the applicant's shares in Bugle Press, Ltd.—and I am quoting from the terms of the application which also find their place in the order—

> ". . . upon the terms of the scheme or contract dated July 14, 1959, notwithstanding that it [the scheme or contract] has been approved by nine-tenths of the shareholders of Bugle Press, Ltd."

The essential facts are set out in Mr. Treby's affidavit and I can summarise them as follows. Bugle Press, Ltd. was incorporated in January, 1950, and its business has, we understand, been that of the publication of a magazine devoted in large measure, if not entirely, to advertisement for the sales of second-hand cars and other like matters. The authorised and issued share capital of the company is ten thousand shares of £1 each fully paid, of which nine thousand have been at all material times held in equal moieties by George Douglas Shaw and Henry Robert Jackson who are the two directors of the company. The remaining thousand shares have at all material times been held by the applicant. The company to which I have already referred, Jackson & Shaw (Holdings), Ltd., was registered in September, 1958, and its only members and directors are the same two persons whom I have mentioned, George Douglas Shaw and Henry Robert Jackson. There is not any doubt, and indeed counsel for the company freely conceded, that the purpose of the formation of this company was in order that the mechanics of the Companies Act, 1948, s. 209, might be invoked. By a letter, dated July 14, 1959, it was stated by the solicitors acting for Jackson & Shaw (Holdings), Ltd., that that company was proposing to make an offer to purchase the whole of the issued share capital of Bugle Press, Ltd. The letter continued:

> " To this end, there have been given facilities for an independent firm of accountants to value the said shares. This has been done by Messrs. Price Waterhouse & Co. and their figures are £100,000 as to Bugle Press, Ltd. and £2,000 in respect of Houses and Estates, Ltd. In consequence, their offer will be in each of these figures to the shareholders of the two companies respectively. It is a known fact that Messrs. Jackson and Shaw, the holders of ninety per cent. of the issued capital in each instance, will accept this offer. Your client [the applicant] would receive should he accept "

as regards Bugle Press, Ltd., £10,000, and then there is a reference to a suggested procedure designed to avoid unnecessary stamp duty.

That offer having been declined, Jackson & Shaw (Holdings), Ltd., to whom I will refer henceforth as the transferee company (anticipating my reference to s. 209) proceeded to invoke the terms of that section with a view to obtaining by compulsion what they had failed to obtain by agreement, viz., the acquisition of the applicant's one thousand shares at the price suggested of £10,000. Section 209 contains a reference to a four months' period and a two months' further period thereafter. In fact the time which was adopted for taking the various steps was not in strict accordance with that indicated in the section and other formal steps were taken to get over that difficulty. For the purposes of this case, no point was taken that what was done was in any way ineffective by reason of the failure at any stage to observe the strict time limits indicated in the section.

With that introduction I can now turn to the language of s. 209 itself. It will be recalled that the section re-enacts with some, but immaterial, variations a similar provision which was for the first time part of the limited company legislation in the Companies Act, 1929, s. 155. Section 209 (1) of the Companies Act, 1948, provides, so far as relevant:

> " Where a scheme or contract involving the transfer of shares . . . in a company (in this section referred to as ' the transferor company ') to another company . . . (in this section referred to as ' the transferee company ') has . . . been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time . . . give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder . . . the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company."

There follows a proviso which counsel for the company very properly read to us, but which I shall not read for the purposes of this judgment, though I do not forget it or its importance as part of the mechanics of the section.

The transferee company invoked the power given by that section and the matter then came on an application by Mr. Treby by originating summons before BUCKLEY, J. The conclusion of that learned judge is summarised in his judgment (1):

> " In my view, therefore, the onus which I consider rests on the respondent [the transferee company] has not been discharged, and having regard to the unusual nature of this case, unusual in the sense that Messrs. Jackson and Shaw are holders of ninety per cent. of the shares and are themselves in substance the transferee company, I think that this is certainly a case in which the court ought to ' order otherwise ' within the meaning of s. 209 (1). In my judgment, the applicant ought not to be compelled to sell his shares at the proposed price in these circumstances."

In fairness to the argument of counsel for the company I shall read one earlier passage of the judgment (2):

> " Whether, in such a case, if the court were fully satisfied that the price offered to the minority shareholders was a fair price to be offered for their shares, the section ought to be allowed to operate according to its tenor is, I think, a matter which it is unnecessary for me to decide today because, in my view, on the facts of this particular case, the onus must at any rate rest on the respondents [the transferee company] to satisfy the court that the price offered is fair."

Counsel for the company in opening the appeal put his case broadly as follows. First, he said that this case was within the four corners of the section on the ordinary construction of its language. Second, he said that it followed that the onus must be on the dissident shareholder to show that an order should be made otherwise than as the section envisages; and that argument, I interpolate, depends on the language of s. 209 (1) which I have already read—

> " . . . the transferee company shall, unless on an application made by the dissenting shareholder . . . the court thinks fit to order otherwise, be entitled and bound to acquire . . ."

Third, counsel conceded that he could not in this case rely on the mere fact

---

(1) [1960] 1 All E.R. at p. 772. (2) [1960] 1 All E.R. at p. 771.

that holders of ninety per cent. of the shares in this company accepted or were prepared to accept this offer, but, he said, since there was an independent valuation of the interest in the company held by the applicant he failed to discharge the onus which the section put on him. Fourth, such criticisms as were contained in the applicant's evidence of the figures Messrs. Price Waterhouse gave only served at best to show that that eminent firm's valuation of the assets of the company might not be the correct figure for such assets. But that after all, says counsel, was not the question; the question was a different one—what was a fair offer for the applicant's minority interest in this company, Bugle Press, Ltd.? It may be added that the applicant's right under the articles to take any part in the control and conduct of the company's affairs is, not unnaturally, very strictly limited indeed. So, says counsel, the applicant has not shown that there is anything wrong with the offer as made to him. Finally, counsel in support of his propositions, and particularly of the second one as regards the onus, relied on a decision of MAUGHAM, J., in *Re Hoare & Co., Ltd.* (3), which was referred to with the express approval of this court in *Re Press Caps, Ltd.* (4). In the case last mentioned, SOMERVELL, L.J., said (5):

> " The case in which the broad general principle was laid down and was decided by MAUGHAM, J., in 1933 is *Re Hoare & Co., Ltd.* (3). That was an application of a similar kind in respect of a scheme. In the course of his judgment, MAUGHAM, J., after referring to the fact that an application of this kind can only come before the court when ninety per cent. or more of the shareholders have accepted the offer, said (6): 'Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair '."

SOMERVELL, L.J., then stated his own acceptance of that principle.

It must be borne in mind that *Re Hoare & Co., Ltd.* (3), followed in this respect by *Re Press Caps, Ltd.* (4), was a case in which the ninety per cent. who had accepted the offer of the shareholders were persons wholly independent of the offeror or transferee company. MAUGHAM, J. (and I will not make further detailed reference to the decision of *Re Hoare & Co., Ltd.* (3)) after pointing out that the section gave no guide whatever as to the basis on which the apparently unlimited discretion is to be exercised, stated that in a case of that kind (which would be the ordinary case) the holders of ninety per cent. of the shares say: " This is, we think, a good offer or satisfactory offer ", the court will not, in the absence of very strong evidence to show there is something wrong with the offer, substitute its own view of what a fair offer would be and by that means enable, as VAISEY, L.J., picturesquely said in another case [*Re Sussex Brick Co., Ltd.* (7)], the one soldier in the regiment who was not out of step to defeat what all the other shareholders had thought was a perfectly proper and fair scheme. As I have said, the section itself gives no guide and imposes no limit as regards the grounds on which the discretion is to be exercised and in the ordinary case of a scheme whereby an outside party seeks to acquire the shares of a company and is not itself interested as a shareholder already or to the extent that it is not so interested, the principle will be that stated by MAUGHAM, J. But one thing is quite plain and that is that this is not an ordinary case, not a case which is at all analogous to the kind of case which came before MAUGHAM, J.

Counsel for the company freely accepts that the mechanism of the section has here been invoked by means of the incorporation specially for the purpose of this holding company, Jackson & Shaw (Holdings), Ltd., in order to enable the two

(3) [1933] All E.R. Rep. 105. (4) [1949] 1 All E.R. 1013; [1949] Ch. 434.
(5) [1949] 1 All E.R. at p. 1014; [1949] Ch. at p. 440.
(6) [1933] All E.R. Rep. at p. 107. (7) [1960] 1 All E.R. at p. 774.

persons, Mr. Shaw and Mr. Jackson, to expropriate the shares of their minority colleague, the applicant. He says that although that is undoubtedly true, nevertheless, in the result, the case does fall within the strict language of the section and falling within it the consequences must follow. If that argument is right it would enable by a device of this kind the ninety per cent. majority of the shareholders always to get rid of a minority shareholder whom they did not happen to like; that as a matter of principle would appear to be contrary to a fundamental principle of our law that prima facie if a man has a legal right which is an absolute right, then he can do with it or not do with it what he will.

Junior counsel for the applicant took the point that the opening words of the subsection required first it to be shown that there exists a scheme or contract involving the transfer of shares. It is true that in one sense, possibly derogatively, there is shown to be a " scheme " in this case; but, as counsel contended, there is nothing established which could be called a scheme or contract as the words would apparently indicate. If that argument were well founded the result would be that the case would be wholly outside the section. That point does not appear to have been taken in the court below and it is not referred to by Buckley, J., nor was it taken in his argument before us by leading counsel. Finally there is no cross-notice of appeal here seeking to uphold the judgment on that ground. In the circumstances I do not think that it would be right for this court now to come to a decision basing itself on an acceptance, if it should think it right to accept it, of that argument. It is, however, relevant (and we are indebted to junior counsel for drawing our attention to it) to note that one must by the terms of s. 209 itself have regard to what lies behind the invocation of the section. It pre-supposes the existence of a scheme or contract involving a transfer of shares and that supposition is expressed when one looks not only at the application but at Buckley, J.'s order. By way of background to the necessary approach, there are the words in the parenthesis following the reference to the nine-tenths fraction " other than shares already held at the date of the offer by, or by a nominee for, the transferee company . . .". Counsel for the company pointed out, with justice in my judgment, that although Mr. Shaw and Mr. Jackson are for all practical purposes the same as Jackson & Shaw (Holdings), Ltd., it is not true to say that at the date of the offer any shares on the evidence were held either by the transferee company or by a nominee for the transferee company. Nevertheless when one has regard to the opening words and to the parenthesis, it seems to me plain that the section is directed to a case where there is a scheme or contract for the acquisition of a company, its amalgamation, re-organisation or the like, and where the offeror is independent of the shareholders in the transferor company or at least independent of that part or fraction of them from which the ninety per cent. is to be derived. Even, therefore, though the present case falls strictly within the terms of s. 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special—a case, therefore, of a kind contemplated by Maugham, J., to which his general rule would not be applicable. It is no doubt true to say that it is still for the dissident shareholder to establish that the discretion should be exercised in the way he seeks. That, I think, agreeing with counsel for the company follows from the language of the section which uses the formula " unless on an application made by the dissenting shareholder . . . the court thinks fit to order otherwise ". But if the dissenting shareholder shows, as he shows here, that the offeror and the ninety per cent. of the transferor company's shareholders are the same, then as it seems to me he has prima facie shown that the court ought to order otherwise, since if it should not so do the result would be, as counsel for the company concedes, that the section has been used not for the purpose of any scheme or contract properly so called or contemplated

by the section, but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority; and that, as it seems to me, is something for the purposes of which prima facie the court ought not to allow the section to be invoked—unless at any rate it were shown that there was some good reason in the interests of the company for so doing, e.g., that the minority shareholder was in some way acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own.

I prefer, therefore, to base my decision on the broad ground, which I have tried to state, and do not propose to involve myself in the conflict which has arisen on the evidence as to the correctness of Messrs. Price Waterhouse & Co.'s valuation of the company or its undertaking or its shares; save only to say that, as counsel for the applicant pointed out, in the absence of any evidence filed on behalf of the transferee company, and, therefore, of any opportunity of cross-examination, the fact that offers were made to the applicant in April and May and in an ascending scale of figures appreciably greater than that contained in the July offer and the facts as to the profit earning of this company during the first quarter of 1959, at least show that there is no case here established why the discretion, given the major premise to which I have referred, should not be exercised in the way in which BUCKLEY, J., exercised it.

For these reasons I think that we could not properly and should not interfere with BUCKLEY, J.'s exercise of discretion. I should add this. When in his judgment (8) BUCKLEY, J., based himself or is recorded as basing himself on the view that the onus rested on the transferee company to satisfy the court " that the proposed price is fair ", I would, with respect, not like to let my decision rest on that proposition. I would prefer, as I have said, to put it on the broader ground which is the ground that BUCKLEY, J., himself expressed in the penultimate paragraph of his judgment which I earlier read.

HARMAN, L.J.: I agree. In my judgment this is a barefaced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, unless the articles so provide, to expropriate a minority. It would be all too simple if all one had to do was to form a £2 company and sell to it one's shares, and then force the outsider to comply. If the point had been taken earlier I, for one, should have been prepared to hold that this case never came within the section at all. Indeed, no serious attempt to comply with the section has ever been made here—that can be seen from the summons which refers to the scheme and contract dated July 14, 1959. There is no sign anywhere of any scheme or contract made on July 14, 1959, and, therefore, the section does not begin to operate. The applicant might have ignored this notice altogether, but he had not the courage to do that, and I am not surprised, and so he makes this application and he does thereby, I suppose, admit that there was a scheme and a contract of July 14, 1959, though everybody must have perfectly well known that there was none. Apart from that, these two individuals or their advisers did not even trouble to comply with the next part of s. 209, viz., the length of delay and the notice that they had to give. They were in a hurry and they just ignored that part of it. The applicant's advisers waived that objection also, and he having applied to the court under the section must, like any other applicant, prove his case, i.e., set up a case which the respondents have to answer. He does that, it seems to me, as it seemed to my Lord, quite simply by showing that the transferee company is nothing but a little hut built round his two co-shareholders, and that the so-called scheme was made by themselves as directors of that company with themselves as shareholders and the whole thing, therefore, is seen to be a hollow sham. It is then for the company to show that nevertheless there is some good reason why the scheme should be allowed to go on. The company, whether because they do not wish to go into the witness-box and be cross-

(8) [1960] 1 All E.R. at p. 772.

examined or for some other reason, do not file any evidence at all; they merely purport to rely on a copy of a valuation said to have been made on their behalf by a firm of chartered accountants. That valuation is not sworn to, nobody has been able to cross-examine the authors of it and there is in my judgment no case to answer. The applicant has nothing to knock down; he has only to shout and the walls of this Jericho fall flat. I am surprised that it was thought that so elementary a device would receive the court's approval. I would dismiss this appeal.

DONOVAN, L.J.: I agree with those judgments.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Blakeney & Co.* (for the respondent); *Henry E. Goodrich* (for the applicant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

GOVERNMENT OF CEYLON *v.* SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS.

[QUEEN'S BENCH DIVISION (Diplock, J.), November 10, 11, 1960.]

Shipping—Demurrage—Computation—Lay days—Readiness for discharge—Vessel chartered to carry part cargo of flour—Option to owners to complete cargo en route to discharging port—Flour cargo overstowed by other cargo loaded en route—Lay days commencing only when all flour cargo accessible for discharge.

Shipping—Demurrage—Time lost waiting for berth—Ship kept waiting because discharging berth not available—During waiting period ship not in physical condition to discharge cargo because of overstowage but ready in all other respects—Whether time spent waiting to count as discharging time.

Under a charterparty in Gencon form the vessel Massalia was to proceed to Antwerp and Bordeaux and there load a part cargo of flour in bags. Being so loaded she was then to proceed to one good and safe berth as ordered at Colombo and there deliver "the cargo". The charterparty went on to provide (inter alia):—"5. Cargo to be brought alongside . . . to enable vessel . . . to load the full cargo (see cl. 16 attached). Time to commence at 2 p.m. if notice of readiness to load is given before noon . . . 6. (See cl. 16 attached). Time to commence at 2 p.m. if notice of readiness to discharge is given before noon . . . Time lost in waiting for berth to count as discharging time. 16. Cargo to be loaded and stowed . . . at the rate of . . . and to be discharged at receiver's risk and expense at the rate of 750 tons of 2,240 lb. per weather working day, Sundays and holidays excepted. 30. Owners to have liberty to complete cargo 'en route' with other goods". The Massalia duly loaded a part cargo of 4,373 metric tons of flour at Antwerp and Bordeaux. En route to Colombo, at Port Said, she loaded general cargo and a cargo of household utensils pursuant to cl. 30. None of the Port Said cargo was shipped by, or destined to, the charterers. In three of the vessel's holds the whole of the flour cargo was overstowed by Port Said cargo; in a further hold the flour cargo was partly overstowed by Port Said cargo and in the remaining hold there was no overstowing of the flour cargo. On Oct. 18, 1956, the vessel anchored in the outer anchorage at the port of Colombo. The outer anchorage was within the legal, fiscal and geographical limits of the port and was the place where vessels ordinarily lay while waiting for a berth. No cargo operations were carried out in the outer anchorage. Notice of readiness

to discharge was given at 0900 hours on Oct. 18, and under the charterparty, expired at 1400 hours on the same day. At the time when notice of readiness was given the vessel was ready in every respect to begin discharging her cargo, but it would not then have been possible to discharge that part of the flour cargo overstowed by Port Said cargo until some or all of the Port Said cargo had first been discharged. The vessel remained at the outer anchorage until Wednesday, Oct. 24, 1956, i.e., for a period of five days sixteen hours fifteen minutes, when a berth became available. She berthed at 0720 hours on Oct. 24 and began to discharge cargo. The overstowed Port Said cargo was sufficiently removed from the holds to render all of the flour cargo accessible for discharge at 0400 hours on Saturday, Oct. 27, 1956. Discharge of the flour cargo was completed at 0300 hours on Nov. 3, 1956. The lay-time for discharging was five days nineteen hours forty-five minutes. On a claim for demurrage, the owners contended that lay-time began to run at 0720 hours on Oct. 24 when the vessel berthed, and further contended that the time spent lying in the outer anchorage was time lost waiting for a berth within cl. 6, though the owners conceded that that time did not start until 1400 hours on Oct. 18, when the notice of readiness expired.

Held: (i) lay-time did not begin to run until all the flour cargo was accessible for discharge, viz., at 0400 hours on Oct. 27, for the following reasons:—

(a) on the true construction of the charterparty "cargo" in cl. 16 and cl. 6 meant the flour cargo, so that readiness to discharge (in cl. 6) meant readiness to discharge the flour cargo, not readiness to discharge a cargo overstowed on the flour cargo (see p. 802, letter C, post).

Dicta of LUSH, J., in *Straker* v. *Kidd* ((1878), 3 Q.B.D. at p. 225) considered and not followed.

(b) the principle applicable to loading, viz., that a vessel is not ready to load until she is discharged and ready in all her holds so as to give the charterers complete control of every part of the vessel available for cargo, applied to readiness to discharge a vessel (see p. 803, letter B, post).

Lyderhorn Sailing Ship Co., Ltd. v. *Duncan Fox & Co.* ([1909] 2 K.B. 929), as approved by SCRUTTON, L.J., in *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* ([1917] 2 K.B. at pp. 211, 212) applied.

(ii) the starting of lay-time was not deferred until 1400 hours on Oct. 27, viz., the time at which, if notice of readiness had been given at 0400 hours on Oct. 27 (when the vessel became ready to discharge), the notice would have expired (see p. 804, letter D, post).

(iii) the time spent by the vessel lying in the outer anchorage was time lost in waiting for a berth within the meaning of cl. 6 although during this period the vessel was not, because of overstowing, in a physical condition to discharge the cargo, viz., the flour cargo, as soon as she got to a berth; in calculating demurrage, therefore, the time spent in the outer anchorage counted as discharging time and must be added to the actual discharging time (see p. 803, letter I, to p. 804, letter A, post).

North River Freighters, Ltd. v. *H.E. The President of India* ([1956] 1 All E.R. 50) and *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers, Ltd.* ([1956] 3 All E.R. 383) applied. Dictum of PARKER, L.J., in *North River Freighters, Ltd.* v. *H.E. The President of India* ([1956] 1 All E.R. at p. 59) considered.

(iv) the time spent in waiting for a berth should be added to the end, not the beginning, of the lay days with the result that Sunday, Oct. 28, 1956, fell during the lay days and did not count as lay-time (see p. 804, letter F, post).

[As to readiness to discharge, see 30 HALSBURY'S LAWS (2nd Edn.) 526, para. 677; and as to the time for discharge, see ibid., 338, para. 520.]

Cases referred to:

Armement Adolf Deppe v. *Robinson (John) & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 14 Asp. M.L.C. 84; 41 Digest 529, *3568.*

Lyderhorn Sailing Ship Co., Ltd. v. *Duncan Fox & Co.*, [1909] 2 K.B. 929; 79 L.J.K.B. 105; 101 L.T. 295; 11 Asp. M.L.C. 291; 41 Digest 448, *2810.*

North River Freighters, Ltd. v. *H.E. The President of India*, [1956] 1 All E.R. 50; [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; 3rd Digest Supp.

Porteus v. *Watney*, (1878), 3 Q.B.D. 534; 47 L.J.Q.B. 643; 39 L.T. 195; 4 Asp. M.L.C. 34; *affg.* sub nom. *Straker* v. *Kidd, Porteus* v. *Watney*, 3 Q.B.D. 223; 47 L.J.Q.B. 365; 41 Digest 563, *3880.*

Roland-Linie Schiffahrt G.m.b.H. v. *Spillers, Ltd.*, [1956] 3 All E.R. 383; [1957] 1 Q.B.109; [1956] 3 W.L.R. 620; 3rd Digest Supp.

Société Franco-Tunisienne d'Armement-Tunis v. *Government of Ceylon*, [1959] 3 All E.R. 25; [1959] 3 W.L.R. 787; 3rd Digest Supp.

Special Case.

This was a consultative Case Stated by an umpire pursuant to s. 21 (1) (a) of the Arbitration Act, 1950, in a dispute between charterers (the respondents), the Government of Ceylon, and shipowners (the applicants), Société Franco-Tunisienne d'Armement-Tunis, owners of the vessel Massalia, as to the amount of demurrage payable in respect of the discharge of the vessel. By a charterparty executed in Paris on July 16, 1956, in the Gencon form, it was mutually agreed between the owners and the charterers:—

" That the Massalia shall proceed to Antwerp and Bordeaux: two loading ports in this rotation (one good and safe place at each port) . . . and there load a part cargo of 4,450/4,700 long tons minimum/maximum of flour in bags, quantity in owners' option. Owners to provide all mats and/or wood for dunnage and any separations required, which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Colombo (one good and safe berth) as ordered on signing bills of lading or so near thereto as she may safely get and lie always afloat and there deliver the cargo on being paid freight on delivered net weight quantity . . . Freight to be paid in pounds sterling in London, 90% on signing bills of lading and balance after right and true delivery, on net delivered weight, payable in British sterling . . .

" 5. Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo (see cl. 16 attached). Time to commence at 2 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon. The notice to be given to the shippers . . . Time lost in waiting for berth to count as loading time.

" 6.* (See cl. 16 attached). Time to commence at 2 p.m. if notice of readiness to discharge is given before noon and at 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time.

" 7. Any demurrage at the rate of £250 (two hundred and fifty pounds) per day or pro rata for any part of a day, payable day by day, at ports of loading and discharging . . .

" 16.† Cargo to be loaded and stowed, free of expense to the vessel, at the rate of 1,000 tons of 2,240 lb. per weather working day, Sundays and holidays excepted, and to be discharged at receiver's risk and expense at the rate of 750 tons of 2,240 lb. per weather working day, Sundays and holidays excepted.

* The initial part of cl. 6 was struck out. † Clause 16 was a typed clause.

" 30. Owners to have liberty to complete cargo ' en route ' with other goods, if shipped in same holds as flour cargo, these goods to be well separated of flour cargo to avoid mixing or damage to the said cargo. Cost of separation being for owners' account, and owners to be also responsible of damage, if any, done to the flour cargo."

The umpire found the following facts. The vessel loaded at Antwerp and Bordeaux a total of 4,373 metric tons of flour in bags for carriage to Colombo. Pursuant to cl. 30 of the charterparty, the vessel loaded at Port Said, en route to Colombo, a total of 398.73 metric tons of general cargo together with 633.6 cubic feet of cartons containing household utensils. The cargo loaded at Port Said was shipped by a number of local shippers and was destined for delivery to order or to consignees in Colombo. None of the Port Said cargo was shipped by or destined to either the charterers or the owners. The cargo shipped at Port Said was overstowed above the flour cargo in holds 2, 4 and 5, practically the whole of the flour cargo in these holds being overstowed by the Port Said cargo. In hold 1 the flour cargo was partly overstowed by Port Said cargo, and in hold 3 the flour cargo was not overstowed at all there being no Port Said cargo in hold 3. The vessel arrived at and anchored in the outer anchorage of the port of Colombo at 0612 hours on Thursday, Oct. 18, 1956. At the time of the vessel's arrival at Colombo, and at all times thereafter until Oct. 24, 1956, no berth was available at which the vessel could discharge either the flour or the Port Said cargo. In the absence of an available berth, the vessel was on her arrival directed by the master attendant's department to anchor in the outer anchorage. The outer anchorage was within the legal, fiscal, and geographical limits of the port of Colombo and was the place at which vessels ordinarily lay while awaiting berths.

While lying in the outer anchorage the vessel was as near as circumstances permitted to her actual discharging berth but was not in a loading or discharging area of the port, no cargo operations being carried out in the outer harbour. Notice of readiness was given by the master, through the ship's agents, to the charterers at 0900 hours on Thursday, Oct. 18. At that time, and at all material times thereafter, the vessel was ready in every respect to begin discharging the cargo that was in her. In particular, all the winches and derricks at each hatch were in good working order, and there was sufficient steam available to drive them. The certificate in respect of the vessel's cargo gear was current and still valid. It would not, however, have been possible to begin to discharge those portions of the flour cargo which were overstowed until some or all of the Port Said cargo overstowing those portions had first been discharged. If the notice of readiness was validly given at 0900 hours on Thursday, Oct. 18, 1956, under the charterparty (cl. 6) the notice would have expired at 1400 hours on Oct. 18. A berth became available for the vessel at 0615 hours on Wednesday, Oct. 24, 1956, and at 0720 hours on Oct. 24, the vessel berthed. Discharge of both the flour cargo and the overstowed cargo had begun by 0730 hours on Oct. 24. At all times between the time when she berthed and 0400 hours on Saturday, Oct. 27, 1956, the vessel could have discharged flour from certain of her holds but it was not until 0400 hours on Saturday, Oct. 27, 1956, that all the holds containing flour became freely accessible for discharge, since it was not until then that the impediment to discharging flour from certain holds caused by overstowage by the Port Said cargo was removed. The last of the Port Said cargo was discharged from the vessel at 0400 hours on Oct. 30, 1956. Discharge of the vessel was completed by 0300 hours on Nov. 3, 1956. The permitted lay-time for discharging, under cl. 16 of the charterparty, was five days nineteen hours and forty-five minutes. But for the fact that a berth was not available between 1400 hours on Oct. 18 and 0615 hours on Oct. 24, the vessel could and would have been totally discharged five days sixteen hours and fifteen minutes earlier than she in fact was.

The charterers contended that lay-time began to run only when the flour cargo in all the holds was accessible for discharge, namely, at 0400 hours on Saturday, Oct. 27, 1956, and they further contended that lay-time did not begin to run until 1400 hours on Oct. 27 because had notice of readiness been given at 0400 hours on Oct. 27, under cl. 6 of the charterparty it would not have expired until 1400 hours that day. The owners contended that lay-time began as soon as the vessel was alongside the berth, at 0720 hours on Oct. 24, 1956. The owners further contended that the time spent by the vessel lying in the outer anchorage was time lost waiting for a berth within the meaning of cl. 6 of the charterparty and they were, therefore, entitled to add that time to the time used in discharging the vessel for the purpose of calculating demurrage. The question of law for the opinion of the court was whether on the facts found and the true construction of the charterparty any, and if so what, parts of the period between 1400 hours on Oct. 18, 1956 and 0300 hours on Nov. 3, 1956, counted as discharging time.

M. R. E. Kerr for the owners, the applicants.
T. O. Kellock for the charterers, the respondents.

DIPLOCK, J.: This is a consultative Case Stated by an umpire in a dispute between the charterers and the shipowners as to the amount of demurrage payable in respect of the discharging of a vessel called the Massalia at Colombo in October, 1956. It illustrates well the advantages in economy and speed of London arbitration. The dispute has been before the arbitrator twice, before the Commercial Court once, and the Court of Appeal once. This is the second " go " before the Commercial Court, and I have no doubt there will be another " go " before the Court of Appeal. [HIS LORDSHIP then referred to the charterparty and to the facts found by the umpire, and continued:] A dispute arose between the parties as to the amount of demurrage which was payable. I do not think that it is necessary for me to go into the circumstances in which the matter first came before the Commercial Court (1) and the Court of Appeal (2), save to say that in the course of it MCNAIR, J. (3), expressed, wholly obiter, a view on which the charterers seek to rely (4) in this case. I will deal with that when I come to it.

There are really two substantial matters in dispute between the parties. The first is: When did lay-time begin to run? The owners contend that it began to run at 0720 hours on Oct. 24, 1956, when the vessel was alongside the berth. The charterers, on the other hand, argue that it only began to run when access to all the holds was available, that is to say, at 0400 hours on Saturday, Oct. 27, 1956. The charterers, indeed, want a little more time than that, but I will deal with that as a subsidiary point when I come to it.

The answer to the first point depends on the true construction of the charterparty. It seems to me that lay-time began to run only when the vessel was ready to discharge the flour cargo, because, on the true construction of this charterparty, the expression " cargo ", unless the contrary appears from the context, means and means only the flour cargo. When, for example, one reads cl. 1 and finds the obligation to deliver " the cargo on being paid freight ", in a particular way and on particular terms, that must mean the flour cargo, and not include any other goods loaded pursuant to the liberty contained in cl. 30 of the charterparty. So also when one comes to cl. 5 as to loading—" Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo (see cl. 16 attached)"—the expression " cargo " must mean the same in cl. 5. So also in cl. 16. When one looks at cl. 16 and finds that the first words of it are " Cargo to be loaded and stowed, free of expense to the vessel, at the rate of 1,000 tons of 2,240 lb. per weather working

(1) *Société Franco-Tunisienne d'Armement-Tunis* v. *Government of Ceylon*, [1959] 1 Lloyd's Rep. 244.
(2) *Société Franco-Tunisienne d'Armement-Tunis* v. *Government of Ceylon*, [1959] 3 All E.R. 25. (3) [1959] 1 Lloyd's Rep. at p. 253. (4) See p. 803, letter F, post.

day, Sunday and holidays excepted ", and then goes back to cl. 5 and sees " Time to commence at 2 p.m. if notice of readiness to load is given before noon ", etc., it is quite plain that the " cargo ", so far as the loading clause is concerned, refers and is limited to the flour cargo and not the additional goods. A

I now turn to the vital clause, cl. 6, which starts with the normal words struck out and says "(See cl. 16 attached)". So it seems to me that when one is considering cl. 6 one must start by reading cl. 16, which, having referred to " Cargo to be loaded and stowed " in the terms which I have already mentioned, goes on " and to be discharged at receiver's risk and expense at the rate of 750 tons . . . per weather working day " etc. It seems to me that " cargo " there must mean the same throughout that clause, and is limited to the flour cargo. Accordingly, when one goes back to cl. 6, and reads on: " Time to commence at 2 p.m. if notice of readiness to discharge is given before noon and at 8 a.m. next working day if notice given during office hours after noon ", the readiness to discharge must refer to readiness to discharge the flour cargo and not readiness to discharge a cargo overstowed on the flour cargo. B C

Counsel on behalf of the owners has made two points in answer to this. First of all, he relies on the judgment of LUSH, J., in *Straker* v. *Kidd* (5). That was a case where a vessel was chartered (6) D

> ". . . for the conveyance of a cargo of wheat from Dantzic to London. Eight bills of lading were given by the master for various portions of the wheat shipped by the charterers, one of which had been indorsed to the defendants. Each of them contained the following clause:—' Three working days to discharge the whole cargo, or £30 sterling per day demurrage '." E

LUSH, J., held that the bills of lading containing that clause placed on each of the indorsees an obligation to pay demurrage if the whole cargo was not discharged within the lay-time. So far as that decision is concerned, and the similar one of *Porteus* v. *Watney*, reported with it (5) (which is also reported in the Court of Appeal in the same volume (7)), they are simply cases on the proper construction of the bills of lading, and lay down no general principle of law. I have to construe an entirely different document. But counsel for the owners says that there is, hidden away in the judgment of LUSH, J., a dictum which shows that LUSH, J., if he had had this case before him, would have decided in the owners' favour. This is the passage on which he relies. Having expressed his view as to the meaning of the clause, LUSH, J., says (8): F G

> " The objection raised against this rendering of the clause is undoubtedly striking. It virtually makes each holder of such a bill of lading answerable for the others as well as for himself, though he has no control over their acts. But no other construction can be put upon the clause, without doing violence to the words or introducing a qualification which destroys their force. If the words had been, as the defendants contend they should be read, ' Three days to discharge the goods in this bill of lading or demurrage ', the defendants would have been in no better position; for the words must have been construed as an absolute contract to clear the goods within that time." H

Looking back, one sees that these particular goods were understowed with other goods above them. Counsel for the owners argues that LUSH, J., was then deciding that the three working days to discharge the goods in this bill of lading would have started at the date at which any part of the cargo could be discharged. I doubt if LUSH, J., was directing his mind to that problem. If he was, the observation is only dicta, and somewhat obscure dicta at that, and I do not propose to follow it. I

(5) (1878), 3 Q.B.D. 223; 4 Asp. M.L.C. 34.
(6) (1878), 3 Q B D. at p. 224; 4 Asp. M.L.C. at p. 34.
(7) (1878), 3 Q.B.D. 534; 4 Asp. M.L.C. 34.
(8) (1878), 3 Q.B.D. at p. 225; 4 Asp. M.L.C. at p. 35.

The other line on which counsel for the owners has sought to say that the lay-time started to run before all the holds were available is that, although there is authority, as respects loading, that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo—see *Lyderhorn Sailing Ship Co., Ltd.* v. *Duncan Fox & Co.* (9), as approved by SCRUTTON, L.J., in *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* (10)—yet there is no authority that the same principle applies as to discharging. Someone has got to decide whether it does or whether it does not. I can, in this respect, see no reason for distinguishing between loading and discharging. It seems to me common sense that the same principle as regards availability of holds would apply to discharging as to loading, and I propose, at any rate temporarily, to fill the gap in the authority on this subject.

I take the view, therefore, that the charterers are right in their contention that lay-time did not begin to run until all the flour cargo was accessible, which time, on the findings of the umpire, is 0400 hours on Saturday, Oct. 27.

I will turn now to the next main point of contention, one on which a substantial amount of demurrage depends, and that is whether or not the owners are entitled to add to the discharging time the time which they in fact spent in waiting for a berth. I will have to consider in a moment whether they add it at the end or the beginning, because that may affect the figures. What the owners say is very simple. They say that cl. 6 provides that " Time lost in waiting for berth to count as discharging time ". This vessel was obliged to wait for five days sixteen hours and fifteen minutes for a berth, as a result of which it took her that amount longer to discharge the cargo from the moment at which she was ready to proceed to the berth, and, say the owners, the additional length of time taken to discharge the cargo as a result of having to wait for the berth is " time lost in waiting for berth ". That is an attractive argument. It is what the words say. Similar words were thought by the Court of Appeal in *North River Freighters, Ltd.* v. *H.E. The President of India* (*the Radnor*) (11), and by SELLERS, J., in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers, Ltd.* (*the Werrastein*) (12) to mean precisely that. Counsel for the charterers, however, seeks to draw a distinction between those two cases and the present case, because he says that, in those two cases, while it is true that the vessel was not in a position to give notice of readiness to load because she was not at a geographical place where she could load or discharge—I think one was loading and the other was discharging—nevertheless she was in a physical condition in each case to start loading or start discharging the cargo as soon as she got to the berth. Relying on my finding that the relevant cargo for the purpose of cl. 6 was the flour cargo, he says that in this case, the vessel was not ready to discharge the flour cargo as soon as she got to the berth because of the overstowing, and he relies in particular on the dictum of PARKER, L.J., in the *Radnor* case (13), where he says:

> " If in any case a charterer could show that, even if a berth had been available, the vessel could not have been ready for cargo, he would be able to say that all the time occupied in waiting for a berth had not been ' lost ', but the finding here is that at 9.30 a.m. on June 3, 1951, the vessel was ' dunnaged, matted and all hatches ready for cargo '."

I am quite sure that PARKER, L.J., in making that dictum, did not have in mind the sort of case with which I am concerned here. I see no reason, in reason or authority, to make me depart from what seems to me to be the natural meaning of the words, that time lost as a result of this waiting for a berth should

(9) [1909] 2 K.B. 929; 11 Asp. M.L.C. 291.
(10) [1917] 2 K.B. at pp. 211, 212; 14 Asp. M.L.C. at p. 86.
(11) [1956] 1 All E.R. 50; [1956] 1 Q.B. 333.
(12) [1956] 3 All E.R. 383; [1957] 1 Q.B. 109.
(13) [1956] 1 All E.R. at p. 59; [1956] 1 Q.B. at p. 350.

count as, and be, extra time which it took the vessel to finish discharging this cargo as a result of waiting for a berth.

In my opinion, therefore, the contention of the owners is correct as regards the second point, and they are entitled to have counted for the purposes of calculating demurrage the time lost in waiting for a berth. The owners concede that that time did not start until the notice of readiness which they gave expired, and, in view of that concession, it is unnecessary for me to decide whether or not that would have been the case. In those circumstances, the time lost waiting for a berth starts ex concessi by the owners at 1400 hours on Oct. 18, 1956, and ends at 0615 hours on Wednesday, Oct. 24, 1956, when the vessel shifted to her berth. That I am told is a time of five days sixteen hours and fifteen minutes.

Two minor points arise. The first is whether, when all the flour cargo was accessible, that is to say at 0400 hours on Saturday, Oct. 27, 1956, the starting of lay-time was nevertheless deferred until 1400 hours on Oct. 27, because, had a notice of readiness been given at that time, it would not have expired under cl. 6 until 2 p.m. on the day in which it was given. There is a good deal to be said for either view on this interesting problem of arithmetic. There is no authority on it of which I know; certainly no one has drawn my attention to any. There is authority that, when notice of readiness is given (as this one was) before the vessel was in fact ready, no further notice of readiness is required. On the whole, I see no reason why I should treat the position as if a further notice of readiness had been given at 0400 hours on Saturday, Oct. 27. There was a notice of readiness already given. It could not take effect until the vessel was in fact ready for discharge, and, as the charterers were in fact discharging the cargo at the other hatches at that time, and so needed no notice to get ready, I do not think I shall be doing any substantial injustice if I take the view which prima facie I think would be the correct one here, namely, that lay-time started at 0400 hours on Saturday, Oct. 27.

The last matter which I have to decide is whether one adds the time lost in waiting for a berth at the beginning or at the end of the lay days. That sounds to an arithmetician as if the sum must come to the same, but in this particular case I understand that it makes a difference of a day, because, if one adds it at the beginning, the Sunday of Oct. 28, 1956, is excluded from the lay-time and therefore counts as demurrage. If, on the other hand, one adds it at the end, then the Sunday comes during lay-time, and does not count. So it does make a difference of twenty-four hours. Without giving any reason, I hold that it should be added at the end.

[The following form of the answer to be given by the court to the question of law stated for the court's opinion (14), was agreed between the parties, His Lordship having requested them to prepare an agreed form of answer:—(i) The period of five days sixteen hours and fifteen minutes from 1400 hours on Oct. 18, until 0615 hours on Oct. 24, 1956, counted as discharging time pursuant to cl. 6 of the charterparty. (ii) The permitted lay-time under cl. 16 of the charterparty of five days nineteen hours and forty-five minutes began to run at 0400 hours on Oct. 27, 1956. (iii) In order to ascertain the owners' entitlement to demurrage at Colombo under the charterparty the period of five days sixteen hours and forty-five minutes under (i) was to be added at the end of the time used for discharging with the result that Sunday, Oct. 28, 1956, did not count against the charterers.]

Order accordingly.

Solicitors: *Holman, Fenwick & Willan* (for the owners, the applicants); *T. L. Wilson & Co.* (for the charterers, the respondents).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

---

(14) See p. 801, letter C, ante.

PIDDOCK *v.* CLIFFORD PRODUCTS, LTD. (INDUSTRIAL GUARDING EQUIPMENT, LTD. Third Party, BALDWIN INSTRUMENT CO., LTD. Fourth Party, B.A.L., LTD. Fifth Party).

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), November 8, 9, 1960.]

Practice—Third-party procedure—Application by third party to join fifth party as additional fourth party—R.S.C., Ord. 16A, *r.* 11 (1), *Ord.* 16, *r.* 11.

After judgment had been given as between the plaintiff, the defendant and the third party in an action in which the defendant had joined a third party, the third party had joined a fourth party, and the fourth party had joined a fifth party, the third party applied for leave to issue a fourth-party notice against the fifth party (so as to make the fifth party a co-defendant on the third party's claim against the fourth party). By R.S.C., Ord. 16A, r. 11 (1), it was provided that " Where a third party makes as against any person not already a party to the action such a claim [i.e., a claim which could be the subject of a third-party notice by a defendant] . . . the court or judge may give leave to such third party to issue a third-party notice . . . " Procedure to add a second fourth party in reliance on s. 39 (1) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925, and R.S.C., Ord. 16, r. 11, was not followed.

Held: leave to issue the fourth-party notice should not be given because—

(i) (per SELLERS and PEARCE, L.JJ.) R.S.C., Ord. 16A, r. 11 (1), did not apply since the fifth party was already a party to the action, and so was not a " person not already a party to the action " within r. 11 (1); and, since the procedure under R.S.C., Ord. 16, r. 11, had not been followed, it would now be more appropriate that the third party should, if he wished, proceed by issuing a writ against the fifth party and consolidating the proceedings.

(ii) (per DEVLIN, L.J.) the proper course, where a third party had already brought in a fourth party and wished to bring in another also, was to apply for leave, under R.S.C., Ord. 16, r. 11, to add the additional fourth party, and this course would give the existing fourth party an opportunity to object; this procedure not having been followed, the third party could not now succeed on the application for leave to serve a fourth-party notice on the fifth party.

Per DEVLIN, L.J.: R.S.C., Ord. 16A, r. 11, is intended to apply only to a notice which takes the place of an originating writ and not to one which is sought to be used as an alternative to amending the writ (see p. 808, letter G, post).

Appeal allowed.

[As to fourth or subsequent parties to actions, see 30 HALSBURY'S LAWS (3rd Edn.) 448, para. 847.]

Interlocutory Appeal.

On Sept. 13, 1957, the plaintiff issued the writ in this action, and on Oct. 1, 1957, delivered her statement of claim against the defendants. On Nov. 14, 1957, the defendants were given leave to issue a third-party notice against the third party, and on Nov. 22, 1957, the defendants delivered their defence. On Jan. 6, 1958, the third party was given leave to issue a fourth-party notice against the fourth party. On Feb. 11, 1958, the defendants delivered their statement of claim against the third party, to which the third party delivered their defence on May 15, 1958, on which date the third party also delivered their statement of claim against the fourth party. The fourth party delivered their defence on Oct. 8, 1958, and were given leave, on Dec. 9, 1958, to issue a fifth-party notice against the fifth party. The action as between the plaintiff, the defendants and the third party, was heard on Dec. 15, 1958, when judgment was given for the plaintiff for £3,500 and costs against the defendants, and for the

defendants for an indemnity and costs against the third party. The fourth party issued their fifth-party notice on Jan. 30, 1959, and delivered their statement of claim against the fifth party on Mar. 5, 1959. The fifth party delivered their defence on Apr. 6, 1959. On Apr. 20, 1960, by which date the defendants and the third party had satisfied the judgments against them, the third party applied by summons, to which the fifth party was made respondent, for leave to serve a fourth-party notice on the fifth party. This application was refused by the master on June 14, 1960, but on July 27, 1960, ELWES, J., in chambers reversed the master's decision and gave leave to the third party to issue a fourth-party notice against the fifth party. The fifth party now appealed against this order of ELWES, J.

Bernard Caulfield for the fifth party, the appellants.

Ryder Richardson, Q.C., and *I. B. Fife* for the third party.

SELLERS, L.J.: On Apr. 20 of this year the third party issued a summons for leave to serve a fourth-party notice against a fifth party in this string of parties, the fifth party being B.A.L., Ltd. The matter came before the master on June 14, 1960, and he refused to make that order, on the ground that the application was very belated and out of time. The matter came before the learned judge and he reversed the decision of the master, having been satisfied by learned counsel that the ground on which the master dismissed it was not (in his discretion) justified and that the proceedings as framed would lie. The position is that before the trial took place (as indeed it has taken place) when the plaintiff and the defendants and the third party were all still interested in the action which had been framed, the other parties down to the fourth party had been joined and leave had been given to join the fifth party, who are appellants here. I need not go into all the respective dates, but long before this proceeding was taken to make the fifth party a fourth party or (in effect) a co-defendant with the fourth party against the third party's claim, judgment had been given and had been met, against the defendants and for the defendants against the third party.

One of the complaints which appealed to the master was that the interval of time was so long that no order should be made. That is a factor which also has a bearing in this court, which has to consider all the circumstances of the case. It appears (and this is how the appeal was advanced before us) that, although not in terms so stated, the summons was taken out under, and reliance was placed on, R.S.C., Ord. 16A, r. 11 (1), which provides that:

> " Where a third party makes as against any person not already a party to the action such a claim as is defined in r. 1 of this order, the provisions of this order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such other person, and the court or judge may give leave to such third party to issue a third-party notice . . ."

Rule 1 (1) of Ord. 16A is:

> " Where in any action a defendant claims as against any other person not already a party to the action (in this order called the third party) . . . [and then it sets out the circumstances in which] the court or judge may give leave to the defendant to issue and serve a ' third-party notice '."

Notwithstanding the argument that was advanced by counsel for the fifth party in his submission that this rule could not be applied because here there was no action having regard to the termination of the proceedings as between the plaintiff, the defendants, and the third party, I have come to the conclusion that that argument does not require any detailed consideration because, on the facts of this case, the rule is not applicable at all as the fifth party against whom these proceedings have been taken was already a party to the proceedings and to the action to which reference is made in r. 1.

Against that it was, really, accepted that the summons was wrongly issued if R.S.C., Ord. 16A, r. 11 (1) had to be relied on, but that rule was not expressly

A relied on, and it was argued that the right claimed to join the fifth party as a fourth party, or a defendant to the third party's proceedings in effect, was to be derived from s. 39 (1) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925 (1). It may well be that the proceedings could have been taken under R.S.C., Ord. 16, r. 11, which (2) seems to embrace, together with R.S.C., Ord. 16A, the rules to carry out the provisions of s. 39 (1) (b) of the Act of 1925. However, B the procedure in reliance on R.S.C., Ord. 16, r. 11, in order to join the fifth party in the way that is intended, has not been followed. In my view the method adopted has been misconceived and the appeal should be allowed on that ground—that whilst the rights of the third party against the fifth party might have been achieved in this particular way, the procedure has not been adopted. I would accede to the submission of counsel for the fifth party that in all the circumstances C of this case it would be more appropriate, having regard to the state of this procedure at the present time, to leave the third party to proceed by way of original writ and consolidate that, if it is so desired, with the proceedings that are already in being.

I do not think it an appropriate occasion to deal in greater detail with the submissions which were made with regard to the rules whether or not there is D any lacuna or gap (which I very much doubt) or whether they could properly have been called to the aid of the claim which is made by the third party to exercise its rights against the fifth party. On the facts of this case the writ is the appropriate remedy.

I would allow the appeal.

E **PEARCE, L.J.:** I agree. In my view, since the fifth party is already a party, the proposed fourth-party proceedings against them cannot properly be allowed under R.S.C., Ord. 16A, r. 11. It appears that s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925 (to which my Lord has referred (3)) gives to the third party the rights which, under the proposed fourth-party notice, they seek to assert against the fifth party. It may well be that they could apply under R.S.C., Ord. 16, r. 11, as SELLERS, L.J., has suggested during the argument, F to add the fifth party as a defendant in the existing third-party proceedings, although that course would create certain difficulties under the later rules of R.S.C., Ord. 16. However, be that as it may, there has been great delay in starting these fourth-party proceedings against the fifth party and no hardship will be caused if they are refused to the third party; they can at any time issue a writ against the fifth party and apply to consolidate that action with the third-party G proceedings that are already in existence against the fourth party; and in the end that course may well save costs.

I agree with what my Lord has said.

DEVLIN, L.J.: R.S.C., Ord. 16A, r. 3, provides:

> "The third party shall, as from the time of the service upon him of the H notice, be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

That rule, therefore, expressly gives to the third party all the rights of a defendant. It seems to me that it must, by necessary implication, give to the defendant in the

---

I (1) By s. 39 (1): "The court or judge shall have power to grant to any defendant . . . (b) all such relief relating to or connected with the original subject of the cause or matter, claimed in like manner against any other person, whether already a party to the cause or matter or not, who has been duly served with notice . . . pursuant to rules of court . . . as might properly have been granted against that person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."

(2) R.S.C., Ord. 16, r. 11, provides, inter alia, that "...The court or a judge may, at any stage of the proceedings . . . order that the names of any parties . . . whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added . . . Every party whose name is so added as defendant shall be served . . . in manner hereinafter mentioned . . ." (3) See letter A, supra and footnote (1) thereto.

action all the rights of a plaintiff in the third-party proceedings. One cannot have a defendant without a plaintiff, and one cannot give to the defendant all the rights of a defendant without letting the plaintiff have all the rights of a plaintiff.

Rule 11 of R.S.C., Ord. 16A, allows a third party to bring in a fourth party, and says that " . . . the preceding rules of this order shall apply mutatis mutandis . . .", and accordingly the position is that, under R.S.C., Ord. 16A, r. 3, if the third party brings in a fourth party, the fourth party has all the rights of a defendant and the third party has all the rights of a plaintiff. One of the rights of a plaintiff is to be able to apply under R.S.C., Ord. 16, r. 11, to join another defendant. It follows from that, in my view, that one of the rights of a third party who has joined a fourth party must be to be able to apply to the court for leave to join an additional fourth party. In my judgment, that is the course which the third party ought to have taken in this case when they wished to join the fifth party as an additional fourth party. They did not, however, do so: they applied (as if there were no fourth party in existence) under R.S.C., Ord. 16A, r. 11, for leave to serve a fourth-party notice. Now the inherent vice in that is that, whether R.S.C., Ord. 16A, r. 11, applies or not, it is not the right procedure if there is a fourth party, with the rights of a defendant, already in existence; for when a plaintiff applies to join another defendant, the existing defendant has a right to be heard and therefore the procedure is that a summons should be taken out as against him under R.S.C., Ord. 16, r. 11. He may object that it is unnecessary for the trial of his action and that it would embarrass him if another defendant were joined, and his objection may be sustained. If it is not sustained, then the order is that the writ should be amended and served on the additional defendant. Just the same procedure ought, in my judgment, to be followed if a third party wants to add another fourth party. It was not followed in this case.

Apart from that, another objection has been raised to the course taken by the third party here—an objection which is based on what I may call the incidental fact that the appellants happen to be fifth parties. It is not, as it were, inevitable that they should be. A third party might well want to join as an additional fourth party someone who is not in the action at all. As it happens, the appellants are in the action—if " the action " is given the broader meaning of including the whole set of proceedings—as a fifth party. Therefore it is said that R.S.C., Ord. 16A, r. 11 (1), cannot apply because it says " Where a third party makes as against any person not already a party to the action . . ." This emphasises that R.S.C., Ord. 16A, r. 11, is intended to apply only to a notice which takes the place of an originating writ and not to one which is sought to be used as an alternative to amending a writ. However, I think that it is sufficient to say that the third party, having failed to take the proper step of issuing a summons under R.S.C., Ord. 16, r. 11, cannot now succeed in his application.

I appreciate that that is a very technical ground on which to defeat the application, because although the third party did not take out his summons under R.S.C., Ord. 16, r. 11, it so happened that the fourth party was a party to all the hearings, and was heard, and presumably had the opportunity of raising any objection, if he desired to raise it, against the joinder of a co-fourth party with him. It is, therefore, a technical ground; but, for the reasons which my Lords have given, in the circumstances of this case it is right that the technical argument should prevail and that no relief should be given to the third party in this case such as might have been given if the nature of his application had been more meritorious.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Clifford-Turner & Co.* (for the fifth party, the appellants); *A. D. Vandamm & Co.*, agents for *Hewitt & Walters*, Birmingham (for the third party).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

NOTE.

Re THE YARN SPINNERS' AGREEMENT (No. 2). Re THE COTTON YARN DOUBLERS' ASSOCIATION'S AGREEMENT (No. 2).

[Restrictive Practices Court (Pearson, J., Sir Stanford Cooper and Mr. W. L. Heywood), November 10, 1960.]

Restrictive Trade Practices—Court—Practice—Undertaking—Variation—Proposed recommendations by trade associations to members of terms and conditions of home trade—Recommendation by Registrar to Board of Trade that terms and conditions are of no substantial economic significance—Release from undertakings to extent necessary to make recommendations of terms, etc., to traders—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 *c.* 68), *s.* 12, *s.* 20 (3).

[For the Restrictive Trade Practices Act, 1956, s. 12 and s. 20, see 36 Halsbury's Statutes (2nd Edn.) 946 and 952.]

Applications.

On Jan. 26, 1959, the Restrictive Practices Court declared that the restrictions contained in the Yarn Spinners' Association's Agreement were contrary to the public interest pursuant to the Restrictive Trade Practices Act, 1956, s. 21 (1) (see [1959] 1 All E.R. 299), and this was followed by an order in regard to the agreement of the Cotton Yarn Doublers' Association (now known as the Yarn Doublers' Association), which was in identical terms. The Registrar of Restrictive Trading Practices formally made an application under s. 20 (3) of the Act, and the two Associations gave undertakings whereby they undertook to give to the Registrar twenty-eight days' notice of their intention to put into effect any similar restrictions to those in the agreements in question. Liberty to apply was given in both cases and both Associations, with the consent of the Registrar, now applied for the variation of their undertakings.

G. W. Tompkin for the Yarn Spinners' Association and the Cotton Yarn Doublers' Association.

J. F. Donaldson for the registrar.

G. W. Tomkin: Both Associations agree in recommending to their members a set of terms and conditions of the home trade and it is understood that the Registrar is willing to recommend to the Board of Trade under s. 12 of the Restrictive Trade Practices Act, 1956, that they are of no substantial economic significance. The form that is proposed is that the Associations shall be released from their undertakings to the extent which enables them to make these recommendations if they are approved by the Board of Trade as being of no substantial economic significance. It was thought appropriate to give the Registrar notice of this and to bring the matter before the court. The recommendations will have to be included in the Registrar's report to the Board of Trade which will have to be approved by the Board of Trade and then, having been released from their undertakings to this extent, the Associations will make the recommendations to their members.

J. F. Donaldson: The Registrar does not oppose these applications.

PEARSON, J.: The court has considered these applications, and the view of the court is that the course which has been adopted is a convenient and proper one.

Order accordingly.

Solicitors: *John Taylor & Co.*, Manchester (for the Yarn Spinners' Association and the Cotton Yarn Doublers' Association); *Treasury Solicitor.*

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

RYE *v.* RYE.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), November 3, 4, 1960.]

Real Property—Conveyance by persons to themselves—Parol grant of lease of premises for a term not exceeding three years—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 52, s. 54 (2), s. 72 (4), s. 205 (1) (ii).

Under s. 72 (4)* and s. 205 (1) (ii)† of the Law of Property Act, 1925, a freeholder can grant effectively to himself a lease of the land taking effect in possession for a term not exceeding three years, e.g., a lease for a tenancy from year to year (see particularly p. 812, letter D, post).

In or about 1942 the plaintiff and his brother (the defendant's father) bought certain freehold premises, paying the purchase price in equal shares, and then carried on their partnership business from the premises. As the shares in which they were entitled to the partnership profits were not equal shares, they agreed that the partnership should pay them £500 a year as the rent of the premises. The agreement was by parol and (according to the plaintiff) there was no definite time agreed. After the brother's death in 1948, the defendant, as one of the three executors of his estate, became one of the owners of the premises. In 1950 the plaintiff took the defendant into partnership, but later the partnership was dissolved. After the determination of the partnership, the defendant continued to occupy a room on the first floor of the premises and carried on his own business from that room, although the plaintiff demanded possession of the room. In an action by the plaintiff for, among other relief, possession,

Held: in order to succeed in his claim to possession the plaintiff must show a better title than the defendant who was in possession, but, in the circumstances and having regard to the paucity of evidence regarding the creation of any tenancy in the brothers when in partnership, the true inference was that the brothers agreed that the partnership should be treated as their tenants at £500 yearly; accordingly the plaintiff had not proved a better title to possession than the defendant and was not entitled to recover possession.

Appeal allowed.

[As to parties to conveyances, see 32 HALSBURY'S LAWS (3rd Edn.) 362, para. 575; and as to the need for a term of years to have a fixed beginning and a fixed ending, see ibid., p. 266, para. 375.

As to conveyances for which a deed is not required, see 11 HALSBURY'S LAWS (3rd Edn.) 331, para. 526.

As to the creation of tenancies by parol, see 23 HALSBURY'S LAWS (3rd Edn.) 466, para. 1081.

For the Law of Property Act, 1925, s. 52, s. 54, s. 72 (4) and s. 205 (1) (ii), see 20 HALSBURY'S STATUTES (2nd Edn.) 549, 552, 579 and 832.]

Appeal.

This was an appeal by the defendant from a judgment of BUCKLEY, J., given on Feb. 19, 1960. The plaintiff was a solicitor practising as Rye & Eyre at premises known as 11, Golden Square, London. The defendant, who was the plaintiff's nephew, was also a solicitor and practised on his own account at the same premises. By his statement of claim, the plaintiff alleged that he held the premises from the freeholders thereof, who were the plaintiff himself and the trustees of the will of his brother Frank Gibbs Rye, deceased (of which trustees the defendant was one), at a rent of £500 a year exclusive; that on Aug. 3, 1950, the plaintiff took the defendant into partnership in his practice as a salaried partner, such partnership being at will; that the partnership was determined by

* The relevant terms of s. 72 (4) are printed at p. 812, letter C, post.
† The relevant terms of s. 205 (1) (ii) are printed at p. 811, letter H, post.

notice dated Nov. 22, 1957; and that, notwithstanding such determination, the defendant wrongfully continued to occupy the front room on the first floor of the premises as a trespasser and practised as a solicitor therefrom. The plaintiff claimed, among other relief, (i) a declaration that the defendant was not entitled to use or occupy any portion of the plaintiff's premises; (ii) an injunction restraining the defendant from using or occupying the said room; (iii) alternatively, possession of the said room; and (iv) damages for trespass. By his defence the defendant admitted the facts relating to the ownership of the premises and that he occupied the front room on the front floor and practised as a solicitor therefrom, but denied that he occupied the room wrongfully. In answer to a request for particulars of the alleged tenancy, the plaintiff said:

> " When the firm of Rye & Eyre moved into this building in January, 1942, my brother and I mutually agreed that the firm . . . should pay £500 per annum exclusive as the rent of [the premises], but there was no definite time agreed. None the less, the benefit of this tenancy was part of the goodwill in respect of which I agreed to purchase my brother's share in the goodwill, and it cannot be disputed. Ever since 1942 the firm . . . has paid one half of the rent of £500 per annum to my late brother until his death in 1948*, and since that date to his executors."

BUCKLEY, J., found that the plaintiff and his brother bought the premises in 1942, but not as part of the partnership assets; that they contributed equally to the purchase price of the premises; and that, as the partnership was not a partnership in equal shares, there was an arrangement between them that, as partners, they should pay to themselves, as owners of the house, a rent of £500 a year. The learned judge gave judgment for the plaintiff, made the declaration which was sought and granted an injunction (which was suspended for two months or until the hearing of an appeal) and ancillary relief.

T. M. Shelford for the defendant.
Raymond Walton for the plaintiff.

LORD EVERSHED, M.R., stated the facts and continued: The first thing that springs to the mind of anybody concerned with this case is its extreme artificiality; for here the landlords and the tenants, if they were tenants, were the same two persons. It is, therefore, a case in which the plaintiff must establish that the two owners of the premises granted an oral tenancy to themselves as tenants. Before the passing of the Law of Property Act, 1925, the proposition would have been met with insuperable difficulties. The first point which fell to be decided was whether it was now competent for a man to grant to himself, effectively in law, a tenancy of his premises by parol. The definition section in the Law of Property Act, 1925, at first sight at any rate, seems to support the contention of the defendant that anything which can be called a conveyance must be in writing. Section 205 (1) (ii) reads:

> " ' Conveyance ' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will . . ."

It was the contention of counsel for the plaintiff that, particularly having regard to the insertion of a comma after the word " disclaimer " and before the word " release ", the words " every other assurance of property or of an interest therein by any instrument " did not have the effect that an instrument was required in the case of the earlier catalogue (" mortgage, charge ", etc.). As a matter of English, I find that argument difficult to accept, but I think none the less on this point, as BUCKLEY, J., thought, that counsel's contention should be sustained, for this definition is not in terms exclusive or exhaustive. It reads:

* The plaintiff's brother, shortly before his death, gave notice determining the partnership.

" ' Conveyance ' includes . . .". If one goes back to s. 52 and s. 54 of the Act, it is, I think, manifest that operations, if I may use a neutral word, which are there called conveyances need not be operations evidenced by writing. Section 52 (1) states:

> " All conveyances of land . . . are void for the purpose of conveying or creating a legal estate unless made by deed."

But then s. 52 (2) states that the section does not apply to, among other things,

> " (b) disclaimers made in accordance with s. 54 of the Bankruptcy Act, 1914, or not required to be evidenced in writing . . .
>
> " (d) leases or tenancies or other assurances not required by law to be made in writing . . ."

Section 54 (2), moreover, shows quite plainly that it is competent to grant by parol a lease taking effect in possession for a term not exceeding three years (1). One then comes, on this part of the case, to s. 72 (4), which states:

> " Two or more persons . . . may convey, and shall be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party . . ."

In the light of the provisions of the statute to which I have referred, I am content to accept, certainly for the purposes of this judgment, that counsel for the plaintiff is entitled to say that it was competent for the plaintiff and his brother, Frank Rye, to grant to themselves by parol a lease of 11, Golden Square, for a term not exceeding three years, that is, a lease from year to year. That was the view of BUCKLEY, J., and I accept it.

The fact, however, that such a strange operation is now within the contemplation of conveyancing, as the statute has enlarged it, does not, of course, derogate from the fact that such a transaction, as a conveyancing operation, is highly artificial; for it is not in doubt that, although one may create a term in favour of oneself, one cannot therein create or make any covenants or contracts which are enforceable, and I venture to think that that circumstance is not irrelevant in turning to the next point which has to be considered. The matter was put with his usual clarity by counsel for the plaintiff in the form of a proposition. He said that the proper conclusion here was that a demise was in truth made by the plaintiff and Frank Rye to themselves in 1942 in fulfilment of an oral agreement to that effect which was made at the same time. The defendant, however, is in possession, being one of the joint freehold owners, and is entitled to say: If you have a better title to possession than I have, you must establish it. There is a strange paucity of evidence. There is not only no evidence of the state of the register at the relevant time but there has been no evidence of any partnership documents or entries or notes of any kind. Subject to what is said hereafter, there is no direct evidence of any " rent " payments—no entries in any books showing dates, etc.—save only a general statement by the plaintiff that such payments were made at some time or times. There remains the statement by way of particulars, which was supplemented in some degree by the plaintiff's evidence. The only other documents which appear to have some bearing are two cheques drawn on the office account of Rye & Eyre, and signed " Rye & Eyre ", we understand, by the plaintiff. The one is dated Apr. 4, 1958, and the other Apr. 13, 1959. Both are made payable to the executors of F. G. Rye and are for the same figure of £153 6s. 3d. Neither has been presented. Attached to each is a piece of paper, and, to take the second, which will suffice, the piece of paper says:

---

(1) Section 54 (2) reads: " Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine."

A

> " 11, Golden Square. The Executors of F. G. Rye. One year's rent due Lady Day, 1959. With Messrs. Rye & Eyre's compliments. Less tax on assessment £455, £193 7s. 6d., net £306 12s. 6d. One half share £153 6s. 3d."

That is the sum total of the evidence.

What is the proper conclusion to be drawn from the evidence? BUCKLEY, J., B came to the conclusion that the true inference from the facts, including the fact of possession by the firm plus some payments of £500 a year, was that a tenancy had been created from year to year, the landlords being the two brothers, the plaintiff and Frank Rye, as freeholders, and the lessees or tenants being the same two persons as partners. As counsel for the plaintiff pointed out, it is, no doubt, generally true to say that, if a lease be granted or purported to be granted which C for some reason is void or fails in effect as such, then, if the intending lessee has gone into possession and paid rent which is accepted, there will arise a tenancy and prima facie, where the rent is an annual rent, a tenancy from year to year. That is the inference to be drawn from the evidence in such a case as I have stated. In the present case, the evidence is in some respects quite unusual and in others extremely defective. In the first place, the particulars contain the phrase " no D definite time agreed." The most striking and significant defectiveness in the evidence consists to my mind in this. Nowhere does it appear from what date the alleged tenancy began and what was the year, if there was a year to year tenancy. I will read the short passage from the particulars: " When the firm of Rye & Eyre moved into this building in January, 1942 . . . "—I pause to note that month and to refer to the fact that, according to the pieces of paper attached to the cheques, the annual rent was said to be due on Lady Day— E

> ". . . my brother and I mutually agreed that the firm of Rye & Eyre should pay £500 per annum exclusive as the rent of No. 11, Golden Square, but there was no definite time agreed."

It will be noted that it is not there said in terms that the agreement was that there should be a tenancy granted and it is also most significant that no time was F agreed. When the matter is judged against the artificial background to which I have alluded, I should have thought that the real inference was that these two brothers, then partners in amity together, were saying no more than this: " Bearing in mind that our interests in the freehold differ from our interests in the partnership, we will treat the partnership as our tenants at £500 a year. That figure will be paid over from the partnership moneys to us and divided equally G between us ". Nothing more than that was required. If that conclusion is right, then I feel compelled further to conclude that in answer to the defendant's allegation that he is in possession, the plaintiff has not here sufficiently proved a better title.

It is a narrow point, and I differ with reluctance from BUCKLEY, J., who felt that the facts justified the inference which he drew. Perhaps this court must act H in these matters rather more strictly, but I cannot think that the evidence is sufficient to establish such a tenancy as the plaintiff must establish to show a better right to possession than the defendant has, and on that narrow ground, therefore, I would allow this appeal.

HARMAN, L.J.: I concur in the judgment just delivered, but I desire to I add a word because I differ from BUCKLEY, J., in one of his lines of reasoning, although I concur in the result. It seems to me that " conveyance " as defined in s. 205 (1) (ii) of the Law of Property Act, 1925, does require a writing: I do not agree with the learned judge that the words " every other assurance of property by any instrument " apply only to " release ". I think that they apply to all the words in that part of s. 205 (1) (ii). There is no grammatical reason why they should not. It would be right to put a comma after every word which is not joined to the next by the word " and " and not put a comma before the " and ". If " other " does not mean what I think that it means, then it should be written

" every assurance of property " and so forth. But, as has been pointed out, this is not an exhaustive definition. It says " includes " and it also says " unless the context otherwise requires ". If one looks back to s. 52 and s. 54, I agree that in that context it is required that a letting for three years or under must be taken as being a conveyance although made by parol.

As to the other matter, it seems to me that the evidence went no further than this: the plaintiff and his brother agreed that the partnership should be treated as their tenant as though the partnership were a separate entity, which of course it was not, and that the rent should be £500 a year, but no beginning, still less any end, seems to have been agreed. I think, therefore, that the plaintiff failed on the facts to prove his case and has not a good enough title to the property to eject the defendant, his nephew.

DONOVAN, L.J.: I agree and there is nothing that I can usefully add.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Scott & Son* (for the defendant); *A. L. Rye* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PHILIPSON-STOW AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Denning), October 11, 12, 13, November 30, 1960.]

Estate Duty—Passing of property—Foreign property—Immovable property—English will—Trust for sale—Death of life tenant—Proper law of disposition—Finance Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 47), *s.* 28 (2).

A testator who made his will in 1898 and died in 1908 resident and domiciled in England, thereby declared that it was his wish and intention that his will should be construed and operate " as far as the case admits " according to the law of England. He devised and bequeathed his residuary real estate (which included land in South Africa) and his residuary personal estate to his trustees on trust for sale with full discretion to postpone sale, and, after usual administrative directions and some bequests, he provided that the ultimate residue should be held as if the moneys or investments representing the same were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his " settled estates ". His " settled estates " which comprised property in Sussex, were directed to be held, in the events which happened, on trust for the testator's widow for her life with remainder to the testator's son for life, and on his death for the testator's grandson for his life. The will contained wide powers for the trustees to manage and cultivate real, leasehold and immovable property whether in England or abroad. At the death of the testator's son, who had survived the widow, and died in 1954, the testator's residuary estate included land in South Africa remaining unsold. The administration of the testator's estate had however, long since been completed and the trustees had long been registered as owners of the land in South Africa. The income from the land in South Africa was being received by the trustees as owners and applied in accordance with the testator's will. Estate duty was claimed in respect of the land in South Africa as passing on the death of the testator's son. The land was immovable property by South African law and, by virtue of s. 28 (2) of the Finance Act, 1949, estate duty would not be leviable on the death of the testator's son unless the " proper law regulating . . the disposition under or by reason of which " the property passed was English law.

Held (LORD RADCLIFFE dissenting): the law regulating the disposition under or by reason of which the property (viz., the land) passed on the

death of the testator's son was South African law, for the word "disposition" meant the devise of the land, not the will, which was the instrument of disposition, and the devise of the land was admittedly governed by South African law; therefore, estate duty was not exigible.

Re Piercy ([1895] 1 Ch. 83), *Re Moses* ([1908] 2 Ch. 235) and *Re Miller* ([1914] 1 Ch. 511) considered.

A.-G. v. *Johnson* ([1907] 2 K.B. 885) considered and criticised.

Per VISCOUNT SIMONDS: the proper law regulating such a disposition as that in the present case might change with a change in the subject-matter, as when the land in South Africa was sold (see p. 819, letter F, post; cf. p. 828, letter H, to p. 829, letter A, post).

Decision of the COURT OF APPEAL ([1959] 3 All E.R. 879) reversed.

[Editorial Note. There was a majority of opinion that "disposition", at any rate in the phrase "disposition under . . . which" property passed, referred to the devise, not the will (see p. 819, letter C, p. 829, letter I, p. 830, letter A; cf. p. 822, letter G, post). LORD RADCLIFFE took the other view and read the word "disposition" as referring to the instrument which formed the source of the property passing (see p. 826, letter D, post). The point is, perhaps, fundamental in leading to his conclusion that the words "proper law regulating the disposition" should not be read as meaning "no more than that system of law without whose sanction the terms of the disposition would not be effective" (see p. 829, letter B, post), but that the words referred, in the case of a will or settlement, to the system of law whereby the trusts created by the will or settlement were governed, which in the present case was English law.

As to the law governing wills of foreign immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 52, 53, para. 102.

As to estate duty and the test of liability in the case of foreign property, see 15 HALSBURY'S LAWS (3rd Edn.) 56, para. 111; and for cases on the subject, see 21 DIGEST 17, *89-96*.

For the Finance Act, 1949, s. 28, see 28 HALSBURY'S STATUTES (2nd Edn.) 523.]

Cases referred to:

A.-G. v. *Belilios*, [1927] All E.R. Rep. 723; [1928] 1 K.B. 798; 97 L.J.K.B. 139; 138 L.T. 294; Digest Supp.

A.-G. v. *Dodd*, [1894] 2 Q.B. 150; 63 L.J.Q.B. 319; 70 L.T. 660; 58 J.P. 526; 21 Digest 129, *952*.

A.-G. v. *Jewish Colonization Assocn.*, [1901] 1 K.B. 123; 70 L.J.K.B. 101; 83 L.T. 561; 65 J.P. 21; 21 Digest 97, *714*.

A.-G. v. *Johnson*, [1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720; 21 Digest 98, *718*.

A.-G. v. *Winans*, [1910] A.C. 27; 21 Digest 65, *430*.

Berchtold, Re, Berchtold v. *Capron*, [1923] 1 Ch. 192; 92 L.J.Ch. 185; 128 L.T. 591; 11 Digest (Repl.) 366, *339*.

British South Africa Co. v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502; 80 L.J.Ch. 65; 103 L.T. 4; *revsd. on other grounds*, sub nom. *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A.C. 52; 11 Digest (Repl.) 376, *405*.

Cigala's Settlement Trusts, Re, (1878), 7 Ch.D. 351; 47 L.J.Ch. 166; 38 L.T. 439; 21 Digest 101, *732*.

Duff Settlement Trusts, Re, (1935), unreported.

Enohin v. *Wylie*, (1862), 10 H.L. Cas. 1; 11 E.R. 924; 44 Digest 730, *5844*.

Forbes v. *Steven, Mackenzie* v. *Forbes*, (1870), L.R. 10 Eq. 178; 39 L.J.Ch. 485; 22 L.T. 703; 21 Digest 57, *375*.

Freke v. *Carbery* (*Lord*), (1873), L.R. 16 Eq. 461; 11 Digest (Repl.) 385, *457*.

Gentili, In the Goods of, (1875), 9 I.R. Eq. 541; 11 Digest (Repl.) 390, *244*.

Howe v. *Dartmouth* (*Earl*), *Howe* v. *Aylesbury*, (1802), 7 Ves. 137; 32 E.R. 56; 44 Digest 197, *265*.

Marlborough (*Duke*) v. *A.-G.* (*No. 1*), [1945] 1 All E.R. 165; [1945] Ch. 78; 114 L.J.Ch. 83; 172 L.T. 21; 11 Digest (Repl.) 493, *1149*.

Miller, Re, Bailie v. *Miller*, [1914] 1 Ch. 511; 83 L.J.Ch. 457; 110 L.T. 505; 11 Digest (Repl.) 391, *497*.

Moses, Re, Moses v. *Valentine*, [1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519; 11 Digest (Repl.) 393, *504*.

Mount Albert Borough Council v. *Australasian Temperance & General Mutual Life Assurance Society*, [1937] 4 All E.R. 206; [1938] A.C. 224; 107 L.J.P.C. 5; 157 L.T. 522; 11 Digest (Repl.) 448, *867*.

Nelson (*Earl*) v. *Bridport* (*Lord*), (1846), 8 Beav. 547; 9 L.T.O.S. 471; 50 E.R. 215; 11 Digest (Repl.) 369, *353*.

Piercy, Re, Whitwham v. *Piercy*, [1895] 1 Ch. 83; 64 L.J.Ch. 249; 71 L.T. 745; 11 Digest (Repl.) 368, *350*.

Smyth, Re, Leach v. *Leach*, [1898] 1 Ch. 89; 67 L.J.Ch. 10; 77 L.T. 514; 21 Digest 122, *918*.

Stokes, Re, Stokes v. *Ducroz*, (1890), 62 L.T. 176; 11 Digest (Repl.) 368, *348*.

United Railways of the Havana and Regla Warehouses, Ltd., Re, [1960] 2 All E.R. 332; [1960] 2 W.L.R. 969.

Wallace v. *A.-G.*, *Jeves* v. *Shadwell*, (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 21 Digest 63, *413*.

White, Re, Skinner v. *A.-G.*, [1938] 2 All E.R. 691; [1939] Ch. 131; *affd.* H.L., [1939] 3 All E.R. 787; [1940] A.C. 350; 108 L.J.Ch. 330; 161 L.T. 169; Digest Supp.

Appeal.

Appeal by the trustees of the will, dated Mar. 14, 1898, of the testator, Sir Frederic Samuel Philipson Philipson-Stow, deceased, from an order of the Court of Appeal (LORD EVERSHED, M.R., SELLERS and HARMAN, L.JJ.), dated Nov. 20, 1959, and reported, [1959] 3 All E.R. 879, affirming an order of UPJOHN, J., dated Feb. 10, 1959, and reported [1959] 1 All E.R. 583. The appellants applied to the court by originating summons for the following relief: that, pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, it might be determined whether the seven-eighths undivided share in the property known as "Steenbokspan" situated in the Orange River Colony in the Union of South Africa (which undivided share formed part of the testator's residuary estate) (i) ought to be treated for the purposes of estate duty as excluded by the Finance Act, 1949, s. 28 (2), or otherwise from the property passing on the death of the testator, or (ii) ought to be treated for such purposes as passing on such death. The facts are set out in the opinion of VISCOUNT SIMONDS.

J. A. Plowman, Q.C., and *R. Cozens-Hardy Horne* for the appellants.

Peter Foster, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.

Nov. 30. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the question in this appeal is whether certain immovable property consisting of seven one-eighth undivided shares in a farm called Steenbokspan situate in South Africa became liable to estate duty on the death in 1954 of the late Sir Elliot Philipson Philipson-Stow, whom I will call "the deceased". At the date of his death, these shares were vested in the trustees of the will of Sir Frederic Samuel Philipson Philipson-Stow (the testator), who died in 1908, on trust for sale and on certain other trusts declared by, or by reference to, the testator's will.

By his will of Mar. 14, 1898, the testator made the following relevant provisions. By cl. 2, he declared that he had an English domicil, and that it was his wish and intention that his will and any codicil thereto should be construed and operate as far as the case should admit according to the law of England. By cl. 3, he appointed executors and trustees. By cl. 4 he devised certain property

in Sussex to his trustees to the use of his wife for life with remainder to his trustees for a term of a hundred years on trusts which have been satisfied with remainder to the use of the deceased for life with remainder to the use of the first and every other son of the deceased one after the other according to their respective seniorities in tail male with remainders over. By cl. 5, he cut down the estate in tail male of any person born in his lifetime to a life interest. By cl. 25, he devised and bequeathed all his real and personal estate whether situate in the United Kingdom or in South Africa or elsewhere except as therein mentioned to his trustees on trust for sale and conversion with the fullest power of postponement, and directed them to hold the proceeds of such sale and conversion on trust to make such payments thereout as were therein mentioned and to retain or invest the residue thereof in manner therein authorised. By cl. 37, he directed his trustees to hold the ultimate residue of the investments representing his residuary estate after setting aside such sums and making such payments as were therein mentioned on trust to pay the annual income to his wife during her life and after her death to hold such ultimate residue as if the moneys or investments representing them were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his settled estates. By cl. 39, he gave his trustees a very wide power of investment, by cl. 40, he provided that, in a certain event, the equitable doctrine of election should apply to the dispositions made by his will and by cl. 44, gave to his trustees power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the trusts or powers in Cape Colony or elsewhere abroad.

The testator died on May 17, 1908, without having altered his will except by a codicil which is not material. He was at his death absolutely entitled to five equal undivided one-tenth shares of the farm known as Steenbokspan. Two further shares were acquired and vested in the trustees of the testator's will and one share was acquired by the deceased personally. There was then a partition whereby certain plots were allotted to the holders of the two remaining shares and the remainder of the farm to the trustees and the deceased in the proportion of seven-eighths and one-eighth. The widow died on Dec. 22, 1930, and, as has already been stated, the deceased died in 1954. His eldest son, having been born in the lifetime of the testator, succeeded to a life estate only in the settled estates. The undivided shares in the South African property to which the testator was entitled at his death were duly registered in the register of deeds in Bloemfontein in the names of the trustees, as at a later date were the seven-eighth shares to which they were ultimately entitled. The formal deed of partition was also duly registered. It will be plain from what I have said that the trustees have not exercised the trust for sale. It follows, and is conceded by the Crown, that the only property, if any, which for estate duty purposes can be deemed to pass on the death of the deceased is the seven-eighth shares of the farm. I will call it " the South African property ".

The question whether this property is to be deemed to pass on the death of the deceased so as to make estate duty exigible on that event depends on the meaning and effect of a few words in s. 28 (2) of the Finance Act, 1949. That subsection is as follows:—

> " As respects property passing on the death of a person dying after the commencement of this Part of this Act, s. 2 (2) of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and s. 24 of the Finance Act, 1936 (which restricts the exemption conferred by the said sub-s. (2)), shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and that one at least of the following conditions is satisfied, namely,—

" (a) that the deceased did not die domiciled in any part of Great Britain; A

" (b) that the property so situate passes under or by reason of a disposition—(i) made by a person who, at the date at which the disposition took effect, was domiciled elsewhere than in some part of Great Britain; and (ii) not made, directly or indirectly, on behalf of, or at the expense of, or out of funds provided by, a person who at that date was domiciled in some part of Great Britain; B

" (c) that the property so situate is, by the law of the country in which it is situate, immovable property;

" or if the property so situate passes only by virtue of para. (c) of s. 2 (1) of the Finance Act, 1894, as having been the subject of a gift inter vivos and it is shown that one at least of the said conditions is satisfied." C

It would not be proper to come to a final conclusion on the meaning of what I think are the vital words of this section—" proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes "—without some reference to the earlier law. But it is legitimate first to see whether the positive enactment in the section has by itself a sufficiently clear meaning. In my opinion, it has. D

To obtain exemption, property situate abroad must by the law of the country in which it is situate be immovable property. That condition is satisfied in the present case. But it must further be established that the " proper law " regulating its devolution or the disposition under which it passes is not the law of England or of Scotland. It is urged, as I understand the argument, that, if in every case it is a corollary of the property being immovable by the law of the E country in which it is situate that the proper law regulating its devolution, etc., should be the law of that country, the section is tautologous. I do not think that this is so. The section may contemplate cases—and there may be such cases—where the law of a country, though it regards certain property as an immovable, may yet in certain circumstances regulate its devolution, etc., by reference to another law. Nor, even if there is some tautology, does F it have much weight with me. That is a common feature of legislation, and in this very section there appear to be other examples of it. But, tautology or not, the question is, what was the proper law regulating the devolution of the South African property or the disposition under which it passed?

First, the question suggests itself, what is the " proper " law? Does it add anything to " law " simpliciter? It relates to both devolution and disposition. G In regard to the former, I cannot see and no one has been able to suggest that it has any meaning at all; in regard to the latter, some assistance may be got from what was said in *Duke of Marlborough* v. *A.-G.* (*No. 1*) (1). There is the underlying suggestion that, just as in relation to a contract the intention of the parties is an important factor in determining what is its proper law, so in relation to a settlement the intention of the settlor is to be ascertained by H admissible evidence and, if possible, given effect to. This may well be so, and the same principle may be applicable to a will. But in the present case at least it is otiose, for the testator has, by cl. 2 of his will, declared his wish and intention to be that his will should operate and be construed according to the law of England. The question remains whether, so far as the South African property is concerned, his disposition is " regulated " by the law of South I Africa. I find myself unable to give any effective meaning to " proper ". It may be added that, whatever the settlor's intention, it cannot prevail against the relevant law.

The next question is, what is the meaning of " disposition "? I accept the view that devolution and disposition are mutually exclusive and are exhaustive of the ways in which property can pass on death, and further (to use the

(1) [1945] 1 All E.R. 165; [1945] Ch. 78.

words of UPJOHN, J. (2)) that it is perfectly clear that the property passed on the death of the son under or by reason of a disposition (the testator's will) and not by devolution. What, then, does " disposition " mean? Is it the instrument, will or settlement, by which property is disposed of? Or is it the provision in an instrument which deals with particular property? In the latter case, there can presumably be several dispositions in a single instrument. Linked with this question is another, viz., is the " proper law " regulating the disposition ascertainable once and for all, or may it change from time to time as successive interests take effect in possession? It appeared to me that on both sides the argument shifted from time to time to get the advantage of a favourable wind. I do not myself find it possible to say that the instrument, be it will or settlement, is the " disposition " intended by the section. Such a construction would be impossible to apply, for example, to a will which, being in other respects an " English will ", purported to devise in strict settlement land in South Africa. For to part of it English law, to other part South African law would apply. I say " apply ", not " regulate ", because I do not wish to beg any question. I am driven, then, to conclude that " disposition " does not mean " instrument ", unless some such words are added as " quoad the particular devise or bequest ". That, in effect, is to say that " disposition " means the particular devise or bequest.

Does this conclusion lead to the further conclusion that, in respect of a single disposition, the relevant law is not ascertained once and for all when the instrument becomes effective? I think that almost inevitably it does. We have seen that there may be two relevant laws at the date of the instrument taking effect. This very case supplies an illustration. For it is as certain that, at the death of the testator, South African law applied to his South African property as English law to his Sussex property. If the relevant law was determined once and for all, that would be the end of this case; for then South African law would continue to apply to the South African property. But, difficult as the question is and anomalous as are the results that may follow any answer to it, I have come to the conclusion that the proper law may change with a change in the subject-matter. Applying that to the present case, I should not exclude the possibility that, if and when the South African property is sold and the proceeds are gathered in, the proper law regulating the disposition will be English law. It is not necessary for the purpose of this case to decide that question. Until, however, the subject-matter has changed its nature and, having been an immovable, it has become a movable, I see no justification for saying that the relevant law has ceased to be South African. What is it that passed on the death of the deceased? Inasmuch as the Crown is claiming duty on the land in South Africa, it is not admissible to contend that anything passed except that land, or that duty, if exigible at all, is exigible on anything except its value. By English law, it may be regarded as converted into personalty; it remains by South African law immovable property as in fact it is. Therefore, though, as I have said, a future sale of the land may result in a change of the relevant law, I am of opinion that, until that event, the law remains that of South Africa.

Some difficulty has been caused, unnecessarily, as I think, by the use of the word " regulating ". It was freely conceded that it means no more and no less than " governing ", a more familiar word in this context. If so, whether the question is one of capacity or formality or validity, it is South African law which governs the disposition, and it is in the courts of South Africa that the ultimate sanction for its enforcement lies. It is irrelevant (if it is the fact) that there is no conflict on any material point between the law of England and that of South Africa. If there was a conflict, that of South Africa would prevail. If the disposition is operative according to its terms as understood by English

(2) [1959] 1 All E.R. at p. 587; [1959] Ch. at p. 405.

law, that is because South African law permits it. Though it permits it now, a change in the law of South Africa in regard to the disposition of tenure of land in that country would be effective to change the position. A

There is little authority directly in point. I do not think that the word "regulating" has been commonly used in this context. But, as I have said, it appears to mean no more than "governing" or perhaps "determining". If so, such cases as *Re Moses*, *Moses* v. *Valentine* (3) and *Re Miller*, *Bailie* v. *Miller* (4) are helpful. It is true that they do no more than illustrate the general rule which is thus stated in DICEY'S CONFLICT OF LAWS (7th Edn.) at p. 814 in regard to contract—r. 156— B

> "The formal and material validity, interpretation and effect of a contract with regard to an immovable are governed by the proper law of the contract. The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (lex situs)." C

I am assuming that, so far as may be, the same rule applies to a will or settlement. The first-named case is interesting as the decision of a very learned judge who plainly thought the case too clear for argument. There the subject-matter of a settlement made by a will was in part leasehold property, an immovable, situate in the Transvaal. The tenant for life, if English law had applied, would have had her enjoyment limited by the so-called rule in *Howe* v. *Earl of Dartmouth*, *Howe* v. *Aylesbury* (5). The learned judge, SWINFEN EADY, J., said (6): D

> "In *Freke* v. *Lord Carbery* (7) LORD SELBORNE, L.C., decided that the validity of a testamentary disposition of an English leasehold was governed by the law of England, i.e., the lex loci rei sitae, and not by the law of the testator's domicil. The same principle was applied in *In the Goods of Gentili* (8), and the same principle is applicable here." E

He, therefore, held that the widow was entitled to enjoy the leaseholds in specie during her widowhood.

I may also refer to *Re Piercy*, *Whitwham* v. *Piercy* (9), which I must state somewhat more fully. It appears from the headnote that an English testator, who owned some land in Sardinia, by his will gave all his real and personal estate on trust for sale and to hold the same until conversion and the proceeds of sale after conversion on trusts for his children for their respective lives with remainders to their issue. These trusts were to a great extent invalid under Italian law as regarded land in Italy, with the result that the tenants for life took their shares absolutely. But part of the land in Sardinia had been sold. In the result, it was held that the trustees having power under Italian law to sell the land must hold the proceeds on the trusts of the will but that the rents of the unsold land until sale would devolve according to Italian law. I quote one passage from the judgment of NORTH, J. (10): F G

> "Then the next question is, as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land: it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law." H I

As in *Re Moses* (3) the rights of the widow were governed, regulated, or determined by South African law in respect of an immovable situate in that country, so in *Re Piercy* (9) the rights of the persons interested were governed,

(3) [1908] 2 Ch. 235. (4) [1914] 1 Ch. 511. (5) (1802), 7 Ves. 137.
(6) [1908] 2 Ch. at p. 239. (7) (1873), L.R. 16 Eq. 461. (8) (1875), 9 I.R.Eq. 541.
(9) [1895] 1 Ch. 83. (10) [1895] 1 Ch. at p. 88.

A regulated or determined by Italian law just so long as the trust property was an immovable situate in Sardinia. So, also, in the case before us the rights of all persons claiming under the testator's will are, so far as the land in South Africa is concerned, regulated by the law of that country as long as the land is unsold. It made no difference in *Re Piercy* (9), and it makes no difference in this case, that a trust is created. The validity of the trust itself is a matter to be deter-
B mined by South African law. Assume it to be valid, its existence cannot affect the fact that the land itself remains subject to the same law. I come, then, to the clear conclusion that South African law " regulates " the disposition under or by reason of which the property passed on the death of the deceased. It is of some significance that the claim for duty is made in respect of the land itself; it is that which is said to " pass ", and it is that on which (since it does not pass
C to the executors as such) the statutory charge would, if the claim is well founded, fasten. I should hesitate to adopt a view of the section which would have a result so strange and contrary to international comity. The fact that the charge would not be enforceable does not make it more likely that the legislature intended to impose it.

I have so far, my Lords, tried to understand and interpret the positive enact-
D ment of s. 28 (2), and, though there are some difficulties which are not easily resolved, they do not touch the main question. I am clearly of opinion that, while foreign land is foreign land, its disposition and its devolution are regulated by the law of the country where it is situate. But it is said that I must not come to this conclusion because, in doing so, I ignore the opening or negative part of the subsection. My Lords, I concede as I said at the opening of this opinion,
E that I must look at the whole subsection before coming to a final conclusion. I will do so. The opening words of s. 28 (2) are:

> " As respects property passing on the death of a person dying after the commencement of this Part of this Act, s. 2 (2) of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and s. 24 of the Finance Act, 1936
F (which restricts the exemption conferred by the said sub-s. (2)), shall not have effect; . . ."

Then follows the enactment that I have already read which established a new criterion for the exigibility of duty. The argument is, first, that, if the test of exigibility under the earlier and now repealed law were applied, duty would be
G exigible in the present case, because succession duty would have been exigible; and, secondly, that it is not to be supposed that the legislature intended by substituting a new criterion to alter the area of tax.

My Lords, I am not impressed by this argument. I see no reason to suppose that the legislature did not intend to alter the area and incidence of tax. At any rate, it is so speculative an argument that, unless the new enactment was much
H less plain than I consider it to be, I should not be deflected from what I otherwise should consider its meaning. And I am the less disposed to give weight to the argument when I find, as I do, that it must be a matter at least of grave doubt whether, if the question was raised in your Lordships' House, it would be held that, under the old law, succession duty and, therefore, estate duty would have been payable on the South African property on the death of the deceased.
I Your Lordships will remember that the generality of the language of the Succession Duty Act, 1853, which would have made duty payable on any succession arising out of any disposition whatsoever, required that some limit should be implied, and that in *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (11), that limitation was supplied by Lord Cranworth, L.C., in words that have been often quoted

> ". . . that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country."

(9) [1895] 1 Ch. 83.

(11) (1865), 1 Ch. App. at p. 9.

These words were used by LORD CRANWORTH, L.C., in reference to the facts of the case before him, in which a testator had died domiciled in France and the Crown had claimed duty in respect of his personal property situate in England at his death. But they have been applied generally, though not without criticism, to other cases where the condition was not satisfied that the beneficiaries " became entitled by virtue of the laws of this country ". Taking these words at their face value, I should have thought it impossible to hold that they covered the case of a succession to foreign land whether or not the disposition purported to create a trust. But undoubtedly in *A.-G.* v. *Johnson* (12) the contrary was decided. In that case, it was, in effect, held that land in Assam, which was held on trust for sale under the will of a domiciled Englishman but remained unsold, was liable to duty on the death of certain persons who were entitled to shares of the surplus income. This decision was criticised by SIR WILFRID GREENE, M.R., in *Re White, Skinner* v. *A.-G.* (13) and, though it was apparently approved by the Court of Appeal in *A.-G.* v. *Belilios* (14), it does not appear that the only reason that was given for the decision commended itself to the court. However, it is not necessary to adjudicate on the correctness of this decision. Succession duty has gone, estate duty exigible by reference to it has gone, and estate duty has been reimposed in words widely different from those which were introduced by LORD CRANWORTH, L.C., into the statutory language of the Succession Duty Act. It is true that they are not in all respects easy to construe, but I have been able to give them a sufficiently clear meaning which at least accords with the principles on which the courts (and the legislature) have purported to deal with foreign land. I see no reason why I should give it up in order that the new law may agree with what is very doubtfully thought to be the old.

I would allow this appeal with costs here and below, subject to a reservation as to costs which I will make when I come to put the questions to the House.

LORD REID: My Lords, this case turns on the proper interpretation of s. 28 (2) of the Finance Act, 1949, which deals with exemption from estate duty of certain property situate out of Great Britain. Previously such exemption had involved reference to succession duty, and the abolition of succession duty in 1949 made it necessary to enact new provisions for such exemption. Section 28 (2) deals with a wide variety of cases. The property may be movable or immovable and it may pass by intestate succession or by a variety of kinds of disposition—will, inter vivos disposition or settlement or settlement based on contract. To find words equally appropriate for all such cases would be difficult, if not impossible, and it does not surprise me that some of the words used by the draftsman are not entirely appropriate for the present case. The first requirement for exemption is that

> " the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland."

The expression " proper law " is not entirely appropriate for all cases covered by the subsection if it is read in the sense in which it is generally used. In the law of contract the expression is familiar as denoting the law which the parties have selected to govern their contract. But clearly there can be no selection by anyone of the law which is to apply on intestacy, and I know of no authority to the effect that a testator can select the law which is to regulate the provisions of his will. He can, of course, " make his own dictionary ". It may appear from the terms of his will that he is using some word or phrase in an unusual sense. But it appears to me that the law which regulates his disposition of movables must be the law of his domicil and the law which regulates his

(12) [1907] 2 K.B. 885. (13) [1938] 2 All E.R. at p. 696; [1939] Ch. at p. 141.
(14) [1927] All E.R. Rep. 723; [1928] 1 K.B. 798.

A disposition of immovables must be the lex rei situs. In this case, it is not disputed that a disposition by a testator of the legal estate of immovables abroad must be governed or regulated by the lex rei situs, whatever intention to the contrary he may have expressed in his will. But it was argued that effect can be given to the testator's intention where the passing of the property involves no change in the legal estate. In this case, the legal estate in the testator's farm B in the Orange Free State vested in his trustees after his death; the property has now passed by reason of the death of a tenant for life, the legal estate remains in his trustees, and the beneficiary is now another tenant for life. It is argued that this passing is regulated by the " proper law " (in its ordinary sense) of the testator's will, and that that proper law is the law of England by reason of the testator's having so provided in his will. I cannot read the subsection as intro- C ducing a new conception into the law of testamentary succession, and I do not think that, in such a case, the " proper law " means any more than the law regulating the disposition under or by virtue of which the foreign immovable passes. What, then, is that law in this case? Is it the law of South Africa or the law of England? If it is the former this appeal must be allowed, if it is the latter this appeal must be dismissed.

D As I understood it, the argument for the Crown was that any regulation by the law of South Africa was at an end when that law permitted the trustees to take the property, and that the regulation of the passing of the property on the death of the tenant for life was purely a matter of English law. I do not agree. The law of South Africa might for any reason prevent the succession of the new tenant for life. In that case, the South African courts would determine E who was to have the property. It is no answer that the trustees could operate their trust for sale and remove the price from South Africa because any sale to be effective must comply with the law of South Africa. Although there is a trust for sale, it is not disputed that the property which passed was the land in South Africa, and that this must still be dealt with as an immovable within the meaning of the section so long as the land remains unsold. So it appears to me that the F " disposition under or by reason of which " the land passed is equally regulated by the law of South Africa whether it contains a trust for sale or not.

I must notice two other arguments for the Crown. First, it is said that, if the passing of immovable property in another country is held always to be regulated by the law of that country, the requirement which I have quoted from the section is redundant and it would have been sufficient merely to enact G para. (c) of the subsection " that the property so situate is, by the law of the country in which it is situate, immovable property ". I am not entirely satisfied of this but, even if that is so, I do not regard it as a strong argument in this case. The section deals with three matters, devolution on intestacy, disposition of movable property and disposition of immovable property. In the first case there is redundancy on any view, in the second case there is redundancy also, and in H the third case admittedly there is redundancy where there is a disposition of the legal estate. In so complicated a matter, I do not think that the presumption that provisions are not redundant is at all strong.

Finally, it is said that, before 1949, estate duty would have been payable in this case and, in the circumstances, one ought not to hold that the previous law has been altered. There would be some force in this if the previous law had I been clearly established, but the only authority cited was *A.-G.* v. *Johnson* (15). That is an unsatisfactory case in that, admittedly, the grounds of judgment of BRAY, J., cannot be supported. Even if the language of s. 28 (2) were more ambiguous than I think it is I would attach little weight to this argument. So, in my opinion, this appeal should be allowed.

LORD RADCLIFFE: My Lords, we have here a case of some undivided shares of land in South Africa being held on trust for sale under the will of a

(15) [1907] 2 K.B. 885.

testator who died many years ago, having settled the resulting proceeds of sale as part of his residuary estate on successive life tenants with ultimate remainders over. On Sept. 23, 1954, the life tenant in possession died and the settled fund still represented by the unconverted land passed to a successor, again for his life. The testator was domiciled in England, he declared it to be his wish and intention that his will should be construed and operate as far as the case should admit according to the law of England, his residuary estate was settled so as to devolve with a family property in Sussex, and his trustees were, and are, English residents. So far as the adjective is of any importance in this case, the settlement created by his will was " English ". I think that those are all the facts that need record.

The Crown have claimed estate duty on these shares as property passing on the death in 1954. I shall have to consider later whether their true claim, the claim that is consistent with the arguments on which they rely, is correctly expressed as arising in respect of the land itself, a subject which they admit to be immovable property both by our law and by the law of South Africa. At any rate, the answer which the appellants make is that the land, being property situate out of Great Britain, is exempt from duty under s. 28 (2) of the Finance Act, 1949, because the " proper law regulating . . . the disposition " under or by reason of which it passed was not the law of England or Scotland, and also the property is immovable property by the law of the country in which it is situate. This answer depends on the acceptance of one simple proposition, that, in the case of an immovable, the " proper law " intended by s. 28 (2) is necessarily the law of the country in which it is situate. To my mind, the fact that this is a simple proposition tells neither for nor against its acceptance; but, at the same time, if the argument is right, I can see no meaning in the word " proper " at all.

In my opinion, " proper law " does not have this meaning in this context. As it appears to me, there are three main reflections on such a construction which are bound to occur to anyone who sets out to read the section as a whole and as a contribution to the existing corpus of estate duty legislation. All of them tell against the proposition which is thus advanced. First, such a reading involves the conclusion that the section is intended to change the law about exemption of foreign property from duty in a not unimportant respect. Up to its passing, the general chargeability of property situate abroad had been governed by the test imposed by s. 2 (2) of the Finance Act, 1894; if legacy or succession duty was payable " in respect thereof ", it was also to be charged with estate duty. Neither immovable property nor real property was exempt eo nomine; nor was personal property situate abroad constructively brought within the conception of property situate within the United Kingdom by the principle " mobilia sequuntur personam ". It was early appreciated that this principle could not be applied to estate duty—see *A.-G.* v. *Winans* (16). Indeed, in the case of settled property, there was no scope for applying it, since the property that passed was not within the ownership of the " persona " whose death was the occasion of the passing.

There are certain obvious difficulties attendant on the idea of adopting as the test of liability to estate duty the same test as had previously been applied to legacy or succession duty, since the latter duties were commonly regarded as being charged on interests or successions in or to property rather than on property itself. I am not sure that, in the case of settled property, the difficulty was of any practical importance. In any event, the test was imposed by the statute and judges have had to make the best of it. From 1894 to 1949, no relevant amendment had been made that affected the applicability of the test, except for s. 24 of the Finance Act, 1936, which, while not touching " immovable property " (the first time, I believe, that this phrase was used in estate duty legislation),

(16) [1910] A.C. 27.

A brought in for other foreign property a new condition of liability depending on the domicil of the person whose death caused the passing. So long as the provisions of s. 2 (2) were operative, I think that it would have been impossible to say that in no circumstances could real property abroad attract a claim to estate duty if a passing took place, since there were known cases in which legacy or succession duty were exacted in respect of it. The circumstances which permitted B such a claim were special and I shall have to consider them in more detail later. In effect, they came down to cases where foreign land formed part of the capital of an English partnership and to cases where foreign land was held on an effective trust for sale under an English settlement. The latter point was, of course, the subject of the decision in *A.-G.* v. *Johnson* (17), which covered both succession duty and estate duty. I am myself of opinion that that case was rightly decided C and was in accordance with a number of earlier authorities which led up to it. But, putting my own opinion aside, I am quite satisfied that, in 1949, *A.-G.* v. *Johnson* (17) stood as established law; which is the immediate point. What are the facts with regard to it? It had never been overruled. It had twice been noticed in Court of Appeal decisions without disapproval; by SARGANT, L.J., and LAWRENCE, L.J., in *A.-G.* v. *Belilios* (18) and by SIR WILFRID GREENE, D M.R., in *Re White, Skinner* v. *A.-G.* (19). In each case the decision was explained as attributable to the existence of the trust for sale which converted the realty in Assam into English personalty. As it did in fact depend on that principle this is not a very damaging criticism. It was followed in 1935 in the Chancery Division by LUXMOORE, J., in *Re Duff Settlement Trusts* (20). It is noticed and treated as constituting an effective rule of the law in all the text-books on death duty which E were current in 1949—see HANSON, DEATH DUTIES (9th Edn.) (1946), GREEN, DEATH DUTIES (2nd Edn.) (1947), DYMOND, DEATH DUTIES (10th Edn.) (1946). In none of them is there any suggestion that *A.-G.* v. *Johnson* (17) is to be regarded with dubiety or that there is any practice on the part of the Revenue to make concessions in its application.

I think it an unexceptionable statement, therefore, to say that, if s. 28 (2) F of the Finance Act, 1949, does exempt foreign land from duty in all cases by virtue of this phrase about " proper law ", it has brought about a change in the existing law. So it may have done, if its true construction so requires. But the occasion of introducing this new section was the abolition of the legacy and succession duties by the immediately preceding section of the same Act and the consequent destruction of the existing statutory test. There is nothing to suggest G that a substantive change in the law is about to take place; least of all that a simple new rule, all foreign land to be exempt, is concealed within the texture of the elaborate formulae laid down.

This leads on to the second reflection that forces itself on the reader. The drafting of the section does not read at all like an attempt to say that no immovable situate outside England and Scotland is to be liable to duty. The point H can be put in more than one way, but, however put, I do not see how it can be brushed away as unimportant. It is not a question of tautology, which, in itself, is of little significance; it is rather that the whole structure of the section runs counter to the idea that it is meant to convey what it must mean according to the argument of the appellants. In the Court of Appeal, the Master of the Rolls (LORD EVERSHED) expressed this point as follows (21): I

> " The difficulty, to my mind, of accepting the argument of counsel for the [appellants] is that the consequence of its acceptance must be that in every case of a disposition by will or settlement of a foreign immovable, the proper law regulating the disposition must always be the lex situs . . . But

(17) [1907] 2 K.B. 885. (18) [1927] All E.R. Rep. 723; [1928] 1 K.B. 798.
(19) [1938] 2 All E.R. 691; [1939] Ch. 131. (20) 1935 (unreported).
(21) [1959] 3 All E.R. at p. 884; [1960] Ch. at p. 326.

the conclusion seems to me to render futile the obvious and apparent intention of the subsection . . ." A

I agree with that comment; but I think, too, that the same point might be put in another way without less cogency. I find it impossible to read the section without inferring that it does contemplate the contingency that property situate abroad, even though immovable, might still not be exempt from duty if the proper law of the disposition under which it passed was English or Scottish. If the appellants are right, that could never be, unless, conceivably, there was some conflict of doctrine between the two jurisdictions as to what was an immovable. I do not think that that can be what para. (c) is directed to. B

Thirdly, there is the difficulty of finding any certain meaning for this strange phrase, " proper law regulating the devolution . . . or the disposition." While it is, indeed, true that the effectiveness of any disposition which purports to dispose of the title to land or whatever ranks as an immovable is governed by the lex situs (see, for instance, *Re Moses*, *Moses* v. *Valentine* (22), *Re Miller*, *Bailie* v. *Miller* (23)), I am not aware that the description " proper law " had ever been given to the law in this relation. Nor would it occur to me as an apt description when used in connexion with the disposition itself, a word which I take to refer to the instrument, will or inter vivos settlement, which is the source of the passing. Under English law, settlements can be created by will as well as by instrument inter vivos; and in connexion with such settlements " proper law " is used, I think, as the equivalent of the adjectival " English ", " Scottish " or " foreign " law. It was so used in the leading case *Duke of Marlborough* v. *A.-G.* (*No. 1*) (24), which was decided only four years before the present enactment. So used, proper law denotes something which is not only not necessarily the same as the lex situs, where an immovable is concerned, but is also so far different in conception that the two systems may each have to be given effect to in respect of the same disposition. *Re Piercy*, *Whitwham* v. *Piercy* (25) offers an illustration of this. In that case, land in Sardinia was devised by the will of an English testator to trustees on trust to sell and hold the net proceeds of sale on successive interests for life tenants and remaindermen. By the Italian law operative in Sardinia, the will was ineffective to limit the land over, the tenants for life being by that law converted into absolute owners of the land. If the lex situs had been the proper law, that would have been the end of the matter; but despite this, it was held by NORTH, J., in the Chancery Division, that the trustees were under a duty to carry out their trust for sale and, having obtained and invested the proceeds, to hold them on the trusts of the settlement declared by the will, the tenants for life being thus reduced again to mere limited owners. On the other hand, the rents of the Sardinian land until sale would devolve according to Italian law. Curious as the case is, I think that, if one were to ask what was the " proper law " of the settlement which affected this Sardinian land and its proceeds of sale, one would really be forced to answer that, so far as the phrase was appropriate at all, the proper law was English, not Italian. The Italian law, said the judge (26), C D E F G H

". . . has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition [the sale] which is valid according to Italian law."

If, then, " proper law " in s. 28 (2), when applied to " disposition " were to have the sense of " English ", " Scottish " or " foreign ", the three alternatives offered, would this reading accord with any known rules about the incidence of legacy and succession duty, and so of estate duty, as they stood in 1949? In my opinion, it would reproduce the succession duty rules as then understood. The following propositions are perhaps adequate to state what they were:— I

(22) [1908] 2 Ch. 235.
(23) [1914] 1 Ch. 511.
(24) [1945] 1 All E.R. 165; [1945] Ch. 78.
(25) [1895] 1 Ch. 83.
(26) [1895] 1 Ch. at p. 88.

A (i) Both succession duty and legacy duty were imposed ex facie in the widest possible terms. The Acts creating the respective charges were, apparently, unlimited in their ambit. It was left to the courts by interpretation to determine what their limits were. For the purposes of succession duty, the general test of its incidence was that laid down by LORD CRANWORTH, L.C., in *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (27); it taxed only those persons "who become entitled by
B virtue of the laws of this country".

(ii) In ascertaining what persons became entitled within this category, the equitable rule that realty is converted into personalty as from the date when a trust for sale becomes effective (whether or not subject to a power to postpone) was applied without reservation. It was as much a binding principle for fiscal purposes as it was for the determination of beneficial rights inter partes: see
C *A.-G.* v. *Dodd* (28), *Forbes* v. *Steven*, *Mackenzie* v. *Forbes* (29).

(iii) Foreign land, though an immovable, was, therefore, not exempt from duty when a succession fell in if at that date it was held on a binding trust for sale under an "English" settlement, that is, a settlement the trusts of which were regarded as having for their natural forum the Court of Chancery in England. Although the land was unsold, the succession was treated as being essentially a
D succession to an "English" asset, the notional fund of personalty. In the words of MATHEW, J., in *A.-G.* v. *Dodd* (30)

> "For all purposes, land converted into money is to be treated as money, either for the purposes of a settlement or for fiscal purposes, because equity, and now law following equity, regards the land as money."

E (iv) This principle, if esoteric, was well recognised and was regularly enforced in death duty cases. Thus, in *Forbes* v. *Steven* (29), a testator domiciled in England died leaving his share in a partnership which owned warehouses in Bombay. JAMES, V.-C., upheld a claim to legacy duty in respect of this asset. By the law regulating the partnership, the land which formed part of its capital was regarded as held in trust for sale; and conversion for one purpose was
F conversion for all. In another case, *Re Stokes*, *Stokes* v. *Ducroz* (31), the rents and profits of real estate in New Zealand unconverted but held in trust for sale were treated as personalty and held to be liable to legacy duty. Mr. Vaughan Hawkins, whose arguments for the Crown in this and other cases seem to have formed no small part of the law on the subject, maintained (32):

G > "The case of *Forbes* v. *Steven* (29) cannot be distinguished. It has never been doubted, always followed in practice, and is incontestably right in principle."

NORTH, J., agreed or succumbed. He noticed the argument that the land in New Zealand was an immovable or real estate: but, he said (33). "Then what is this interest? In my opinion it is personalty . . . not an interest in land". In
H 1898 came *Re Smyth*, *Leach* v. *Leach* (34). A testator domiciled in the United Kingdom died, having created by his will a settlement of land in Jamaica. At a certain stage in the course of the successions under the settlement, a trust for sale became effective. One of the remaindermen entitled to a vested interest in reversion in the resulting proceeds died before the trust for sale had become binding or any sale had been made. The learned judge (ROMER, J.) held, never-
I theless, that probate duty was exigible in respect of this legatee's interest, on the explicit ground that the interest was of the nature of personalty, though the land remained unsold at the date of the legatee's death. It was an English asset, an English "equitable chose in action", and it was not to be treated as foreign by reason of the fact that the plantation in question was situate in Jamaica.

---

(27) (1865), 1 Ch. App. at p. 9.
(28) [1894] 2 Q.B. 150.
(29) (1870), L.R. 10 Eq. 178.
(30) [1894] 2 Q.B. at p. 156.
(31) (1890), 62 L.T. 176.
(32) (1890), 62 L.T. at p. 178.
(33) (1890), 62 L.T. at pp. 178, 179.
(34) [1898] 1 Ch. 89.

Having regard to the trust for sale, the Jamaican land was to be considered merely as an investment of the personalty fund. In the light of these decisions, to which there was no countervailing current of authority, I do not see what BRAY, J., could have done in *A.-G.* v. *Johnson* (35) except decide the case as he did. His reasoning is said to have been obscure; but the doctrines that he had to expound and apply do not admit of very simple exposition. It has been objected that the arguments as to succession duty are inextricably mixed with those bearing on estate duty; but s. 2 (2) of the Finance Act, 1894, made that confusion inevitable, since it took liability to one as the test of liability to the other. It is a fair theoretical criticism of the learned judge's decision that he did not so much decide that the estate in Assam was liable to duty, though situate abroad, as that the property that passed was not situate abroad at all, being personalty arising under an English settlement. Nevertheless, having regard to the principles laid down in the previous authorities and to the wording of the Finance Act, 1894, s. 2 (2), itself, I think that in this limited field of trusts for sale of foreign land a double-faced argument such as is here involved has to be accepted. I will return to this point before I finish.

(v) It was clearly appreciated that, in determining the range of succession duty, foreign property, real or personal, was being brought within the scope of British taxation and, formally at any rate, subjected to the resulting charge. Nor were these cases in which the maxim " mobilia sequuntur personam " could assist or explain the predations of the Revenue even where only items of personal property in the most straightforward sense were involved. The two leading cases on this point are *Re Cigala's Settlement Trusts* (36) and *A.-G.* v. *Jewish Colonization Assocn.* (37), both concerned with claims to succession duty (and, in the second case, with a claim to estate duty) when life interests terminated in property situated abroad. In the former, the trust fund under an English settlement included French rentes, inscribed in the Grand Livre in Paris, and shares in the Bank of France; in the latter, the great part of the securities affected was choses in action situate abroad, as were the documents of title to them. The judgments of the Court of Appeal are, I think, peculiarly relevant to what is now before us, because they were unanimous in holding that the death duty charge was exigible, notwithstanding that the property was physically situated abroad and that the succession itself could only be effective if admitted by foreign law. It was not relevant, said A. L. SMITH, M.R. (38), that Austrian law, the law of the settlor's domicil, would govern questions of " legitim " in the property. " It is . . . quite immaterial ", said COLLINS, L.J. (39) " where the property . . . was actually situate ". He accepted that (40)

> " it must depend on foreign law whether the property, the subject of the trust, could ever be brought under it ",

but that only meant that the succession might be defeated. Finally, STIRLING, L.J., explicitly rejected the argument (41) that an English succession is affected by having to refer to foreign law to ascertain the capacity of the settlor or the validity of his acts.

It is, I think, necessarily involved in the appellants' argument that " the proper law of the disposition " must change according to the question whether or not there is a foreign immovable among the trust investments at the date when any particular passing takes place under the settlement. Thus, if the land in South Africa had been sold and the proceeds invested in anything but other foreign land, the proper law in this case would not be anything but English. On the other hand, if a settlement starts off as English with investments in the United Kingdom and some or all of them are sold and invested in foreign land before a passing takes place, the proper law of the disposition, originally English,

(35) [1907] 2 K.B. 885. (36) (1878), 7 Ch.D. 351. (37) [1901] 1 K.B. 123.
(38) [1901] 1 K.B. at p. 133. (39) [1901] 1 K.B. at p. 135.
(40) [1901] 1 K.B. at p. 137. (41) [1901] 1 K.B. at p. 141.

then becomes foreign qua that asset. I find it very hard to be content with such a method of construction under which the " proper law " sways to and fro; the more so because proviso (b) (i) to the section plainly contemplates that the proper law of a disposition is determined once and for all at one date, the date when it becomes effective.

My Lords, I have come to the conclusion that s. 28 (2) of the Finance Act, 1949, must be interpreted in the light of all this previous authority. Having regard to it, I do not believe that the words " proper law regulating . . . the disposition " can be read as meaning no more than that system of law without whose sanction the terms of the disposition would not be effective. So to read it attributes no significance at all to the adjective " proper ". It might as well not be there. I hope that I am not being peremptory in saying that; but I do not think that any other of your Lordships has succeeded in finding any significance for it, if that reading were to be accepted. That seems to me an unsatisfactory method of construction, if another and certainly no less plausible meaning is to hand. " Proper law governing the devolution " can be read as a simple description of the effective law, but, in my opinion, in the case of a will or settlement, " the proper law " means the system of law by which trusts created under it are to be taken as governed, and in an English settlement of the proceeds of sale of foreign land that proper law is English. I do not think, therefore, that, in the present case, the conditions of exemption have been made out.

I would dismiss the appeal. We have, if I may say so, three excellent judgments before us, from UPJOHN, J., in the High Court and from the Master of the Rolls and HARMAN, L.J., in the Court of Appeal. They are all very familiar with this field of death duties, and the judgments on each side show how well balanced the arguments are. I do not believe that either side can present a wholly satisfactory case or one that does not leave certain difficulties unanswered. I can only say that, for the reasons which I have set out, I think that the views of UPJOHN, J., and the Master of the Rolls are the more convincing.

There is only one further point to mention. The claim to estate duty has been expressly made in respect of the immovable property consisting of the seven one-eighth undivided shares in Steenbokspan farm. That is the property situate abroad which is treated as passing. Is it consistent with the tenor of the argument which can alone sustain the charge of duty that the claim should be made in respect of the land itself, or does the claim, when analysed, really amount to an assertion that, apart from the passing of the land, there was also a passing of the equitable interest in the fund of personalty created by the will? I have found this a troublesome, because it is rather a metaphysical, question. I think, however, that the Crown's claim is rightly directed to the immovable itself. It might have been wiser policy to formulate it, as in *A.-G.* v. *Johnson* (42), in the shape of a claim on " so much of the residuary estate as was attributable to " the land in South Africa, but there is not, I think, any ultimate difference between the two ways of putting it. Estate duty is charged in respect of actual property; and, although the trusts affecting that property, if they turn it into personalty in the eyes of the law and so into an English asset, may afford a test whether it is chargeable or not, they do not create money or investments where no money or investments yet exist. What exists is the land forming part of the residuary estate and, in my opinion, it is that asset which falls within the charge imposed by s. 1 of the Finance Act, 1894.

LORD TUCKER: My Lords, I agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD DENNING: My Lords, it is clear to my mind that when s. 28 (2) of the Finance Act, 1949, speaks of the " devolution " of property, it means a

(42) [1907] 2 K.B. 885.

devolution by operation of law, such as heirship or kinship. When it speaks of a " disposition ", it means a disposition by instrument, such as a will. And when it speaks of " the disposition under or by reason of which " property passes, it means the particular devise or bequest under which it passes. The disposition with which your Lordships are concerned is a gift in the will of Sir Frederic Philipson-Stow, the first baronet. He devised his residuary estate to trustees who, under the direction in the will, received the income and paid it to his widow during her life. After she died, they paid it to his son, Sir Elliot Philipson-Stow, the second baronet. When Sir Elliot died, the trustees were bound by the will to pay the income to his son, Sir Frederic, the third baronet. It is this disposition—this gift over in the will to the present Sir Frederic—with which this case is concerned. The Crown claim estate duty on the property which passed on Sir Elliot's death. The trustees have, of course, to pay estate duty on much of it, but they claim to be exempt from estate duty on a farm at Steenbokspan in South Africa which they still hold. It is part of the residuary estate which they hold under a trust for sale, but they are at liberty to postpone the sale. They have postponed the sale and still hold the property although fifty-two years have passed since the testator's death.

It is admitted that all the conditions necessary to give exemption are fulfilled in respect of the South African land except this one on which the whole question arises. What is the proper law regulating the disposition? The Crown say that, in order to ascertain the proper law, one must look at the intention of the testator; just as in the case of a contract one looks at the intention of the parties (quoting *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society* (43)), and likewise in the case of a marriage settlement (quoting *Duke of Marlborough* v. *A.-G. (No. 1)* (44)); this applies, say the Crown, even though the contract deals with land abroad (quoting *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (45)). My Lords, I cannot accept the Crown's contention on this point. I do not even accept all that the Crown say about the case of a contract. Only a little while ago this House declared that, in the absence of an express clause, the proper law is to be found by asking with what country has the transaction the closest and most real connexion: see *Re United Railways of the Havana and Regla Warehouses, Ltd.* (46). But we are not dealing here with a contract. We are dealing with a will; and, whilst I would agree that the *construction* of a will depends on the intention of the testator, I would say that in no other respect does his intention determine the law applicable to it.

Let me take first the case where there is a disposition of *movable* property by will. There is no doubt that the proper law regulating the disposition of *movables* is the law of the domicil of the testator at the time of his death. In the leading case on this subject, LORD CRANWORTH used the word " regulate " in this very connexion. When a person dies domiciled abroad, he said, " In every case the succession to personal property will be *regulated* not according to the law of this country, but to that of the domicil ": see *Enohin* v. *Wylie* (47). There is, perhaps, an exception in regard to the *construction* of his will; for, if a question arises as to the interpretation of the will and it should appear that the testator has changed his domicil between making his will and his death, his will may fall to be *construed* according to the law of his domicil at the time he made it; though in all other respects it would be governed by the law of his domicil at the date of his death. Take next the case where there is a disposition of *immovable* property by will by means of a direct devise and not a trust for sale. There is no doubt that the proper law regulating the disposition is the law of the country where the property is situate and not the law of the testator's domicil; see *Freke* v. *Lord Carbery* (48), *Re Moses, Moses* v. *Valentine* (49). There is, perhaps, again an

(43) [1937] 4 All E.R. at p. 214; [1938] A.C. at p. 240.
(44) [1945] 1 All E.R. at p. 168; [1945] Ch. at p. 88. (45) [1910] 2 Ch. at p. 513.
(46) [1960] 2 All E.R. 332. (47) (1862), 10 H.L.Cas. at p. 19.
(48) (1873), L.R. 16 Eq. 461. (49) [1908] 2 Ch. 235.

A exception in regard to the *construction* of his will; for, if a question should arise as to the interpretation of the will, it will normally fall to be *construed* according to the law of his domicil at the time when he made his will. But this interpretation would itself be subject to the overriding requirement that it must in no way conflict with the law of the country in which the property is situate; for, if the disposition is not one which is permitted or recognised by the lex situs, it B cannot be given effect: see *Earl Nelson* v. *Lord Bridport* (50), *Re Miller, Bailie* v. *Miller* (51).

The so-called exceptions to which I have referred—about the *construction* of a will—are not really exceptions at all; for, in construing a will, so as to see what a testator meant, every civilised country looks to see what he intended—and for this purpose you may legitimately look at the law he had in mind—but this is C only done as a guide to find his meaning. It is not done so as to find out the law which regulates his dispositions. He has no choice about that. Apart from this one question of construction, the succession to movables is regulated by the law of his domicil; and the succession to immovables is regulated by the lex situs. Now, does a trust for sale make any difference to this proposition? It was not disputed that a trust for sale does not alter the quality of property. If it is land, D then, so long as the land has not been sold, the interest of the beneficiary remained immovable property: see *Re Berchtold, Berchtold* v. *Capron* (52). It follows that when the life tenant dies and the right to the income passes from him to his successor, the disposition under which it passes is regulated by the lex situs just as if it were a direct devise.

I was for some time impressed by the argument that, if the law regulating the E disposition of immovables by will is always the lex situs, why add s. 28 (2) (c)? But I do not think that it should prevail. The draftsman, I think, was concerned to deal comprehensively with movable and immovable property passing under a will or on intestacy. And it was natural enough to frame the section in the way he has, even though the conditions of exemption involve a good deal of overlapping. I was also impressed by the argument that in 1949 the decision in F *A.-G.* v. *Johnson* (53) held the field and the legislature cannot have intended to open a new door for exemption. But the decision is admitted by the Crown to have been based on wrong reasons. And I prefer not to suppose that the legislature intended to perpetuate a wrong decision.

I would, therefore, allow this appeal.

[The order as to costs was that the Crown do pay to the appellants their costs G here and in the Court of Appeal and that the Crown do pay to the appellants half of their costs in the Chancery Division.]

Appeal allowed.

Solicitors: *Norton, Rose, Botterell & Roche* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

---

(50) (1846), 8 Beav. at p. 570.
(51) [1914] 1 Ch. 511.
(52) [1923] 1 Ch. 192.
(53) [1907] 2 K.B. 885.

SHINER *v.* LINDBLOM (INSPECTOR OF TAXES). LINDBLOM (INSPECTOR OF TAXES) *v.* SHINER.

[CHANCERY DIVISION (Danckwerts, J.), November 10, 1960.]

Income Tax—Profits—Profession—Actor selling film rights in book—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 123 (1), *Sch. D, Case* II.

Income Tax—Income—Copyright—Actor selling film rights in book—Whether adventure in the nature of trade—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 123 (1), *Sch. D, Case* I.

The taxpayer's sole occupation was as an actor and he received no remuneration from any other source. He bought for £200 an option to purchase the film rights of a novel and endeavoured to interest film producers in making a film of the book. C.L.P., Ltd. offered to produce such a film, but only on the footing that the film rights were sold to them. It had not been the taxpayer's intention to sell the film rights, which he had acquired as an investment, but he consented to sell them. The taxpayer, therefore, exercised his option to purchase the rights for a further payment of £1,500. C.L.P., Ltd. arranged for a part in the film to be enlarged so as to be suitable for the taxpayer, and the taxpayer played the leading part in the film under an agreement which also provided for the sale to C.L.P., Ltd. of the film rights for £4,000. On the question whether the profit, £2,300, was chargeable to income tax either under Case I or Case II of s. 123, Sch. D, of the Income Tax Act, 1952,

Held: the profit to the taxpayer from the transactions was not chargeable to income tax because the £4,000 purchase price paid by C.L.P., Ltd. for the film rights did not form part of the taxpayer's remuneration or profits in respect of his profession as an actor, but was the realisation of an investment, and, therefore, it did not fall within Case II; nor did it fall within Case I, because the sale of the film rights was not a transaction in the nature of trade, since the taxpayer acquired the rights as an investment and had carried out no other transaction of a similar nature.

Appeal allowed.

[As to scope of charge to income tax under Case I and Case II of Sch. D respectively, see 20 HALSBURY'S LAWS (3rd Edn.) 108-110, 239-244, paras. 199-202, 438-446; and for cases on the subject, see 28 DIGEST (Repl.) 21-23, 154-157, *84-93*, *594-611*.

For the Income Tax Act, 1952, s. 123 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 116.]

Case referred to:

McLellan Rawson & Co., Ltd. v. *Newall*, (1955), 36 Tax Cas. 117; 28 Digest (Repl.) 31, *139*.

Case Stated.

This was a Case Stated by the General Commissioners of Income Tax for the Holborn Division under the Income Tax Act, 1952, s. 64. The commissioners held that a sum of £4,000 received by the taxpayer in respect of the sale by him of the film rights of a book formed part of the profits and gains arising to him in his profession as an actor, and so fell to be assessed under Case II of Sch. D to the Income Tax Act, 1952. The taxpayer appealed against the decision of the commissioners in relation to the application of Case II, and the Crown cross-appealed, claiming that the taxpayer was liable under Case I of Sch. D. The facts appear in the judgment.

R. Buchanan-Dunlop for the taxpayer, the appellant.

J. G. Foster, Q.C., and *A. S. Orr* for the Crown, the respondent.

DANCKWERTS, J.: In this case I think that the General Commissioners for Holborn have reached the wrong conclusion on the facts which they found, and their conclusion cannot be supported.

A The appellant is an actor on the stage, in films, on sound radio and on television, and one of the facts found was that he never received any remuneration from any other source. He obtained an option from an authoress called Noel Streatfeild to acquire limited performance rights in regard to a novel of hers called "Aunt Clara", and that he eventually disposed of to a film producing company. The option cost him £200. He had to pay £1,500 further under the terms of B the option agreement for the acquisition of the copyright, and the sum paid to him by the film producing company was £4,000; that left him with £2,300 on the transaction. It is claimed that that sum of £2,300 forms part of his profits or receipts from his profession as an actor; and there is an alternative way in which the claim of the Inland Revenue is put, in that they say it was a profit from a transaction in the nature of trade. It would be assessable in the first C alternative under Case II of Sch. D and in the second alternative under Case I of that Schedule. I will now turn to the facts as found by the commissioners in their Case. They say:

> "At the hearing of this appeal, evidence was given before us by the appellant which we accepted, and the facts found by us on that evidence are stated in the following sub-paragraphs:—(a) The appellant stated that D his sole occupation was that of an actor who appeared on the stage, in films, on sound radio, and on television and that he had never received any remuneration from any other source. (b) The appellant said he had never been either a producer or a dramatist or sold film rights before this occasion. (c) In the summer of 1953 the appellant had read a book by the author Noel Streatfeild entitled 'Aunt Clara'. (d) The appellant formed the E opinion that the story would make a good film and that the title part would be eminently suitable for his friend and neighbour Margaret Rutherford though there would be no part of sufficient merit for himself. (e) The appellant accordingly instructed his agent to acquire an option on the film rights of the novel and, as a consequence, the appellant took up the option on Sept. 12, 1953, for the consideration of £200. (f) The appellant stated F that it was not his intention upon acquiring the rights of the novel to sell them for profit. He intended to treat the acquisition as an investment so that the income therefrom might offset probable loss of earnings in his capacity as an actor."

That was an important finding, and I have had to apply my mind to it to find G out what it really meant. The option as such, of course, produces no income; it is merely a right to acquire something which might produce income, and I think that what is meant is that he intended to acquire the copyright, which the option provided for and enabled him to acquire, and that he intended to make use of the rights so acquired, not, I think, by a resale of those rights but by licensing or something of that sort so that, instead of a capital sum, income would H be produced in some such form as royalties. That must be the meaning of it, I think, otherwise it cannot make sense at all. The Case continues:

> "(g) Having obtained an option on the film rights of the novel, the appellant sought to induce people to make a film based on the novel. (h) The appellant endeavoured to interest Anthony Kimmins, the film producer, in the project and as a consequence the appellant's agent was approached by I Colin Lesslie Productions, Ltd. and negotiations were opened for the making of the film. (i) The aforesaid offer from Colin Lesslie Productions, Ltd. was the only one that the appellant had received. (j) The appellant's agent reported to him that Colin Lesslie Productions, Ltd., were not prepared to proceed with the making of the film unless the appellant sold them the film rights. (k) Accordingly, the appellant abandoned his intention not to sell the rights . . . (l) On June 17, 1954, an agreement was reached between the appellant and the author of the novel whereby the former exercised his option and acquired for the consideration of £1,500 certain rights of copyright.

(m) Subsequently, Colin Lesslie Productions, Ltd., arranged for the part of Henry Martin to be enlarged so as to meet the requirements of the appellant. In consequence, the appellant ultimately played the lead in the film of the aforesaid novel under the terms of the agreement dated June 22, 1954." A

From the exhibits it appears that the appellant received £4,000 in respect of the assignment of the copyright, and in consideration of his services as an actor he received a salary as provided by agreement between the parties. The finding on those facts by the commissioners is in para. 7 of the Case: B

"We, the commissioners who heard this appeal, having carefully considered the evidence and arguments brought before us, accept the appellant's evidence that it was his intention upon acquiring the option for the copyright of the book 'Aunt Clara' to use it as an investment. [That is a finding of fact.] But we hold that the sum of £4,000 paid to the appellant by Colin Lesslie Productions, Ltd., in respect of their acquisition of the said copyright comprises part of the agreement by letter dated Feb. 8, 1954, between Colin Lesslie Productions, Ltd., and Ronald Shiner and as such the aforesaid sum of £4,000 forms part of the profits and gains arising to Ronald Shiner in his profession as actor, and so falls to be assessed under Case II of Sch. D for the year 1955-56." C D

That is the conclusion which was reached by the commissioners on the facts found by them, and it is a conclusion on facts. It may be partly a matter of law and partly a matter of fact, but at any rate it is a conclusion which needs to be supported by evidence on which they could reasonably reach that conclusion, or it cannot stand. They did not deal with the question whether it was an adventure in the nature of trade under Case I, and I think I ought to deal with it as there is a cross-appeal by the Inland Revenue on that point. E

In my opinion the commissioners reached the wrong conclusion. It is quite true that there were two transactions included in one agreement, one the purchase of the copyright and the other the engagement of the appellant to act in the production of a film. But the fact that they were in the same agreement does not make them necessarily the same thing or the same transaction. They are parts of the same transaction, but in my view it does not necessarily follow from that that the purchase price paid for the copyright was part of the remuneration or profits received by the appellant in respect of his profession as an actor. It seems to me that it may well be that his position as an actor in this case enabled him to dispose of the copyright in the way in which he did, but it was not part of his profession to dispose of the copyright; it so happened that the film-producing company were not prepared to produce the film unless he assigned to them the copyright, but that seems to me to be quite a different thing from saying that it was part of his profits in the course of his profession. It seems to me that the price received was something quite distinct from his remuneration as an actor and was the realisation of the investment which he had acquired by means of the option. F G H

On the question whether it was a transaction in the nature of trade, it seems to me that a conclusion can be reached on the facts which have been found by the commissioners. It is quite plain that he had no other transactions of this nature, and they have found that he acquired the copyright as an investment and had no intention of realising it; he was not, in other words, trading in copyright or anything of that sort. It was something which he had acquired. He received an offer which was favourable and he decided to realise the investment. I

It seems to me very similar to the case which I had to decide of *McLellan Rawson & Co., Ltd.* v. *Newall* (1). Consequently, I come to the conclusion that

(1) (1955), 36 Tax Cas. 117.

the appellant is not subject to income tax in respect of the sum of £2,300 which was the excess of the sale price over what he paid for the copyright.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *Howe & Rake* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re ANGUS'S WILL TRUSTS. HALL AND ANOTHER *v.* ANGUS AND OTHERS.

[CHANCERY DIVISION (Buckley, J.), October 26, 1960.]

Will—Implication—Moiety remaining "after my wife shall have received her jus relictae" bequeathed by testator domiciled in England—Whether implied gift of other moiety—Meaning of "moiety".

By his will dated Oct. 16, 1940, a testator gave "the moiety of my property that remains after my wife shall have received her jus relictae unto my trustees" upon trusts for the upkeep of a memorial and a grave, "and to pay my wife the interest on the residue of the property so long as she shall live . . ." The testator further declared: ". . . at the death of my wife or if she shall have died before me then I bequeath the said property in equal shares between all such of my brothers and sisters nephews and nieces who shall be living at that time".

Jus relictae, a Scottish conception, is a provision for the widow of a person dying domiciled in Scotland out of the movables of the deceased and amounting, after payment of debts and expenses, to one-half of the free succession where there are no surviving children.

The testator, who was by birth a Scot, and born in Scotland, died on Oct. 14, 1957, domiciled in England. His widow died on May 31, 1959. There was no issue of the marriage.

Held: (i) there was no implied gift to the wife because such an implication would be inconsistent with the testator's assumption that his widow would be entitled to jus relictae (which had to be met by the laws of Scotland before his testamentary dispositions would operate) and his recognition that he could not dispose of it; and accordingly his will did not evince an intention to give to his wife anything except the life interest in the property settled by his will.

Adams v. *Adams* ((1842), 1 Hare, 537) followed.

Hall v. *Lietch* ((1870), L.R. 9 Eq. 376) considered and distinguished.

(ii) there was nothing in the will to detract from the ordinary meaning of "moiety" as "equal half part" which meaning the word accordingly bore.

(iii) the gift of "the said property" at the wife's death included everything of which the testator was competent to dispose at the date of his death; accordingly, there was an intestacy as to a moiety of the income during the widow's lifetime and on her death the brothers, sisters, nephews, and nieces of the testator then living became beneficially entitled to the whole of the residuary estate.

[As to the rules of construction of recitals and other statements in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 225, para. 282; and for cases on the subject, see 44 DIGEST 603, *4295 et seq.*]

Cases referred to:

Adams v. *Adams*, (1842), 1 Hare, 537; 11 L.J.Ch. 305; 66 E.R. 1144; 44 Digest 604, *4298.*

Hall v. *Lietch*, (1870), L.R. 9 Eq. 376; 23 L.T. 298; 44 Digest 604, *4300.*

Adjourned Summons.

The plaintiffs, Sydney Copestake Hall and Basil Garth Haselgrove, who were the personal representatives of Helen Chapman Angus, deceased, widow of the testator John Angus, deceased, and were also executors by representation of the testator's estate, applied to the court by originating summons dated Mar. 31, 1960, for the determination of certain questions arising under the testator's will, dated Oct. 16, 1940. The testator, who had lived in Walthamstow, Essex, for at least the last fifty years of his life, died on Oct. 14, 1957, and his widow died on May 31, 1959, without leaving issue of the marriage. The defendants, Annabel Morison Angus, William Angus Leith and John Adams were representatives of the class of the testator's brothers, sisters, nephews and nieces which was not wholly ascertained at the date of the summons. The facts appear in the judgment.

P. R. de L. Giffard for the plaintiffs.
G. T. Hesketh for the defendants.

BUCKLEY, J.: In this case I have to determine a question of construction of the will of a testator named John Angus, who was by birth a Scot, and was born in Scotland, but it is common ground that he died domiciled in England. The only parties who would be concerned to say the contrary would be the plaintiffs representing the testator's widow and they do not so contend.

Unfortunately, in his will, which would appear to have been drawn by the testator himself, he makes references to his wife's jus relictae, which is a Scottish conception. Before I read the will, I think it would be desirable that I should refer to the evidence which I have before me from a Scottish lawyer as to what the nature of jus relictae is in Scottish law. He says:

> " By the law of Scotland jus relictae is a legal provision accruing to the widow of a person dying domiciled in Scotland out of his movable or personal succession, wherever situated. It is in the nature of a debt attaching to the free succession . . ."

after the debts have been paid and the costs of administration of the estate have been met

> ". . . amounting to one-third of the free succession where there are children surviving the husband and one-half where there are no surviving children."

In the present case the testator left no children—in fact I think he never had any children—and, consequently, had he died domiciled in Scotland his widow would have been entitled by way of jus relictae to one-half of the movable property.

By his will, after appointing executors, the testator proceeded as follows:

> " I give and bequeath the moiety of my property that remains after my wife shall have received her jus relictae unto my trustees upon trust to pay the sum of £40 for the erection of a suitable memorial and to hold the sum of £50 for the upkeep of my parents' grave [in a certain churchyard] and to pay my wife the interest on the residue of the property so long as she shall live and at the death of my wife or if she shall have died before me then I bequeath the said property in equal shares between all such of my brothers and sisters nephews and nieces who shall be living at that time."

The question which I am asked to determine on that provision is whether on the true construction of the will the gift of the moiety which should remain after his wife should have received the jus relictae extends to the whole of the testator's property, or to only half of it, or whether it wholly fails for uncertainty or otherwise.

I may say at once that counsel for the plaintiffs concedes that he cannot contend that it failed for uncertainty, or for any other reason. I am further asked to determine whether, if the gift of that moiety so described only extends to

half of the testator's estate, on the true construction of the will there is a gift by implication or otherwise to the testator's widow of the other half of his estate or whether the last-mentioned half is undisposed of.

The testator made the will in question in 1940 and died in 1957 having been survived by his widow who has since died, the present plaintiffs being her personal representatives. The defendants are members of the class of the testator's brothers and sisters, nephews and nieces, who were living at the death of his widow. That class cannot at present be wholly ascertained, because one of the brothers of the testator has not been heard of for a great many years. It is unknown whether he is alive or was alive when the testator's widow died, and it is also unknown whether he has any children or other issue.

Counsel for the representatives of the widow has submitted that the property which was settled on the trusts containing the provision which I have mentioned consists only of one-half of the testator's residuary estate and that there is an implied gift to his client of an absolute interest in the other half. On the other hand counsel who appears for representative defendants contends, in the first place, that the gift of " the moiety of my property that remains after my wife shall have received her jus relictae " means, in the circumstances of this case, the whole of the testator's residuary estate. Alternatively, he says, if it only means one-half, then there is an intestacy as to the income of one-half of the residuary estate during the life of the testator's widow but after her death the whole of the residuary estate is given to the class of beneficiaries whom his clients represent.

Counsel for the plaintiffs in support of his argument says that all that is given to the trustees is one moiety of the testator's property, which is given to the trustees to be held on the trusts set out in the will. Counsel says that the testator has indicated that he intended that his wife should take the other half of his estate absolutely. He has referred me to two authorities in that connexion, one of which he admits to be against him, and the other of which is in his favour. The first is *Adams* v. *Adams* (1). In that case, the testator, after directing the payment of his debts, funeral and testamentary expenses, devised and bequeathed all and every his (the testator's) real and personal estate on trust to his children subject to the dower and thirds at common law of his wife, and his will contained a direction to apply the rents and profits after deducting the dower and thirds of his wife to the maintenance of his children. In that case it was held that there was no gift by implication to the wife as she was not in fact entitled to any dower herself. The vice-chancellor [SIR JAMES WIGRAM] pointed out in his judgment that there were two different sorts of cases. On the one hand, there may be the case where the testator's testamentary document contains a recital that he has given property by his testamentary disposition to someone when in fact he has omitted to do so. In such case the court can ascertain from the recitals the intention of the testator to make the recited gift although he has not properly expressed that intention positively in his testamentary disposition. On the other hand, there may be a different kind of case in which the testator declares wrongly that somebody is entitled to certain property which in fact belongs to the testator. Where that is the case, the vice-chancellor says that such a declaration cannot be relied on as evidence of an intention by the testator to make a gift of that property to the person in question. It is pointed out in JARMAN ON WILLS (8th Edn.), at p. 629, that such a declaration does not amount to a gift, for the testator evidently conceived that the person referred to possessed a title independent of the testator's own title, and it is wrong, in those circumstances, to suppose that he is intending to make a disposition in favour of that person.

The other case referred to by counsel for the plaintiffs was the decision of MALINS, V.-C., in *Hall* v. *Lietch* (2), where the testator, who was entitled to a

(1) (1842), 1 Hare, 537. (2) (1870), L.R. 9 Eq. 376.

policy of insurance of £500 on the joint lives of himself and his wife, bequeathed all his personal estate A

> " save and except the sum of £500 payable at my death, under a policy of insurance, to my wife, and to which she is absolutely entitled under the said policy."

He devised all his residue with that exception to trustees on trust to his wife for life and to his children after her death. The question arose whether there was an implied gift to the widow of the £500 payable under the policy. The vice-chancellor stopped counsel who appeared for the widow and evidently formed a view on first impression in favour of the widow's claim. Counsel for the parties who argued to the contrary did not refer to any authorities, nor apparently to the passage to which I have referred in JARMAN ON WILLS. The vice-chancellor came to the conclusion that the widow was entitled by implication to the £500. That case certainly is much more favourable to the view put forward by counsel for the plaintiffs in the present case than is *Adams* v. *Adams* (3), but the reasoning in *Adams* v. *Adams* (3) appears to me to be unanswerable. That reasoning was not, I think, brought to the attention of the vice-chancellor in *Hall* v. *Lietch* (4). If *Hall* v. *Leitch* (4) were otherwise an authority binding on me, and I had to choose between *Adams* v. *Adams* (3) and *Hall* v. *Lietch* (4), I should prefer the former. B C D

However, the present case is not precisely the same as *Hall* v. *Lietch* (4), and it is sufficient for me to say that I do not feel bound in the present case to follow the decision of MALINS, V.-C. It seems to me to be clear that this testator conceived that he had not any power to deprive his wife of whatever she might be entitled to out of the estate by way of jus relictae under Scottish law. That would be a liability of his estate which would have to be met before his testamentary dispositions would operate in Scotland. By the way in which he has framed his will, it seems to me that he recognised that that would be the position if his wife were entitled to jus relictae, and he also assumed that she would be entitled to jus relictae. It seems to me to be inconsistent with what the testator himself has said in his will to suppose that he is by these words indicating an intention to make a gift to his wife of any property except in so far as he gave her a life interest in his property which was settled on trust. So, I come to the conclusion, first of all, that there is not any implied gift here such as counsel for the plaintiffs has contended for of any part of the estate to the wife. E F

I pass to the next question, which is whether it is possible to get out of this will a gift of the whole of the residue of the testator to trustees on the trusts set out in the will. In support of this ground, counsel for the defendants quoted from STROUD'S JUDICIAL DICTIONARY (3rd Edn.), Vol. 3, p. 1811, dealing with the meaning of the word " moiety " where a decision of CHATTERTON, V.-C., is referred to, in which passage it is said: G

> " Although the proper meaning of ' moiety ' is the half part, it is here, in my opinion, used by the testator, who seems to have been an ill-educated person, in the sense of an equal part or share. I am not aware of any judicial opinion having been expressed on the meaning of this or a similar word; in the Imperial Dictionary, I find its meanings given as a part or share as distinguished from a half part." H

He says, therefore, " a moiety " need not necessarily mean a half, and he also remarks that careful draftsmen, if they want to use the word " moiety ", usually said " one equal moiety " suggesting perhaps that one could have a moiety which was not an equal moiety. I

If one looks in the SHORTER OXFORD DICTIONARY, the meanings that are given for " moiety " are:

> " 1. A half, especially in legal or quasi-legal use; 2, loosely one of two (or more) parts into which something is divided."

(3) (1842), 1 Hare, 537. (4) (1870), L.R. 9 Eq. 376.

A Then there are several meanings set out which I do not think are appropriate to the present case. An example of the loose meaning of the words which is given is

" The southern and greater moiety of this island: FULLER."

No doubt in the appropriate context one can come to the conclusion that the word " moiety " does not mean an equal half part. If the lady was entitled to
B jus relictae, what she would have been entitled to would have been one-half of the testator's property and the other half would have been left for him to dispose of. I do not find anything here which enables me to put on the word " moiety " anything other than what I think is its primary meaning of " equal half part ". Therefore, in my judgment, what is given to the trustees is a half of his property. He then goes on to express his reason for giving that
C half, his reason being that he thinks his wife will have the other half in right of jus relictae. He gives one-half to his trustees and they are to make certain payments out of that in connexion with the memorial and grave. Then he directs the trustees to pay to his wife interest on the residue of the property, which must mean what remains of the half, so long as she shall live. Down to that point, I think it is clear that the testator is dealing with only one-half of the estate. But
D then he goes on " and at the death of my wife or if she shall have died before me ". Pausing there, if she died before him she would have been entitled to nothing by way of jus relictae. Then he goes on " I bequeath the said property in equal shares " to the class of beneficiaries to which he has referred. What does he mean there by " the said property " ? He is dealing in this will with two possibilities, one being the event of his wife surviving him and dying after his
E death, and one of her pre-deceasing him. In either of those events he gives " the said property ". Reading back, I think " the said property " must be the property of which he has given a moiety to his trustees in the opening words of the clause " the moiety of my property that remains after my wife shall have received her jus relictae ". I think he gives in this clause everything that he was competent to dispose of at the time of his death. He gives it in
F equal shares between all his brothers and sisters. So far as he has earlier given his estate to the trustees this would operate as a trust in favour of the brothers and sisters. But, so far as there is no earlier gift, this must be a direct gift of anything not already disposed of to the brothers and sisters. The result is, in my judgment, that during the lifetime of the wife there was an intestacy as to the income of one-half of his estate, but at her death the whole residuary
G estate passed to the brothers and sisters and nephews and nieces who were living at her death.

With regard to the other question, there will have to be an inquiry (i) whether the testator's brother, William Angus, was living at the date of the death of the testator's widow and if he has since died who are his personal representatives and (ii) whether there were any and if so what children of the said William Angus living at the date of the death of the testator's widow and if any of them have since died who are their personal representatives.

Declaration accordingly.

Solicitors: *Cartwright, Cunningham, Haselgrove & Co.* (for the plaintiffs); *Clarke, Rawlins & Co.* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

CLAYTON (VALUATION OFFICER) *v.* KINGSTON-UPON-HULL CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), October 20, 21, November 10, 1960.]

Rates—Rateable occupation—Art gallery—Trust of gallery for enjoyment by the public in perpetuity—Gallery vested in local authority.

Hull Corporation held an art gallery subject to a trust deed " upon trust to permit the same to be used and enjoyed by the citizens of the said city . . . and the public generally as an art gallery for the exhibition of works of art in perpetuity ". They had made no regulations as to its use and admitted the public during certain hours in the day-time without charge to about two-thirds of it, using the remainder as offices, storerooms, etc., normally appropriate to the use of a building as an art gallery. A director and his assistant and staff were responsible for maintenance, repair, decoration, lighting, heating, etc., and security.

Held (DONOVAN, L.J., dissenting): Hull Corporation were in beneficial occupation of the art gallery because—

(i) the public had not such a right of free and unrestricted user of the art gallery as would exclude any beneficial occupation of it by the corporation; for the corporation might conduct the gallery in a manner usual to such resorts, and the public might, e.g., be charged some charges to supplement the fund for upkeep, or parts of it might be let or lent for specific exhibitions of works of art.

(ii) the art gallery would not necessarily command only a nil rent if let on a tenancy subject to the terms of the trust.

Lambeth Overseers v. *London County Council* ([1897] A.C. 625) distinguished.

Appeal allowed.

[As to occupation for the use of the public, see 32 HALSBURY'S LAWS (3rd Edn.) 21, para. 25; and for cases on the subject, see 36 DIGEST (Repl.) 351-354, *12-25*.]

Cases referred to:

Burnell v. *Downham Market U.D.C.*, [1952] 1 All E.R. 601; [1952] 2 Q.B. 55; 116 J.P. 168; 36 Digest (Repl.) 352, *17*.

Hare v. *Putney Overseers*, (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 38 Digest (Repl.) 480, *38*.

Lambeth Overseers v. *London County Council*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; sub nom. *St. Mary, Lambeth (Churchwardens & Overseers)* v. *London County Council*, 61 J.P. 580; 36 Digest (Repl.) 351, *13*.

Liverpool Corpn. v. *West Derby Union*, (1905), 92 L.T. 467; 69 J.P. 277; 1 Konst. Rat. App. 219; 38 Digest (Repl.) 579, *611*.

London County Council v. *Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, etc.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest (Repl.) 481, *47*.

Mersey Docks v. *Cameron, Jones* v. *Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest (Repl.) 545, *395*.

Soane's Museum (Sir John) Trustees v. *St. Giles-in-the-Fields & St. George's Bloomsbury Joint Vestry*, (1900), 83 L.T. 248; Ryde & K. Rat. App. 235; 38 Digest (Repl.) 492, *115*.

Westminster Corpn. v. *Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd., etc.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; 38 Digest (Repl.) 634, *969*.

Case Stated.

The respondent corporation, Kingston-upon-Hull Corporation, were the owners of a hereditament described as Ferens Art Gallery and premises, Queen Victoria Square, Kingston-upon-Hull, assessed at £4,700 gross value, £3,913 rateable value in the valuation list for Kingston-upon-Hull City. The hereditament was the subject of a trust deed requiring the corporation to permit it to be used and enjoyed by the citizens of the city and the public generally as an art gallery in perpetuity. The valuation officer appealed by way of Case Stated against a decision of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.) given on Sept. 21, 1959, and reported (1959), 5 R.R.C. 309, in which he held that the hereditament was not in rateable occupation. The valuation officer contended that the tribunal was wrong in law in deciding that the hereditament was in the occupation of the public, that on the facts it was in the rateable occupation of the corporation and that the principle laid down in *Lambeth Overseers* v. *London County Council** did not apply to a hereditament consisting or primarily consisting of buildings.

W. L. Roots, Q.C., and *J. R. Phillips* for the appellant valuation officer.
Peter Rawlinson, Q.C., and *J. P. Harris* for the respondent corporation.

Cur. adv. vult.

Nov. 10. The following judgments were read.

LORD EVERSHED, M.R.: The claim of the appellant valuation officer in this case is that the respondent corporation, Kingston-upon-Hull Corporation, are in rateable occupation of the Ferens Art Gallery, Queen Victoria Square, in Kingston-upon-Hull. The answer of the corporation, which found favour with the Lands Tribunal, is that the obligations under which, by virtue of certain deeds made in the years 1919 and 1928 between the late Mr. Ferens and the corporation (to which I shall later refer), any " occupation " by or on behalf of the corporation is in the character of mere custodians for the public; that accordingly the " occupation " by the corporation has no " beneficial " or other quality sufficient to attract liability to rates; and that the principle applied in *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case) (1) and *Burnell* v. *Downham Market U.D.C.* (2) to parks or open spaces are no less applicable to a public art gallery, such as the Ferens Act Gallery.

If the matter were free from authority and could be judged by common sense and the ordinary usages of language, I should feel little doubt that the tests of occupation applicable in the case of a public park or a public open space would have little reference to a public art gallery controlled and managed as is the gallery in the present case. The facts in the case appear to have been agreed and are set out in the report of the decision (3). I do not repeat them in this judgment; for they are such as one would expect them to be. Though no one sleeps on the premises, they are under the control of a director and assistant director responsible, with the staff necessary for the purpose, for the maintenance, repair, decoration, lighting, heating, etc., of the building and for its ordinary security. It is open to the public during certain hours in the day-time. No admission fee appears to be charged and no regulations seem to have been made or published. There is no evidence of the ownership or character of the pictures or other works of art displayed. The area open to the public is approximately two-thirds of the whole. The remaining parts of the building, to which the public are not admitted, are used for the ordinary purposes, i.e., as offices, storerooms, etc., normally appropriate to the use of the building as an art gallery.

On this basis of fact the question " are the premises occupied and if so by whom? " when applied to this art gallery would, as I have said, appear to me to

---

* [1897] A.C. 625.
(1) [1897] A.C. 625.
(2) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(3) (1959), 5 R.R.C. at pp. 310, 311.

yield, according to common sense and use of language, quite a different answer from that appropriate to the same question when related to a public park or open space. In the latter case the sensible answer would to my mind be—in any ordinary acceptance of language—the park or open space is not occupied by anyone; the public have, when the gates are open, free and unrestricted access to the whole of it, save only such buildings or places as are reserved for the use of the park keepers or custodians. But, in the case of a building such as the present gallery, I should have thought that the sensible answer was no less certainly that it was occupied by those whose function it is to maintain the building in the ordinary way as such, and not the less so because during the specified hours of the day-time members of the public are admitted to look at the works of art displayed.

It is well established that where more than one person or set of persons have rights to be in or on a building, that person or set of persons having the control and regulation of the building is treated as the rateable occupier (see *Westminster Corpn.* v. *Southern Ry. Co.* (4), e.g., per LORD RUSSELL OF KILLOWEN). It is also well established that occupation in order to attract liability to rates must be beneficial occupation. But that phrase does not mean profitable occupation and may be satisfied by occupation in discharge of a statutory duty or statutory power or for discharging the duties of a trustee—see, e.g., the case cited to us of a public library, *Liverpool Corpn.* v. *West Derby Union* (5). It has also been clearly established since *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (6), as pointed out in the speeches in the *Brockwell Park* case (7), that the fact of a property being held for public purposes does not deny beneficial occupation in the occupier.

In the *Brockwell Park* case (7)—which followed the case relating to Putney Bridge, *Hare* v. *Putney Overseers* (8) and was in turn followed by this court in the *Downham Market* case (9) relating to a war memorial playing field—it was held by the House of Lords that the right of the public to the use and enjoyment of the park was " free and unrestricted ", save only for those buildings reserved by London County Council for the purposes of management and conservation of the park, activities purely ancillary to the general purpose of the public park and occupying together a very small area compared with that of the park as a whole. It appears from the relevant Act of Parliament under which London County Council acquired the park that its duty to give to the public free and unrestricted access was perpetual and involved a denial of any right to charge an entrance fee. In the *Downham Market* case (9) this court held that the public were entitled to a similar free and unrestricted access—the power of the local authority on occasion to close the field and charge an entrance fee—as for a hospital fête—being minimal in effect; and the power of the authority in certain circumstances to sell the field no more qualifying for practical purposes the permanence of the public right of enjoyment than the possibility of London County Council getting a special amending Act in regard to Brockwell Park.

In their speeches in the House in the *Brockwell Park* case (7) both LORD HALSBURY, L.C., and LORD HERSCHELL refer to and appear to base themselves on the dual grounds of free and unrestricted user by the public and of the absence of any beneficial occupation in London County Council. LORD HALSBURY, L.C., at the beginning of his speech, said (10):

> " I do not think there is here a rateable occupation by anybody. The ' public ' is not a rateable occupier; and I think that one sentence disposes of the case."

Later he continued (10):

> " Once it has been found, as in this case, that the occupation cannot as a

(4) [1936] 2 All E.R. at p. 326; [1936] A.C. at pp. 529, 530.
(5) (1905), 92 L.T. 467. (6) (1865), 11 H.L. Cas. 443. (7) [1897] A.C. 625.
(8) (1881), 7 Q.B.D. 223. (9) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(10) [1897] A.C. at pp. 629, 630.

matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it."

LORD HERSCHELL said (11):

> " No tenant would give anything for them, [the park and the buildings thereon] seeing that every part of them is dedicated to the public use, and that the small sums of money which might be received in respect of them would, as the case finds, be more than absorbed by the expense of keeping them in order."

On the following page he said (12):

> ". . . I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

But, as pointed out by KENNEDY, J., in *Liverpool Corpn.* v. *West Derby Union* (13), the two things are in truth manifestations of the single, decisive, proposition, viz., that on the facts of the *Brockwell Park* case (14) the free and unrestricted user by the public was exhaustive and exclusive of any right to any occupation, or at any rate any beneficial occupation, in anyone else. By way of distinction, the Divisional Court in *Liverpool Corpn.* v. *West Derby Union* (13) emphasised the absence of any statutory or other obligation to continue to allow the premises there in question to be used as a public library for any particular length of time, still less in perpetuity.

I do not say that the principles of the *Brockwell Park* case (14) cannot be applicable to a building as opposed to an open space. It may well be that, if a public authority acquire a piece of land and erect on it, say, a public shelter and thereafter hold the property by virtue of some statute or of a deed of trust under the obligation to maintain it as a public shelter for all time, the public could be said to have such right of free and unrestricted user as would be exhaustive and exclude any beneficial occupation in the authority. But the question here is: What is the nature and what the extent of the public rights to or in the Ferens Art Gallery? So far as I can see, such rights are to be found and found only in the final words of cl. 5 of the trust deed of Dec. 9, 1919. The words are:

> " Upon trust to permit the same to be used and enjoyed by the citizens of the said city and county of Kingston-upon-Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity."

True it is that the last two words impose a permanent obligation, but I cannot see that a charge for admission to help towards provision for the cost of maintenance would be inconsistent with the use of the premises by the public " as an art gallery ". Further, if on occasion or in some part of the building works of art were displayed which were lent for the purpose and were of very great value, I see nothing in the obligation which I have quoted which would prevent the making of regulations restricting the passage of the public in the rooms for the better security of the exhibits. In other words, I cannot accept the argument that, in the case of premises used—in the ordinary acceptance of the word—as a public art gallery, the right of the public necessarily involves or must be comparable to the free and unrestricted user by the public of an open space.

After paying therefore, as I hope, due regard to the language and reasoning in

---

(11) [1897] A.C. at p. 631.
(12) [1897] A.C. at p. 632.
(13) (1905), 92 L.T. 467.
(14) [1897] A.C. 625.

the cases binding on us, I have nevertheless in the end come to the same conclusion that, as I stated at the beginning of this judgment, appeared to flow from the application of common sense and ordinary language.

I add one further consideration: If the question, relevant in all rating cases, be asked, what rent, if any, might be payable for a tenancy of the premises subject to the obligation of the overriding trusts affecting them, I am by no means satisfied that the answer would necessarily be nil. A great amateur of the arts might well pay a rent for the premises in order to enable him, by the exhibition of works of art belonging to or borrowed by him, to increase public interest in and appreciation of the arts. And he would be more inclined so to do if he happened himself to be a painter or sculptor and therefore able to exhibit his own works—and offer them for sale—in one room of the premises. Similar considerations might, I conceive, apply to a person or company carrying on business as an art dealer; and the result would in neither case disqualify the premises as a public art gallery or involve any failure in observance of the terms of the trust deed.

HARMAN, L.J.: The decision of the Lands Tribunal from which this appeal arises, if it be good law, must have important effects, for it extends to public buildings held for public purposes the freedom from rateability established in regard to various open spaces by a line of cases of which the prototype is *Hare* v. *Putney Overseers* (15) and the leading case *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case) (16). Now in my judgment the true ratio decidendi in those cases is that no one is in occupation at all and therefore no one is rateable. This is easily seen in the first case which was concerned with Putney Bridge. It would be extravagant to say that the public occupies Putney Bridge but true to say that the public has such extensive rights over it as entirely to exclude any beneficial occupation in the owners who are mere custodians. The *Brockwell Park* case (16) was perhaps a slight extension of this line of reasoning, for there London County Council did exercise some control, shutting the park at night and having certain buildings in the park which they controlled, but these powers of control were strictly ancillary to the maintenance of the park for the use of the public and the House concluded that they were not enough to make it untrue to say that the public had, as the Act of Parliament provided, free and unrestricted access. It is true that LORD HALSBURY, L.C., expressed the view by implication (17) that the public was in occupation, but the following paragraph shows his true view in these words (17):

> "... as I have said, I think there is no occupation at all, the county council being merely custodians and trustees for the public."

As to the further point discussed in that case, viz., whether there was a beneficial occupation, it is clear that neither LORD HALSBURY, L.C., nor LORD HERSCHELL considered that the word beneficial meant profitable. LORD HALSBURY, L.C., for instance, says (17):

> "Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose."

It is possible that *Burnell* v. *Downham Market U.D.C.* (18) was an extension of the principle in a different direction, because there the dedication to the public was by deed and not by statute, but that aspect of the matter is of no importance here.

The tribunal's decision, therefore, amounts to this, that this building is an

(15) (1881), 7 Q.B.D. 223.
(16) [1897] A.C. 625.
(17) [1897] A.C. at p. 630.
(18) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.

A unoccupied building and this seems to me clearly wrong. It is not in fact unoccupied. It is not in law occupied by the public, whose only right is to enjoy the advantages of a picture gallery. It is on the other hand in my judgment occupied by the corporation under the deeds which my Lord has already cited. Time was when land held for public purposes was held on that account not to be rateable, but that time has long gone by. See the speech of LORD HERSCHELL, L.C., in B *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) (19) where he says:

> " The decision of this House in *Jones* v. *Mersey Docks* (20) marks an epoch in the law of rating. Many of the earlier decisions are tainted with this vice, that they proceed upon the supposition that lands held for public purposes are on that account not rateable. This doctrine is now exploded, C your Lordships' House having distinctly determined that the circumstance that land is held by a public body for public purposes does not affect its rateability."

It is not then the fact that the purposes concerned are public purposes that will absolve the occupiers, if there are any, from rates. As I have already said, I cannot think this can be treated as an unoccupied building. It is in fact actively D used and occupied every day of the week. It is vested in possession in the corporation, who are therefore prima facie the occupiers—see RYDE ON RATING (10th Edn.), at p. 20 and cases there cited. Unless therefore they occupy merely as custodians, or in other words unless the rights of the public are such as to exclude all possibility of beneficial occupation by the trustees, then the occupation on the part of the owners will be treated as beneficial for rating purposes.

E The answer to this last question must rest on the document of trust. The trusts are declared with a remarkable lack of particularity:

> " . . . to permit the same [i.e., the building] to be used and enjoyed by the citizens of . . . Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity."

F I suppose that the trust has been delegated to the appropriate committee of the corporation. This body acts through its appointee, the curator and his staff, but apparently has not thought it necessary to issue any bye-laws for the regulation of the gallery. There is nothing in the trust about the public enjoying free and unrestricted access. The public is entitled to enjoy the property " as an art gallery ". What does this mean? It must mean in my judgment that the G corporation are to conduct on the property an art gallery in the usual way of such resorts. I see no reason why the public should not be charged at any rate such a sum as will supplement the inadequate upkeep fund, even if not sums which will augment the fund for the purchase of works of art. I see no reason why the art gallery may not be closed, say on Thursdays, for the use of art students. Indeed I see no reason why the corporation should not let or lend the H gallery or specific parts of it for the exhibition of works of art on loan whether by some body like the Arts Council or by a wealthy patron or indeed an impresario wishing to make a profit. In these circumstances it seems to me that the corporation are truly the managing owners and occupiers of the building and that their position is quite unlike that of the mere custodian of an open space and much more clearly akin to the trustees of the Soane Museum who were held I rateable in *Trustees of Sir John Soane's Museum* v. *St. Giles-in-the-Fields & St. George's Bloomsbury Joint Vestry* (21). For these reasons I agree with the Master of the Rolls that the appeal should be allowed.

DONOVAN, L.J.: This is an appeal by way of Case Stated from a decision of the Lands Tribunal that the Ferens Art Gallery at Hull is exempt from rating having regard to the decision of the House of Lords in *Lambeth Overseers* v.

(19) [1893] A.C. at p. 585. (20) (1865), 11 H.L. Cas. 443.
(21) (1900), 83 L.T. 248.

London County Council (22) commonly referred to as "the *Brockwell Park* decision". The appellant valuation officer contends that that case has no application to the present.

The salient facts in the *Brockwell Park* case (22) were that London County Council had under the London County Council (General Powers) Act, 1890, power to purchase the park; and if the council exercised the power, were—under the same Act—to hold the property as a park, and maintain and preserve it as a park, for perpetual use by the public for exercise and recreation. The power to purchase was exercised and the park conveyed to London County Council

> "to the use of them, their successors and assigns, for ever, to the end and intent that the same might be used as and for a public park . . ."

And as for the prescribed purposes and exercise and recreation, the council provided inter alia thirty lawn tennis grounds and thirteen cricket pitches for the use of which, it seems reasonable to infer, some small charge was made. The previous private owner had been assessable to rates in respect of the park and a Divisional Court held that London County Council in turn were likewise rateable. The Court of Appeal reversed that decision and its judgment was upheld in the House of Lords.

In the Court of Appeal (23) the decision against rateability was based on the absence of beneficial occupation. A. L. SMITH, L.J., pointed out that an authority discharging some public duty and having property vested in it for the purpose was still to be regarded for rating purposes as one of the hypothetical tenants. On that basis its occupation could be beneficial, for, if the authority did not own the premises it might have to rent them to discharge the duty. But London County Council were under no obligation to provide parks for the public; and in the case of Brockwell Park the outgoings far exceeded any possible income. Accordingly, on the hypothesis that any tenant of the hereditament would be bound under the Act of 1890 to maintain it as a public park, such tenant would make an annual loss, and could not therefore be expected to pay any rent. The park was not, therefore, rateable.

The House of Lords agreed with this view, but decided the case on the broader ground that there was no rateable occupation by anybody. There was obviously physical occupation, e.g., by the council's servants, some of whom dwelt in cottages being part of the park. But for rating purposes the public were in occupation. LORD HALSBURY, L.C., said (24):

> "I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier . . . It appears to me that the nature of the occupation here is such that there can be no rateable occupation . . ."

LORD HERSCHELL said (25):

> "Here these very lands and every part thereof, by statute, must be held in perpetuity for the use of the public, and the question is, whether, under these circumstances, they are rateable at all. I think that on principle they are not."

In the case before us, one, Thomas Ferens, a citizen of Hull, on Dec. 9, 1919, conveyed to the Hull Corporation for a nominal consideration of 10s. a plot of land in Queen Victoria Square in Hull, together with a church on part of the site, to hold the same unto and to the use of the corporation, but subject to the trusts comprised in an indenture of even date made between the same parties. That indenture recites the aforesaid conveyance and further that Mr. Ferens, being desirous of providing for the erection by the corporation of an art gallery on the said land for the use of the citizens of Hull and the public generally, had

(22) [1897] A.C. 625.
(23) [1896] 2 Q.B. 25.
(24) [1897] A.C. at pp. 629, 630.
(25) [1897] A.C. at p. 632.

A transferred certain investments to the corporation worth some £48,000. The trusts declared in respect of these investments were that the corporation should convert the same into money when they thought fit and use the fund to erect an art gallery on the land within five years. The trusts declared in respect of the land were that the corporation should hold it and the art gallery to be erected on it

B

> "Upon trust to permit the same to be used and enjoyed by the citizens of the said city and county of Kingston-upon-Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity."

It is to be noted that by the same deed the corporation covenanted to demolish a public lavatory which stood on land adjacent to that conveyed by Mr. Ferens,
C and the site of the lavatory was to be comprised in the site for the art gallery. I do not think that anything turns on this. It is reasonable to suppose that this additional ground was a very small part of the whole.

A third deed of Mar. 15, 1928, between the same parties, after reciting that the building of the art gallery had been postponed by mutual arrangement, but that the gallery was now complete and properly fitted up, and open to the public,
D and that a residue remained of the original fund of £48,000, such residue amounting to upwards of £20,000, provided as follows: £22,500 was to be set aside as an endowment fund. The income from £2,500 of this fund was to be applied towards the cost of maintenance and upkeep of the art gallery. The income of the balance of the fund was to be applied in defraying the cost of works of art which the corporation might from time to time acquire for exhibition in the art gallery.
E The residue of the funds still in the hands of the corporation was to be known as "the purchase fund", and was to be applicable, both as regards capital and income, in defraying the costs of acquiring works of art for exhibition in the art gallery. In this way Mr. Ferens provided an art gallery for Hull to be used and enjoyed as such in perpetuity by the public. The parties agree that the effect of the aforesaid deeds was to make the corporation trustees of a valid charitable
F trust, and I think that this is right.

From its opening in 1928 until 1958 no attempt was, we were told, made to charge rates in respect of the art gallery; but the present proposal was then made to enter it in the valuation list with a gross value of £4,700 and a rateable value of £3,913. In my opinion such a proposal is in conflict with the principle on which the House of Lords held that Brockwell Park was exempt. That
G principle was that the public was in occupation of the park, and that conclusion derived in turn from the circumstance that the park and every part thereof has to be held in perpetuity for the use of the public. The same is true of the art gallery in the present case, and it can make no difference that in the one case such dedication to public use was by statute and in the other by voluntary trust. The same principle was, in my respectful opinion, applied in this court in *Burnell*
H v. *Downham Market U.D.C.* (26) which dealt with a recreation ground held on trust for the public, and is expressed in the concluding words of the judgment (27):

> "... the council were mere trustees or custodians for the public, and, accordingly ... the real occupiers for present purposes are the public themselves."

I Counsel for the appellant valuation officer argued that the public could not in any real sense be said to occupy a building as it could be said to occupy a park. But, just as the public goes to Brockwell Park to enjoy its amenities, so the public goes to this art gallery to enjoy what it has to offer—in both cases in exercise of permanent public rights. Counsel also said that the public rights in relation to Brockwell Park "exhausted" its occupation. I am not sure what this

---

(26) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(27) [1952] 1 All E.R. at p. 608; [1952] 2 Q.B. at p. 69.

means, it may be an expression in different language of the argument with which I have just dealt. A

An alternative contention for the valuation officer is that, since the public is excluded from one-third of the hereditament, the public has not "free and unrestricted" use of the art gallery and is, therefore, not in occupation of it. This argument necessarily concedes that the public may be in occupation of such a building as this because otherwise the contention would be irrelevant. It is admitted, however, that this one-third is used for purposes necessary and ancillary to the running of the art gallery, i.e., storage of works of art, restoration of pictures, heating and lighting, and so on. The tribunal held that the physical exclusion of the public from this portion of the hereditament was not in the circumstances inconsistent with occupation of the whole by the public. I agree with this conclusion and with the reasons for it given by the tribunal. B C

The decision in *Liverpool Corpn.* v. *West Derby Union* (28), dealing with the case of a public library, is, I think, distinguishable. There the hereditament was not held in trust solely for the public. It was the corporation's own property, bought by the corporation, and, if some other building were ever substituted as the library, the corporation could sell the unwanted building and use the proceeds for different corporation purposes. That was a case, in my view, of a corporation occupying its own building as a local authority for public purposes. The present is, I think, a case of a corporation occupying a building as a trustee, and managing it on behalf of the public. The distinction is no doubt a fine one, but it exists, as the *Brockwell Park* case (29) and the *Downham Market* case (30) show. D

In the argument before us a further question was canvassed, viz., even assuming that the corporation were in occupation of the art gallery, whether their occupation was of any value. To be rateable it has to be shown that E

> "the occupation should be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant . . . would either give no rent, or a rent which after deducting the average annual expense of the maintenance would leave no overplus, there is nothing to rate." F

See *Jones* v. *Mersey Docks* (31), per BLACKBURN, J. In the present case the valuation officer's figures mean that in his view the art gallery would be sufficiently valuable to a hypothetical tenant that he would be willing to pay practically £4,000 a year rent for it. When it is remembered that such a hypothetical tenant would have to respect the trust on which the building is held, this seems very unlikely. But this aspect of the matter was never canvassed before the tribunal, the parties arguing the sole question whether the corporation were in occupation at all. The question whether, if so, the occupation was beneficial depends on facts and figures not before us; and on the questions whether a hypothetical tenant—other than the corporation—would be presumed to be with or without the income from the endowment and the purchase funds; and whether under the terms of the trust a charge could be made for admission to the art gallery. If, therefore, beneficial occupation were the crucial question, I think the case would have to go back to the tribunal for a determination thereof after hearing such further evidence and arguments as the parties wished to adduce. G H

In my opinion, however, the tribunal's decision that the public is in occupation of the hereditament is correct, and this appeal should be dismissed. I respect the contrary opinion of my Lords and in the absence of authority might have shared it. I feel precluded from doing so, however, since all the features of the case which they regard as making the corporation occupiers here are matched by corresponding features in the *Brockwell Park* decision (29); and I feel that that case cannot be satisfactorily distinguished except by tacitly accepting what was I

(28) (1905), 92 L.T. 467. (29) [1897] A.C. 625.
(30) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55. (31) (1865), 11 H.L. Cas. at p. 461.

A the valuation officer's principal contention, that there cannot be occupation of a building by the public where management and control of it are in some other party. I do not believe that contention to be sound. It would otherwise have provided a very short cut to the decision in *Liverpool Corpn.* v. *West Derby Union* (32) and *Trustees of Sir John Soane's Museum* v. *St. Giles-in-the Fields* (33), which the courts deciding those cases could hardly have missed.

B *Appeal allowed. Leave to appeal to the House of Lords granted.*

Solicitors: *Solicitor of Inland Revenue* (for the appellant valuation officer); *Town clerk,* Hull (for the respondent corporation).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

C

KATIKIRO OF BUGANDA *v.* ATTORNEY-GENERAL.

[PRIVY COUNCIL (Lord Morton of Henryton, Lord Keith of Avonholm, Lord Denning, Lord Hodson and Mr. L. M. D. de Silva), October 27, 31, November 1, 2, 24, 1960.]

D *Privy Council—Eastern Africa—Uganda—Constitutional law—Legislative Council—Procedure for representation of Buganda in legislative council—Alleged fundamental changes invalidating a term of Buganda Agreement,* 1955—*Buganda Agreement,* 1955 (*Laws of Uganda,* 1955, p. 383), *art.* 7 (2), *Sch.* 2, *reg.* 5—*Royal Instruction dated June* 5, 1920 (*Laws of Uganda,* 1951, *Vol.* VI, *p.* 104), *cl.* XVA, *cl.* XXV, *cl.* XXVI, *as amended by Royal Instructions*

E *dated Dec.* 17, 1957 (*Laws of Uganda,* 1957, *p.* 435).

Statute—Construction—White Paper—Whether admissible for construing a document having the force of statute.

Uganda became a protectorate in 1894 and by the Buganda Agreement, 1894, the then Kabaka of Buganda (a province of Uganda) pledged himself to certain conditions. From 1902 to 1920 the governor was the legislative

F authority for Uganda Protectorate. In 1920 a legislative council was constituted, consisting of the governor and such persons as might be directed by Instructions under the Sign Manual. The governor had both an original and a casting vote. In 1953 the constitution of the legislative council was altered so as to consist of the governor, ex officio members, nominated members (who would support government policy) and representative

G members. The total numbers of ex officio and nominated members on the one hand, and of representative members on the other hand, were equal. The legislative authority then became " the governor, with the advice and consent of the legislative council ". In 1954, Her Majesty's government having withdrawn recognition of the Kabaka, who had left Uganda, a White Paper (Cmd. 9320) was issued which included the recommendations of a

H constitutional conference held in Uganda. The Buganda Agreement, 1955, between the governor on behalf of Her Majesty and the Kabaka on behalf of the chiefs and people of Buganda, was made in October, 1955, and the governor declared that Sch. 2 thereto should have the force of law. Royal instructions dated Dec. 17, 1957, were issued whereby (cl. XVA)* a speaker, to be appointed by the governor, was included in the legislative council of

I Uganda, (cl. XXV)† who was to preside if the governor were not present, and (cl. XXVI)† neither the speaker nor the governor were to have original or casting votes. Two additional nominated members were appointed, so that the balance of voting was preserved. Under art. 7 (1) of the Buganda Agreement, 1955‡, Buganda was to be represented in the legislative council

(32) (1905), 92 L.T. 467. (33) (1900), 83 L.T. 248.

* Clause XVA is set out at p. 854, letter E, post.

† Clause XXV and cl. XXVI are set out at p. 854, letters G and H, post.

‡ Article 7 is set out at p. 851, letters D to I, post.

of Uganda when certain provisions had been made for specified fractions of the members to be Africans, and by art. 7 (2) the Katikiro was to submit to the governor the names of persons elected in accordance with Sch. 2 to the agreement to represent Buganda in the legislative council. The conditions of art. 7 (1) being fulfilled, art. 7 (2) became binding, according to the terms of the agreement, on the Katikiro (the appellant). A

In June, 1958, the appellant sought declarations, among others, (i) that the legislative council as then constituted was not the legislative council referred to in Sch. 2 to the agreement of 1955, and (ii) that he was not bound or entitled to take the steps laid down in Sch. 2 for the purpose of electing members to represent Buganda in the council as then constituted. The appellant contended that (a) between the date of the Buganda Agreement, 1955, and June, 1958, changes had been made in the constitution of the council which were so fundamental that the council bearing that name in 1958 ought to be regarded as a different body from the council bearing that name in 1955, and (b) having regard to the steps leading to the agreement of 1955 and, in particular, to the White Paper of 1954, Sch. 2 to the agreement should be construed as coming into existence on the basis that there would be no major changes in the constitution of the council prior to 1961 and that the changes made in 1957 were major changes. B C D

Held: the changes made to the constitution of the legislative council by the royal instructions of 1957 were not fundamental, nor did they amount to the substitution of a new council, and nor, when viewed in the light of constitutional history, were the changes " major " changes in the constitution of the council, for they had little effect on the conduct of the affairs of the council and on the voting, and no effect at all on the legislative powers of the Crown, the governor and the council; therefore, the appellant was not entitled to the declarations claimed (see p. 855, letters F to I, post). E

Per CURIAM: Sch. 2 to the Buganda Agreement, 1955, should be construed in accordance with the legal rules for the construction of statutes, since that schedule had been given the force of law, and, there being no such ambiguity in Sch. 2 as would justify the admission of extraneous evidence, the White Paper of 1954 was not admissible in evidence for the purposes of construing Sch. 2 (see p. 855, letter I, post). F

Appeal dismissed.

[As to the legislative and executive councils of Uganda, see 5 HALSBURY'S LAWS (3rd Edn.) 606, para. 1303.] G

Appeal.

Appeal by the Katikiro of Buganda from an order of the Court of Appeal for Eastern Africa (SIR KENNETH O'CONNOR, P., FORBES, V.P., and GOULD, J.A.), dated May 9, 1959, dismissing the appellant's appeal from an order of the High Court of Uganda (BENNETT, J.), dated Nov. 25, 1958, whereby the appellant's claim was dismissed. The facts are set out in the judgment of the Board. H

Phineas Quass, Q.C., and *M. P. Solomon* for the appellant.

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the respondent.

LORD MORTON OF HENRYTON: The appellant is the plaintiff in this suit. He issued his plaint in the High Court of Uganda on June 25, 1958, claiming the following relief: I

" (1) A declaration that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in Sch. 2 to the Buganda Agreement, 1955.

" (2) A declaration that the Katikiro is not bound or entitled to take the steps laid down in the said schedule for the purpose of electing representative members to represent Buganda in the Legislative Council of the Uganda Protectorate as at present constituted.

" (3) A declaration that unless and until the Legislative Council of the Uganda Protectorate is reconstituted so as to be the same as the Legislative Council referred to in the Buganda Agreement, 1955, and contemplated at the time thereof there is no procedure for electing representative members thereto.

" (4) Costs.

" (5) Further or other relief."

BENNETT, J., dismissed the suit and the Court of Appeal for Eastern Africa affirmed his decree.

The Buganda Agreement, 1955, was made on Oct. 18, 1955 (1), between the Governor of the Uganda Protectorate on behalf of Her Majesty and the Kabaka of Buganda for and on behalf of the Kabaka, chiefs and people of Buganda. The agreement contained provisions regulating the election and the recognition of each successive Kabaka and the composition and functions of the Lukiko. It provided that Buganda should be administered in accordance with the constitution set out in Sch. 1 to the agreement. Article 7 of the agreement made the following provisions for the representation of Buganda in the Legislative Council of Uganda:

" (1) At all times when provision has been made for at least three-fifths of all the representative members of the Legislative Council of the Uganda Protectorate to be Africans and for such number of Africans to be appointed as nominated members of the council as will bring the total number of Africans who are members of the council up to at least one half of all the members of the council, excluding the President of the council, then Buganda shall be represented in the Legislative Council of the Uganda Protectorate, and for that purpose at least one quarter of the representative members of the council who are Africans shall be persons who represent Buganda.

" (2) The Katikiro shall submit to Her Majesty's Representative, that is to say the Governor, the names of the candidates for appointment as the representative members of the Legislative Council to represent Buganda, that is to say the persons who have been elected for that purpose in accordance with the provisions of Sch. 2 to this agreement.

" (3) Notwithstanding the provisions of para. (2) of this article a system of direct elections for the representative members of the Legislative Council who represent Buganda shall be introduced in the year 1961 if such system has not been introduced earlier.

" (4) Her Majesty's Government shall during the year 1957 arrange for a review by representatives of the Protectorate Government and of the Kabaka's Government of the system of election of representative members of the Legislative Council who represent Buganda. In such review consideration will be given to any scheme submitted by the Kabaka's Government for the election of such representative members based upon the recommendation contained in Sch. 6 to this agreement. Every effort will be made to give effect to the recommendations resulting from such review in time for the election of the representative members of the Legislative Council who represent Buganda when the Legislative Council is generally reconstituted after the general vacation of seats in the council next following the coming into force of this agreement."

Regulation 5 of the Buganda (Legislative Council Candidates) Regulations contained in Sch. 2 to the agreement, was in these terms:

" Whenever there is occasion to appoint a representative member or members to represent Buganda in the Legislative Council of the Protectorate the Governor shall by notice in writing request the Katikiro to submit names to him for that purpose and the Katikiro shall submit to him the names of

(1) Legal Notice No. 190 of 1955; Laws of Uganda, 1955, p. 383.

persons who have been elected in that behalf by the Electoral College in accordance with these regulations." A

The Buganda Agreement, 1955, Order in Council, 1955, made on July 29, 1955 (2), to come into operation on a day to be appointed by the Governor of the Uganda Protectorate, provided (3) that the Governor might declare by proclamation that any part of the Buganda Agreement, 1955, should have the force of law. The Governor appointed Oct. 18, 1955, as the date when this Order in Council should come into operation (4), and on the same day declared by proclamation (4) that Sch. 1 and Sch. 2 to the Buganda Agreement, 1955, should have the force of law. B

It is common ground between the parties that the two conditions laid down in art. 7 (1) of the agreement of 1955 have at all times been fulfilled. Therefore, in the absence of valid reasons to the contrary, the appellant would be bound to carry out the provisions of art. 7 (2) of that agreement and of reg. 5 in Sch. 2 thereto. Counsel on behalf of the appellant based the appellant's claim to the three declarations set out in his plaint on the following contentions:—(i) Between Oct. 18, 1955 (the date of the Buganda Agreement) and June 25, 1958, when the plaint was issued, certain changes were made in the constitution of the Legislative Council of the Uganda Protectorate. These changes were so fundamental that the council bearing that name on June 25, 1958, ought to be regarded as a different body from the council bearing that name on Oct. 18, 1955. Therefore the appellant was not bound to take any of the steps laid down in Sch. 2 to the Buganda Agreement for the purpose of electing representative members to represent Buganda in the former body. Alternatively, (ii) Having regard to the events leading up to the Buganda Agreement of 1955, and, in particular, to the matters set out in a White Paper (Cmd. 9320) presented by the Secretary of State for the Colonies to Parliament by command of Her Majesty in November, 1954, Sch. 2 to the Buganda Agreement should be construed as coming into existence on the basis that there would be no major changes in the constitution of the council prior to the year 1961. The changes already mentioned were major changes. Accordingly, the basis for Sch. 2 is gone, and the appellant is no longer bound by it. C D E F

Before examining these contentions it is desirable to refer to certain stages in the constitutional history of Uganda. In June, 1894 (following an agreement made in 1893), Uganda was placed " under the Protectorate of H.M. Queen Victoria " and, by the Buganda Agreement, 1894, made on behalf of Her Majesty and the then Kabaka, the Kabaka pledged himself to certain conditions. By the Buganda Agreement, 1900 (Laws of Uganda, 1951, Vol. VI, p. 12), made on behalf of Her Majesty and on behalf of the Kabaka, the relationship between Her Majesty's Government and the Kabaka, chiefs and people of Buganda was further defined. This agreement was extended by various supplementary agreements. By the Uganda Order in Council, 1902 (5), art. 12, the Governor was made the legislative authority for the Uganda Protectorate. By art. 15, the High Court of the Uganda Protectorate was constituted. By art. 7 of the Uganda Order in Council, 1920 (Laws of Uganda, 1951, Vol. VI, p. 97) (6) a Legislative Council was constituted for the Protectorate, consisting of the Governor and such persons as His Majesty might direct by any Instructions under His Sign Manual and Signet. Legislative powers (subject to veto by the Governor and assent by the Governor on behalf of His Majesty to bills) were given to the Legislative Council (art. 8), without prejudice to the power of the Crown to disallow ordinances and to legislate by Order in Council (art. 9). By art. 13, the Legislative Council was bound to observe Royal Instructions. Royal Instructions G H I

(2) S.I. 1955 No. 1221; Laws of Uganda, 1955, p. 202. (3) By art. 2 (2).
(4) Legal Notices Nos. 188, 189 of 1955; Laws of Uganda, 1955, p. 381.
(5) S.R. & O. 1902 No. 662; Laws of Uganda, 1951, Vol. VI, p. 82.
(6) S.R. & O. 1920 No. 884.

were issued in 1920 (Laws of Uganda, 1951, Vol. VI, p. 104). Under cl. XV, the Legislative Council was to consist of the Governor, certain ex officio members, and such official and unofficial members as the Governor might from time to time appoint pursuant to Royal Instructions. By cl. XXV, the Governor was required to attend and preside at all meetings unless prevented by illness or other grave cause. By cl. XXVI, all questions were to be decided by majority vote, and the Governor or member presiding was given an original vote and a casting vote if on any question the votes should be equal. Thus the position was that, from 1902 to 1920, the Governor was the legislative authority for the Protectorate. In 1920 a Legislative Council was constituted, presided over by the Governor in which he was given an original and a casting vote.

In December, 1953 (Legal Notice No. 314 of 1953) (7) the Royal Instructions of 1920 were amended. A new clause was substituted for cl. XV, providing that the Legislative Council of the Protectorate should consist of (i) the Governor; (ii) ex officio members; (iii) nominated members; and (iv) representative members. A new cl. XVA set out who the ex officio members were to be. By a new cl. XVB, the nominated members were to be (a) such persons holding office in the public service and (b) such persons not holding such office " who the Governor is satisfied will support government policy in the Legislative Council when called upon to do so "; as the Governor in pursuance of Royal Instructions might appoint. The representative members (cl. XVC) were to be such persons (not official members and not nominated members) as the Governor might in pursuance of Royal Instructions from time to time appoint. In December, 1953, by art. 4 of the Uganda (Amendment) Order in Council, 1953 (Legal Notice 317 of 1953) (8), art. 8 of the Uganda Order in Council, 1920, was replaced, the Legislative Authority now being made " the Governor, with the advice and consent of the said Legislative Council ". Their Lordships were informed from the Bar that the representative members were not appointed to represent geographical constituencies but were appointed on a racial or community basis, as follows:—fourteen Africans, six Europeans and eight Asians, a total of twenty-eight representative members—the Africans being balanced by the Europeans and Asians. There were, in addition, eight ex officio members and twenty nominated members. The Uganda (Amendment) Order in Council, 1953, art. 5, introduced a new art. 8 in the Uganda Order in Council, 1920, giving the Governor reserved powers to legislate in the interests of public order, public faith or good government, notwithstanding failure by the Legislative Council to pass the relevant bill or motion, subject to report to, and revocation by, the Secretary of State.

Before November, 1954 (the date of the White Paper already mentioned), Her Majesty's Government had withdrawn recognition from the Kabaka, and he had left Uganda. A suit had been filed against the government, judgment had been given and an appeal was pending. A conference presided over by a constitutional expert from England had deliberated at Namirembe near Kampala and had made constitutional proposals relating, inter alia, to the continued participation of Buganda in the Protectorate, a constitution for Buganda and the representation of Buganda in the Legislative Council of the Protectorate. It is common ground that these events were matters of notoriety in Uganda, and most of them are set out in the White Paper. The White Paper also contained " Agreed Recommendations of the Namirembe Conference " (Appendix A), " Statement by the Governor " (Appendix B) and " Explanatory Memorandum issued by the Namirembe Conference " (Appendix C). The White Paper was included in the Record and its contents were strongly relied on by counsel for the appellant in support of his second contention already stated. Counsel for the respondent did not object to its being read de bene esse, but he contended that it was not admissible in evidence.

(7) Laws of Uganda, 1953, p. 513.
(8) S.I. 1953 No. 1908; Laws of Uganda, 1953, p. 518.

Their Lordships will return to this subject later and will now pass on to the subsequent events. On May 19, 1955 (Legal Notice 122 of 1955) (9), the Royal Instructions of 1920 (as amended in 1953) were again amended. A new clause was substituted for cl. XV under which the members of the Legislative Council were to be (a) the Governor; (b) three ex officio members; (c) the nominated members; and (d) the representative members. A new clause was substituted for cl. XXV which provided inter alia: " (1) The Governor shall, so far as is practicable, preside at meetings of the Legislative Council ". The next event was the signing of the Buganda Agreement of 1955 (10), and the declaration by the Governor (already mentioned) that Sch. 1 and Sch. 2 to the 1955 agreement should have the force of law. A further amendment to the Royal Instructions was made on Apr. 13, 1956 (Legal Notice 88 of 1956) (11). Clause XXV was again replaced, and it was provided that the Governor should preside at the sittings of the Legislative Council and, in his absence, " such member of the council as the Governor may appoint " and, in the absence of the Governor and of any member so appointed, the senior ex officio member present.

Their Lordships now come to the changes which counsel for the appellant describes as " fundamental " or, if not fundamental, " major " changes. On Dec. 17, 1957, additional Royal Instructions were issued (Legal Notice 272 of 1957) (12). These came into operation on Jan. 1, 1958 (Legal Notice 271 of 1957) (13). By these, cl. XV of the Royal Instructions was amended by providing that the Legislative Council should consist of a Speaker, as well as the Governor and the ex officio, nominated and representative members. A new cl. XVA was inserted reading as follows:

> " *The Speaker.* XVA. (1) The Speaker shall be a person who is not an ex officio, nominated or representative member of the Legislative Council and shall be appointed by the Governor by instrument under the public seal.
>
> " (2) The Speaker shall hold office during Her Majesty's pleasure, and, subject thereto, for such period as may be specified in the Instrument by which he is appointed, and shall not vacate his office by reason of a dissolution of the Legislative Council . . ."

There follow provisos enabling the Speaker to resign his office and giving the Governor power to revoke any appointment of a Speaker. Clause XXV and cl. XXVI of the Royal Instructions were revoked and new clauses substituted which, so far as material, read:

> "*Presiding in the Legislative Council.* XXV. (1) The Speaker shall preside at the sittings of the Legislative Council, and in the absence of the Speaker such member of the council as the Governor may appoint, or if there is no member so appointed, or the member so appointed is absent, the senior ex officio member present shall preside: Provided that if the Governor shall have occasion to be present at any sitting he shall preside at such sitting . . .
>
> " *Voting.* XXVI. (1) All questions proposed for decision in the Legislative Council shall be determined by a majority of the votes of the members present and voting, and if upon any question before the Legislative Council the votes of the members are equally divided, the motion shall be lost.
>
> " (2) (a) Neither the Governor nor the Speaker shall have an original or casting vote; (b) any other person shall, when presiding in the Legislative Council, have an original vote but no casting vote."

Their Lordships have thought it right to state these events in some detail, and in substantially the same form as they were stated by the learned President of the Court of Appeal for Eastern Africa (Sir Kenneth O'Connor), because they

(9) Laws of Uganda, 1955, p. 169.
(10) Legal Notice No. 190 of 1955; Laws of Uganda, 1955, p. 383.
(11) Laws of Uganda, 1956, p. 165. (12) Laws of Uganda, 1957, p. 436.
(13) Laws of Uganda, 1957, p. 435.

have some bearing on the question whether the changes made by the Royal Instructions of December, 1957, were either " fundamental " or " major ".

Counsel for the appellant's first contention, already stated, can succeed only if these changes were so fundamental that the council bearing the name of " the Legislative Council of the Uganda Protectorate " on June 25, 1958, ought to be regarded as a different body from the council bearing that name on Oct. 18, 1955. In counsel's second contention, there are three steps, (i) the White Paper of November, 1954, is admissible in evidence for the purpose of construing the Uganda Agreement of 1955; (ii) the contents of the White Paper show that Sch. 2 to the Uganda Agreement came into existence on the basis that there would be no major changes in the constitution of the council prior to the year 1961; (iii) the changes made by the Royal Instructions of December, 1957, were " major " changes. The changes which counsel invites their Lordships to regard as being either " fundamental " or " major " changes are first, that the Speaker would normally preside at the sittings of the Legislative Council instead of the Governor, and, secondly, that the Governor loses his original and casting vote.

It is to be observed that the powers of the Crown and the Governor respectively as regards legislation are left entirely unchanged. So, too, are the powers of the council. As regard the conduct of business in the council, the Governor will still preside when he has " occasion to be present " at any sitting, and the Speaker, who will preside in his absence, is to be appointed by the Governor and can be removed from his post by the Governor. In these circumstances, there seems to be every reason to suppose that the business of the council will be conducted on the same lines whether the Governor or the Speaker presides. The loss of the Governor's two votes was counterbalanced by the appointment of two additional " nominated " members, and it will be remembered that nominated members are defined as being persons " who the Governor is satisfied will support government policy in the Legislative Council when called upon to do so." See cl. XVB of the Royal Instructions of 1920, inserted in December, 1953, by Legal Notice No. 314 of 1953 already mentioned. Thus, from a practical point of view, the balance of voting power in the council was preserved.

Their Lordships find it quite impossible to regard these changes as being " fundamental " in any ordinary sense of the word. Still less can they regard the changes as amounting to the substitution of a new body for the Legislative Council as it existed before the changes came into force. Counsel for the appellant's first contention fails.

Turning to counsel's second contention, it is to be observed that, if the changes in question cannot properly be described as " major " changes in the constitution of the council, this contention also must fail. Viewing these changes in the light of the constitutional history of Uganda, as already briefly set out, and contrasting them with the important changes made from time to time between 1920 and 1957 in the constitution of the council, their Lordships think it would be a misuse of words to apply the word " major " to changes which have so little effect on the conduct of affairs in the council and on the voting, and no effect at all on the legislative powers of the Crown, the Governor and the council.

The result is that it becomes unnecessary to consider the first two steps in counsel's second contention; but, as these matters were fully considered in the courts in Africa, and were fully argued on this appeal, their Lordships will state their views briefly on each point. The members of the Court of Appeal for Eastern Africa were unanimous in holding, first, that the rules to be applied in construing Sch. 2 to the Agreement of 1955 were the rules applicable to the construction of statutes, since that schedule had been given the force of law, and, secondly, that the contents of the White Paper were not admissible in evidence for the purpose of construing the schedule. Their Lordships agree with the decision of the Court of Appeal on each of these points. They find no ambiguity

in Sch. 2 which would justify the admission of extraneous evidence. They think it right to add that, even if the contents of the White Paper were given full consideration, they would fall far short of establishing the second step in counsel for the appellant's second contention. Their Lordships refrain from discussing this matter at length since they have already held that the changes made in December, 1957, were not major changes in the constitution of the Legislative Council. They desire, however, to call attention to two articles in the agreement of 1955 which indicate that the obligations of the appellant under Sch. 2 were not conditional on there being no major changes made in that constitution prior to the year 1961. First, in art. 7 (1) of the agreement, already quoted, representation of Buganda in the Legislative Council is made subject to two express conditions. Their Lordships cannot doubt that the condition for which the appellant contends would also have been inserted in the agreement if the parties had intended to impose it. Secondly, art. 11 of the agreement is as follows:

> "No major changes shall be made to the constitution set out in Sch. 1 to this agreement for a period of six years after the coming into force of this agreement, but at the end of that period the provisions of the said constitution shall be reviewed."

This article refers to the constitution of Buganda and not to the constitution of the Legislative Council of the Uganda Protectorate; but, if the parties had intended a similar prohibition to apply to the Legislative Council, they would surely have expressed it in the agreement, since the subject of major changes during the period in question was so fully in their minds.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondent, with one exception. On June 29, 1960, the respondent made an application for the appeal to be set down and heard forthwith. That application was refused by the Board, and the costs thereof were reserved. In their Lordships' opinion, the appellant's costs of that application should be paid by the respondent. They will be set-off against the general costs payable by the appellant to the respondent.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

[END OF VOLUME THREE.]

BIBL. LONDIN. UNIV